CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK DWAYNE MURPHY,

Petitioner,

v.

The STATE OF OKLAHOMA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

Patrick Murphy, a member of the Muscogee (Creek) Nation, was tried, convicted, and sentenced to death by the State of Oklahoma for a crime which occurred within the Muscogee (Creek) Nation and on an allotment with restricted mineral interests. The federal government has exclusive jurisdiction over major crimes committed by Indians in "Indian country." 18 U.S.C. § 1153. "Indian country" includes "all Indian allotments, the Indian titles to which have not been extinguished" and "all land within the limits of any Indian reservation." 18 U.S.C. § 1151 (c), (a).

The questions presented are:

(1) Is an Indian allotment "Indian country" if mineral interests, but no surface interests, remain under restriction?

(2) Did congressional allotment of tribal lands cause the disestablishment of the Muscogee (Creek) Nation and thereby remove all lands within tribal boundaries from "Indian country" as defined by 18 U.S.C. § 1151(a)?

Answers to these questions will resolve not only whether Mr. Murphy can be subjected to the penalty of death[1] but also the scope of state criminal jurisdiction over Indian lands that are of critical economic importance to Indian tribes in Oklahoma and elsewhere.

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[1]Because the Muscogee (Creek) Nation has not opted in to the federal death penalty this crime cannot be capitally charged in federal court. *See* 18 U.S.C. § 3598.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings.

CORPORATE DISCLOSURE STATEMENT

No corporate entities are parties to this lawsuit.

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CITATIONS TO THE RECORD USED IN THIS PETITION

The materials referenced in this petition are filed with the Clerk of the United States District Court for the Eastern District of Oklahoma. The record will be referenced by transcript volume and page number, or exhibit number, as indicated below:

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Patrick Dwayne Murphy respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals as it relates to the jurisdiction of the State of Oklahoma to try him and the conclusion that the crime at issue did not occur in "Indian country" as defined by federal law.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 124 P.3d 1198 and reproduced in the Petitioner's Appendix ("App.") *infra* at 1a-12a.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on December 7, 2005. No petition for rehearing was sought. On February 21, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including May 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

TREATIES AND STATUTES INVOLVED IN THE CASE

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 53–INDIANS

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 53–INDIANS

§ 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who

has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 228--DEATH SENTENCE

§ 3598. Special provisions for Indian country

Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.

TREATY OF AUGUST 7, 1856 (11 Stat. 699)

ARTICLE IV.

The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

* * *

ARTICLE XV.

So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks . . . shall be secured in the unrestricted right of self-government, and full

jurisdiction over persons and property, within their respective limits . . . .

TREATY OF JUNE 14, 1866 (14 Stat. 785, 788)

ARTICLE X.

The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: Provided, however, [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs. . . .

ACT OF MARCH 1, 1901 (31 Stat. 861)

TITLES

23. * * *

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the land of the tribe, as provided herein, and as a relinquishment of his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment.

* * *

MISCELLANEOUS

* * *

44. This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith.

ACT JUNE 30, 1902 (32 Stat. 500)

ROADS

10. Public highways or roads 3 rods in width, being 1 and one-half rods on each side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others shall take the title to such lands subject to this provision. . . . .

STATEMENT OF THE CASE

Jurisdiction over a major crime committed by an Indian in Indian country is exclusively federal. When the Oklahoma Court of Criminal Appeals ["OCCA"] decided that Oklahoma had jurisdiction over the crime in this case – which undisputedly occurred on an Indian allotment with unextinguished restricted mineral interests and within the boundaries of the Muscogee (Creek) Nation – it decided an important question of federal law contrary to: the mandates of this Court and of United States Courts of Appeals; the letter of 18 U.S.C. § 1151; the treaties and statutes governing the relationship between the United States and the Muscogee (Creek) Nation; and the opinion of the former Deputy Commissioner for the Bureau of Indian Affairs.

The implications of the decision are profound. For Mr. Murphy, it is a matter of life or death; this crime cannot be capitally charged in federal court. For Native Americans generally, the decision affects their settled rights; if the OCCA is correct, states can now assert criminal jurisdiction over allotment and other tribal lands held as Indian by mineral ownership.

A. Statement of Facts Material to this Petition

Patrick Murphy is a member of the Muscogee (Creek) Nation, a federally recognized, self-governing Indian tribe. Mr. Murphy was tried, convicted, and sentenced to death by the State of Oklahoma for the murder of George Jacobs, also a member of the Muscogee (Creek) Nation. App. 2a (¶ 1); 3a (¶ 7). The crime occurred on a rural dirt road in McIntosh County, Oklahoma, which, at the time of trial, was assumed to be within state jurisdiction. App. 9a (¶ 37); II Tr. 421; State's Trial Ex. 13. After trial, however, it was learned that state officials incorrectly located the crime scene by two and one-half miles. Evid. Hr. Tr. 50. The crime actually occurred on an Indian allotment to which there exist restricted Indian mineral interests devised from the original Creek Indian allottee located within the territorial boundaries of the Muscogee (Creek) Nation. App. 6a

(¶ 27); App. 10a (¶ 50); App. 4a (¶ 18); App. 5a (¶ 21); App. 7a (¶ 32).

Most Indian tribes, and specifically the Muscogee (Creek) Nation, have not agreed that their citizens should be subject to the penalty of death for crimes committed in Indian country. Thus, this crime cannot be capitally charged in federal court. *See* 18 U.S.C. § 3598. Had Mr. Murphy been tried in federal court, as he clearly should have been, he would have been ineligible for a sentence of death.

B. Procedural History of the Case

The jurisdiction of the State of Oklahoma to try Mr. Murphy was raised for the first time to the Oklahoma Court of Criminal Appeals ["OCCA"] on a Second Application for State Post-Conviction Relief. App. 2a (¶ 2). The OCCA ordered an evidentiary hearing to resolve contested jurisdictional facts. App. 4a (¶ 11). That hearing was held in the District Court for McIntosh County, Oklahoma, on November 18, 2004. The District Court's Findings of Fact and Conclusions of Law were filed in the OCCA on December 10, 2004. App. 4a (¶ 18); App. 5a (¶19). The OCCA ruled on the question of jurisdiction on December 7, 2005. App. 1a-12a. All factual issues regarding jurisdiction are now settled.

C. The Oklahoma Court of Criminal Appeals's Ruling

The OCCA resolved the relevant jurisdictional facts in Mr. Murphy's favor and found the crime had indeed occurred on land with restricted mineral interests devised from the original Muscogee (Creek) Nation allottee. App. 4a (¶ 18); App. 5a (¶ 21); App. 7a (¶ 32). The mineral interests are subject to restrictions in alienation that accompanied the original fee allotment and are today subject to the supervision and trust responsibilities of the Bureau of Indian Affairs. App. 6a (¶ 26); App. 6a (¶ 27); App. 8a (¶ 35). The court also found that the crime occurred on land which

is entirely within the territorial boundaries of the Muscogee Creek Nation. App. 6a (¶ 27); App. 10a (¶ 50).

The OCCA accepted that, if the crime occurred in Indian country, the State of Oklahoma had no jurisdiction to try Mr. Murphy or to subject him to the sentence of death. App. 3a (¶ 8). The OCCA acknowledged that the questions presented were not matters controlled by state law, but rather required "interpreting federal statutes, federal decisions" to decide this "matter of utmost importance." App. 4a (¶ 16). The OCCA agreed the restricted mineral interests were "not insignificant." App. 9a (¶ 44). However, the OCCA refused to enforce the letter of section 1151(a) which commands that allotment land is Indian until all right and title are gone. Instead, the court performed a kind of "minimum contacts" balancing analysis and concluded that the "unobservable mineral interest is insufficient contact with the situs . . . to deprive the State of Oklahoma of criminal jurisdiction." App. 9a (¶ 42). Thus, the court concluded that, "[a]bsent clear authority requiring a different interpretation, we refuse to vacate the state murder conviction and death sentence based on a theoretical interpretation of federal law." App. 10a (¶ 46).

The OCCA next turned to the question of disestablishment of the Muscogee (Creek) Nation. While acknowledging that federal courts have opined that the disestablishment of the Muscogee (Creek) Nation is an open question, the OCCA took the absence of any federal case clearly reaching the question of disestablishment to sidestep the issue and said: "[i]f the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here." App. 11a (¶ 52). By refusing to reach the question and simultaneously finding that the crime did not occur in Indian country, the OCCA implicitly found the Muscogee (Creek) Nation disestablished.

REASONS FOR GRANTING THE WRIT

Jurisdiction over a major crime committed by an Indian in Indian country is exclusively federal. When the Oklahoma Court of Criminal Appeals ["OCCA"] decided that Oklahoma had jurisdiction over this crime – which undisputedly occurred on an Indian allotment with unextinguished restricted mineral interests and within the boundaries of the Muscogee (Creek) Nation – it decided an important question of federal law contrary to: the mandates of this Court and the United States Courts of Appeals; the letter of 18 U.S.C. § 1151; the treaties and statutes governing the relationship between the United States and the Muscogee (Creek) Nation; and the opinion of the former Deputy Commissioner for the Bureau of Indian Affairs.

The implications of the decision are profound. For Mr. Murphy, it is a matter of life or death; this crime cannot be capitally charged in federal court. For Native Americans generally, the decision implicates their settled rights; if the OCCA is correct, states will be able to assert criminal jurisdiction over allotment and other tribal lands held as Indian by mineral rights. Indeed, given the broad application of the criminal definition of Indian country, this decision will likely impact civil jurisdiction in Oklahoma and elsewhere.[2]

The OCCA decision dramatically broadens state criminal jurisdiction over lands that have historically been regarded as "Indian country." The decision directly affects approximately 3 million acres of allotted Indian lands in Oklahoma.[3] Many of these allotments are comprised, as in

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[2] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998) ("Although this definition [of Indian country] by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction . . . .").

[3] *See* Allotment Information for Southern Plains BIA Region, Indian Land Tenure Foundation, available at: http://www.indianlandtenure.org/ILTFallotment/specinfo/sf%20Southern%20Plains.pdf.

this case, solely of mineral interests.[4] These rights are important to Native Americans and their tribes. *See* Judith V. Royster, *Mineral Development in Indian Country: the Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 542-43 (1994) (Describing the importance of Native American mineral rights and noting that, "Indian tribes, collectively, are the third largest owners of mineral resources in the nation. . . . The market value of minerals produced on Indian lands exceeds $1 billion.") (internal references omitted).

The broader Indian interests potentially affected by the OCCA's erroneous decision are also significant. Oklahoma has the largest per capita population of Native Americans in the United States[5] and is "home to . . . thirty-seven . . . federally recognized [tribes], [with a] tribal population [of] approximately 390,000."[6,7]

Tribes in Oklahoma, and around the country, have relied on the plain language of section 1151 to determine the boundaries of their sovereignty and their rights to use and control their lands. For example, the federally recognized Osage Tribe in Oklahoma asserts its right to establish casinos on Indian land based on tribal retention of mineral rights. *See, e.g.*, Osage Tribe Letter to Assistant Solicitor, Division of Indian Affairs (asserting Indian country right to build casinos based on

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[4] *See also* 1998 BIA Annual Accountability Report, *available at*: http://www.doi.gov/pfm/acct98/high_bia.html ("The Bureau of Indian Affairs, which is responsible for the management of restricted allotment land, has trust responsibility for "over 11 million acres of individually owned land held in trust status.").

[5]State and Country Quick Facts, United States Census (2000), *available at*: http://quickfacts.census.gov/qfd; and http://www.census.gov/statab/ranks/rank13.html.

[6]Oklahoma Indian Affairs Commission Report, *available at*: http://www.ok.gov/~oiac/StateTribal.htm.

[7]*See* State and Country Quick Facts, United States Census (2000), *available at*: http://quickfacts.census.gov/qfd.

"mineral rights which were reserved to the Osage Tribe").[8] The Osage, thus rely on the principle that the "mixed" or "split" nature of allotment land, combining some restricted Indian interests with unrestricted interests, does not affect tribal rights to assert control over and use their lands as Indian country. The OCCA's expansion of state criminal jurisdiction within Indian country exposes the Osage, and other similarly situated tribes, to state criminal prohibitions on gambling. *See* OKLA. STAT. tit. 21, § 941 et seq.

The OCCA not only erroneously applied section 1151(c) to the Indian allotments, but it also erroneously concluded, by implication, that the Muscogee (Creek) Nation had been disestablished by allotment of its lands to tribal members. That conclusion is contrary to the plain language of the treaties and acts which define the relationship between the United States and the sovereign Muscogee (Creek) Nation. Those treaties guaranteed that the "Creeks . . . shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits."[9] The Creek Allotment treaties guaranteed that they "shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith."[10] The OCCA's conclusion that disestablishment was effectuated by allotment is contrary to the plain language of these treaties and the settled principles of statutory construction which hold that, once Congress has set aside lands as Indian country, those lands remain Indian until Congress diminishes those rights by clear and express intent. The conclusion is contrary to the decision of

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[8] *Available at*: http://www.nigc.gov/ReadingRoom/IndianLandDeterminations/tabid/120/Default.aspx.

[9] Treaty of August 7, 1856 (11 Stat. 699, Art. XV).

[10] Act of March 1, 1901 (31 Stat. 861, § 44); *see also* Act of June 30, 1902 (32 Stat. 500).

this Court that "[t]he [Five Civilized] tribes have not yet been dissolved."[11] The decision is also contrary to the conclusions of federal courts that the Creek tribal government created by the Creek Constitution of 1867 was not dissolved by statute.[12]

Certiorari is warranted because the Indian country issues presented by this case are important to Native Americans and are recurring; clarification from this Court is appropriate. *See, e.g., City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (considering disestablishment of the Oneida Nation); *United States v. Arrieta*, 436 F.3d 1246 (10th Cir. 2006) (considering Indian country status of road maintained by county within the exterior boundaries of the Pojoaque Pueblo). Certiorari is warranted because the decision below has a "significant impact on the relationship between Indian tribes and the Government." *United States Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001). See also *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 141 (1972) (granting certiorari "because of the importance of the issues for [certain] Indians"); *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 424 (1943) ("We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States."); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (granting certiorari because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern Indian land claims").

The OCCA decision wrongfully strips Indian tribes throughout this country of settled and expected rights based on the federal definition of Indian country. The OCCA decision wrongfully subjects Mr. Murphy to the penalty of death. For these, and all of the reasons discussed herein, the

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[11] *Creek Nation v. United States*, 318 U.S. 629, 640 (1943).

[12] *Harjo v. Kleppe*, 420 F. Supp. 1110, 1118 (D.D.C. 1976), *aff'd sub. nom, Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

state court decision should not be allowed to stand.

I. An Indian Allotment Having Restricted Indian Mineral Interests Is "Indian Country"

Because the crime occurred on a tract having restricted mineral interests, it occurred in Indian country, that is, on an "allotment the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c). The tract in question was originally owned by the Muscogee (Creek) Nation as part of lands negotiated by the Creeks in treaty with the United States. In 1903, the Muscogee (Creek) Nation deeded the land to Lizzie Smith, a Full Blood Muscogee (Creek) Indian. Lizzie Smith received a fee simple title. *See* Allotment of Lizzie Smith, Def.'s Evid Hr. (Nov. 18, 2004) Exs. 16, 14; *see also Jefferson v. Fink*, 247 U.S. 288, 294 (1918) (construing Creek allotment statutes: "estate which the allottee was to receive . . . was to be a fee simple"). Fee title to property in Oklahoma consists of both surface and mineral estates. *See* OKLA. STAT. tit. 60, § 64 ("The owner of the land in fee has the right to the surface and to everything permanently situated beneath or above it."); *Erwin v. Poole*, 446 P.2d 601, 603 (Okla. 1968) (minerals are part of fee estate).

Through a series of conveyances, the surface and mineral estates on this tract were severed. It is undisputed that, at the time of the crime, no restricted Indian interests existed in the surface estate. *See* State's Evid. Hr. (Nov. 18, 2004) Ex. 3; Def.'s Evid. Hr. (Nov. 18, 2004) Ex. 14; State's Evid Hr. (Nov. 14, 2004) Ex. 1

It is also undisputed that, in 1999, there existed restricted Indian interests in the mineral estate. Owners of the mineral estate, as of 1999, include Joe McGilbray (1/18 undivided interest) and Roy Ussrey (1/36 undivided interest). Mr. McGilbray is the Full Blood Creek son of the original allottee, Lizzie Smith. Def.'s Evid. Hr. (Nov. 18, 2004) Ex. 5. Both of these owners have more than one-half Indian blood, and their interests are restricted. *See* Def.'s Evid. Hr. (Nov. 18, 2004) Ex. 14 (Title Opinion, at 1). No other restricted Indian interests exist in the mineral estate.

The question presented here is whether a partial restricted mineral interest holds the land as an Indian country within the meaning of section 1151(c). App. 7a (¶ 32). The plain language of a statute determines the meaning of the statute. However, "[i]n the context of Indian law, appeals to 'plain language' or 'plain meaning' must give way to canons of statutory construction peculiar to Indian law." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc). Those canons of construction require that all doubt regarding sovereignty or diminishment of Indian interests be resolved in favor of the preservation of Indian rights. *United States v. Errol D.*, 292 F.3d 1159, 1163 (9th Cir. 2002) (admonishing that statutes affecting the tribes are to be construed liberally in favor of the tribes).

Applying these rules of construction courts have concluded that allotment lands that carry any restrictions in alienation, such as the land at issue in this case, are Indian country. *United States v. Ramsey*, 271 U.S. 467, 470-72 (1926); *United States v. Pelican*, 232 U.S. 442, 449 (1914) (same); *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996) ("allotted lands constitute Indian country"); *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992) (same). As the testimony at the evidentiary hearing established, the land at issue in this case carries restricted mineral interests. Therefore, it falls within the plain language of the statute as Indian land with a restriction in alienation.

Nothing in the language of the statute suggests that partial interests (either partial surface or partial mineral) affect the character of land as Indian. Indeed, just the opposite is true. The statute uses the language "Indian ***titles***" plural to indicate the multiplicity of title interests that can arise under conveyancing of allotment land. In the absence of a specific statutory intent to limit the application of 18 U.S.C. § 1151(c) to a certain quantum of Indian title, the OCCA had no basis to

conclude that the Indian mineral interests at issue are not Indian country. If Congress had intended to limit the character of the land as Indian to situations in which there was a single unified Indian title, Congress could have said so – but it did not.

Courts having occasion to consider whether severance of surface and mineral rights affect the Indian country status of the land conclude that, as long as ***any*** Indian title remains, the land is Indian. *See, e.g., HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1254 (10th Cir. 2000) ("The split nature of the surface and mineral estates does not alter the jurisdictional status of these lands . . . ."); *Cravatt v. State*, 825 P.2d 277, 280 (Okla. Crim. App. 1992) (concluding that an undivided 6/7 restricted surface interest sufficient for land to retain its character as Indian country and rejecting argument that "mixed" title precludes a finding of Indian country).

Sharon Blackwell, Creek Indian, former Deputy Commissioner for the Bureau of Indian Affairs ("BIA"), and former Regional Solicitor for the BIA in the Tulsa office responsible for the management and protection of restricted interests of members of the Five Civilized Tribes, agrees that restricted mineral interests make this land "Indian country" within the meaning of federal law. Evid. Hr. Tr. (Nov. 18, 2004), at 199; *see also United States v. Hellard*, 322 U.S. 363, 366 (1944) ("Restricted Indian land is property in which the United States has an interest."). As Ms. Blackwell explains, when restricted minerals rights are at issue, the Bureau of Indian Affairs, the office of the Solicitor, and the Bureau of Land management, exercise their statutorily mandated trust responsibilities to the mineral owners in the management of those mineral assets. Evid. Hr. Tr. (Nov. 18, 2004), at 191-92. Ms. Blackwell confirms that the presence of restricted Indian interests means that the land remains the responsibility of the Federal Government and is Indian country within the meaning of Federal law. *Id.* at 199; *see also* Supp. CR 153, ¶ 12 ("So long as a tract has restricted interests, it remains the responsibility of the Federal Government and is Indian country

within the meaning of federal law."). Thus, Ms. Blackwell opines that Indian title on the tract in question has not been extinguished and the tract on which the crime occurred is Indian country within the meaning of federal law. Evid. Hr. (Nov. 18, 2004) Tr., at 190, 199.

Retention of restricted mineral rights maintains the connection to the Federal Government so necessary and inherent in the definition of Indian county. When restricted mineral rights are at issue, the Bureau of Indian Affairs retains aspects of its classic trust relationship with the mineral owners in the management of those mineral assets. *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, at 535-36(1982 ED.); *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 384 (3d ed.1998) (leasing on allotted lands allowed with approval of the Secretary of the Interior and supervision of leasing performed by the Bureau of Indian Affairs). When incidents of the trust relationship survive, the land is indubitably Indian country. *Cf. HRI, Inc.*, 198 F.3d at 1254 (noting the split nature of surface and mineral rights does not alter the analysis of Indian country status of the land for purposes of determining whether the lands are subject to the Safe Drinking Water Act). Even if severance were to affect the determination of Indian country, it would only do so in favor of mineral rights, which are superior to surface rights. HOWARD R. WILLIAMS AND CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 302 (9th ed. 1994) (Once severed, the mineral estate becomes the dominant estate, and the surface estate becomes the servient estate.). Retention of restricted mineral rights signifies retention of the incidents of property which are in fact the dominant interests in the land.

In rejecting the conclusion that restricted mineral interests are "Indian country" the OCCA relied, not on the result compelled by the statutory language of section 1151(c), but rather a series of illusory concerns. First, the OCCA suggested that federal authorities' failure to assert jurisdiction over this crime was a sign that jurisdiction was not federal. App. 9a (¶ 39). But it was hardly

possible for the federal authorities to assert jurisdiction over the crime when the state had mislocated the crime. It was not until Mr. Murphy's counsel proved the true and correct location of the crime scene that anyone knew with assurance where the crime had occurred.

The OCCA further relies on the severance of surface and mineral estates to justify concluding that the crime scene is not Indian country. App. 9a (¶ 40). However, there is no rule of law that severance of estates affects the determination of Indian country. Even after such a severance, mineral interests require trust supervision of the federal government. Evid. Hr. Tr. (Nov. 18, 2004), at 191-92, 199; *see also* Supp. CR 153 (¶ 13). Such interests are unextinguished – clearly falling within the plain meaning of section 1151(c).

Next, the OCCA suggested that federal jurisdiction over Indian country could be determined by some sort of "minimum contacts" analysis, much as a state would undertake in determining whether it could assert jurisdiction over a person. App. 9a (¶ 42). A state has no right to perform a minimum contacts analysis to decide whether it has sufficient contacts with Indians to assert jurisdiction. Jurisdiction over Indian country is an incident of Indian sovereignty. If that sovereignty could be defeated by minimum contacts analysis, then the exclusive federal jurisdiction over Indian country would be nullified. Every state could exercise criminal jurisdiction over the Indian lands within its borders, because the Indians and tribes on these lands inevitably come into contact with the people and institutions of the host state.

Finally, the OCCA ruled that the practicalities of policing and administration suggest that geography and surface rights should control which land is Indian and militate against the "checkerboard" of Indian and State interests that would arise if they were to rule that restricted mineral interests could characterize land as Indian. App. 9a (¶ 43); App. 10a (¶ 45). Yet this Court has long recognized that a checkerboard of interests is inevitable where Indian lands have been

federally allotted, as in Oklahoma. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 502 (1979) ("In short, checkerboard jurisdiction is not novel in Indian law . . . ."); *United States v. Burnett*, 777 F.2d 593, 597 (10th Cir. 1985) ("[J]urisdiction [over Indian country] changes from property to property depending on the current status of the particular allotment on which the crime occurs.").

Holding that restricted mineral rights are Indian country creates no greater burden on law enforcement than already exists now. Tribal and state authorities are cross-deputized and each may respond to emergencies throughout the Creek Nation. Indeed, that is why a Creek Nation Lighthorseman was available and accompanied the State in making entry into Mr. Murphy's residence. *Cf.* II Tr. 384 (Lighthorse Officer Eldon Kelough discussing his investigation of the crime scene).

Moreover, when prosecution of an Indian is at issue, it is common practice in McIntosh County, indeed many Oklahoma counties, to proceed carefully and to verify with tribal realty offices or the Bureau of Indian Affairs the possible Indian ownership of the land on which the crime occurred. Each of these offices is well prepared to provide title information for both the surface and subsurface estates. The burden to policing suggested by the OCCA will not be increased by holding restricted mineral interests are Indian country – it will be the same as it has always been where there is a patchwork of allotted land.

The OCCA was wrong in concluding that restricted mineral interests were not Indian country for purposes of 1151(c). In so doing, the OCCA unwarrantedly broadened the criminal jurisdiction of the State of Oklahoma. The Court should grant review and rule that unextinguished, restricted Indian ownership of land makes that land Indian country subject to exclusive federal jurisdiction.

II. Congressional Allotment of Tribal Lands Did Not Cause the Disestablishment of the Muscogee (Creek) Nation

The crime scene falls entirely within the territorial boundaries of the Muscogee (Creek) Nation and thus falls within the definition of "Indian country" as "land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1153 (a); *see also* App. 10a (¶ 50); Evid. Hr. (Nov. 18, 2004) Ex. 14 (Ham Affidavit).

Once land has been designated as an Indian reservation, it remains so until some act disestablishes the reservation. The Muscogee (Creek) Nation has never been disestablished as a sovereign entity. The Muscogee (Creek) Nation thus has jurisdiction over all lands, whether owned by Indians or non-Indians, within its boundaries.

Disestablishment is relevant to the question of whether ***non-Indian*** owned lands within the exterior boundaries of a reservation are Indian country within the meaning of 18 U.S.C. § 1151(a). *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 975 n.3 (10th Cir. 1987) (The "disestablishment question is primarily important for determining the status of *non-Indian* lands, which remain Indian country under 18 U.S.C. § 1151(a) until the surrounding portion of a reservation is disestablished."). Thus the question of disestablishment of the Creek Nation is critical to the determination of Indian country in the event the Court concludes that the crime did not occur on ***allotted*** land the Indian title to which has not been extinguished.

The resolution of disestablishment turns on the construction of treaties between the Creek Nation and the United States. This Court has said that treaties like that signed by the Creek Nation are unique. Unlike ordinary conveyances of property, treaties made with the Indians are "not a grant of rights to the Indians, but a grant of right from them,–a reservation of those not granted." *United*

States v. Winans, 198 U.S. 371, 381 (1905). Thus, once Congress has set aside lands for Indian use and occupancy by treaty or act of congress, these lands remain Indian "until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909).

To determine if land once acknowledged as Indian by treaty has been diminished or disestablished this Court examines the history of the treaty, the language of the treaty, and the subsequent history of land ownership. Consistent with this Court's mandate on construction of Indian treaties, Courts have consistently concluded that intervening conveyances such as allotment, grant of land in fee, and set-aside for town sites ***do not*** cause land to lose its status as Indian country even when that land has been conveyed to non-Indians. *See, e.g. Seymour v. Superintendent*, 368 U.S. 351, 355 (1962) (The act of allotment, sale of mineral rights, and opening of reservation land to homesteading are not acts which themselves cause the dissolution of an Indian reservation unless "there [is] to be found any language . . . restoring that land to the public domain."); *Solem v. Bartlett*, 465 U.S. 463, 481 (1984) (opening land to homesteading did not effectuate disestablishment of the reservation). The key determination is, therefore, not whether there have been conveyances to non-Indians, but rather whether there have been any specific and unequivocal congressional statements withdrawing sovereignty and taking the land into the public domain. *Seymour*, 368 U.S. at 359; *Ellis v. Page*, 351 F.2d 250, 252 (10th Cir. 1965) ("[A]llotment of lands in severalty or the conveyance of land to non-Indians d[oes] not operate to disestablish the reservation or create a state jurisdictional enclave within the limits of the reservation."); *Chickasaw Nation v. Oklahoma*, 31 F.3d 964, 977 (10th Cir. 1994) (analysis of whether a treaty or statute has abrogated rights of a tribe "requires a particularized examination of the specific treaties involved"), *aff'd in part, rev'd in part, Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1975).

This Court has ruled that, before any treaty or statute will be construed to have terminated

Indian sovereignty and convey Indian lands to the public domain, the intent of Congress must be expressed in language that is clear and plain. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 353-54 (1941). Absent such a clear expression, any Indian right that is not expressly extinguished by a treaty or federal statute is reserved to Indian tribes. In addition, any ambiguities in statutes and treaties are to be interpreted in favor of Indian tribes. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (Stating that the "canons of construction applicable in Indian law are rooted in the trust relationship between the United States and the Indians" and that "it is well established that treaties should be construed liberally in favor of the Indians"); W. F. SEMPLE, OKLAHOMA INDIAN LAND TITLES ANNOTATED, at 427 (St. Louis, Thomas Law Book Co. 1952 and Supp. 1977) ("[W]here a treaty is ambiguous or a statute is susceptible to two constructions, the construction most favorable to the Indian is the construction that is applied.") [hereinafter "SEMPLE"].

Close examination of the treaties and statutes governing the relationship between the United States and the Muscogee (Creek) Nation show that the Muscogee (Creek) Nation has not been disestablished. For centuries, the Muscogee (Creek) Indian tribal lands were located on the east coast of what is now the United States. In the early 19th century the United States forced the removal of the Muscogee Indians from the east coast to Indian territory in Oklahoma. By an initial treaty, the Muscogee Indians gave up right and title to their historic lands in exchange for title to land in Indian territory. 7 Stat. 417 (February 14, 1833). Again, by treaty in 1856, the Muscogee Indians agreed to accept land in Indian territory in exchange for the return of their historic lands to the public domain. The 1856 treaty was specific and guaranteed to the tribes jurisdiction over their lands and people within the Creek Nation:

ARTICLE IV.

> The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

* * *

ARTICLE XV.

> So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks . . . shall be secured in the ***unrestricted right of self-government, and full jurisdiction over persons and property***, within their respective limits . . . .

11 Stat. 699 (Aug. 7, 1856) (emphasis added). Under the 1856 treaty, the Muscogee (Creek) Nation's sovereignty within their territorial boundaries was complete. SEMPLE, at 18.

When the 1856 treaty was signed, it was not anticipated that the Muscogee (Creek) Nation would ever be asked to remove again to other lands. *Id.* However, in response to the pressure of westward expansion, the discovery of hydrocarbons and other interests, the United States revisited the location of tribal lands of the Muscogee (Creek) and the four other Indian nations established in Indian Territory and referred to as the Five Civilized Tribes. A commission to the Five Civilized Tribes was established to compel the citizens of the tribes to accept "allotment of their lands in severalty with the ultimate object of creating a state out of the tribal domains." *Id.* at 18 (citing 27 Stat. 645 (Act of March 3, 1893, creating the Dawes Commission)).

Over the course of the next ten years, the United States negotiated individual allotment agreements with the each of the tribes which purported to dissolve and disestablish the tribes as sovereign entities and to allot the tribal domains in severalty to individual tribal members. In return, the federal government assumed the obligation to insure that the lands were not dissipated in the

hands of the tribal allottees by imposing restrictions on alienation. Each tribal allotment agreement was unique, with its own conditions and consideration.

The original Creek allotment agreement was signed in 1901 and was supplemented by an agreement in 1902. *See* 31 Stat. 861 (1901) and 32 Stat. 500 (1902). Neither the original Creek agreement nor the amendment contain language of disestablishment of the sovereign status of the Creek tribe or of dissolution of its historical territorial boundaries. *See* 31 Stat. 861 (1901) and 32 Stat. 500 (1902).

Some aspects of the Creek allotment acts have been litigated. It is settled that these acts did not dissolve the sovereign government of the Muscogee (Creek) Nation. This Court has held the "[t]he [Five Civilized] tribes have not yet been dissolved." *Creek Nation*, 318 U.S. at 640. The District Court for the District of Columbia ruled:

> the Court has arrived at the inescapable conclusion that despite the general intentions of the Congress of the late nineteenth and early twentieth centuries to ultimately terminate the tribal government of the Creeks, and despite an elaborate statutory scheme implementing numerous intermediate steps toward that end, the final ***dissolution of the Creek tribal government*** created by the Creek Constitution of 1867 ***was never statutorily accomplished***, and indeed that government was instead explicitly perpetuated.

Harjo v. Kleppe, 420 F. Supp. 1110, 1118 (D.D.C. 1976) (emphasis added), *aff'd sub. nom, Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

In 1987, the Tenth Circuit acknowledged that, because the plain language of the Creek allotment acts is very different from other allotment acts, they might be compelled to conclude that the exterior boundaries of the Creek Nation are intact and define the limits of Indian country if the question were squarely presented to them. *Indian Country*, 829 F.2d at 975 (Ultimately concluding that, "we need not decide whether the exterior boundaries of the 1866 Creek Nation have been disestablished" to decide the case at bar.).

A comparison of the Creek allotment acts to those of other tribes is instructive. In *Ellis v. Page*, the Tenth Circuit considered the disestablishment of the Cheyenne and Arapaho reservation. 351 F.2d 250, 251-52 (10th Cir. 1965). The court noted that the allotment acts involving the Cheyenne and Arapaho reservation contained language to the effect that the "tribes occupying the reservation did 'cede, convey, transfer, relinquish and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced' within the reservation." *Id.* at 251 (quoting cession language in the Comanche, Kiowa and Apache agreements and noting that the Cheyenne and Arapaho transfer language was indistinguishable).

In contrast, the Creek allotment act, found at 31 Stat. 861 (1901), contains no such wholesale language of conveyance. The Creek allotment provides only that: "Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment." *Id.* at 868. There is no concomitant language relinquishing all right and title to reservation lands or surrendering forever every interest of every kind and character in the reservation. There is no language returning land once held by the tribe to the public domain. Most importantly, the allotment acts specifically states that it "***shall in no wise affect the provisions of existing treaties between the United States and said tribe*** except so far as inconsistent therewith." 31 Stat. 861, 872, ¶ 44 (emphasis added). The treaties then in existence recognized the Creek Nation's complete sovereign authority and jurisdiction over its people and lands. That authority is still in full force.

Creek tribal courts have repeatedly ruled that the Muscogee (Creek) Nation has not been disestablished. The Creek Nation adopted the Tenth Circuit's reasoning in *Indian Country* and has

asserted jurisdiction over land within the eleven counties that comprise its historical treaty boundaries even when the claim is made that title to the land is held by a non-Indian. *Enlow v. Bevenue*, 4 Okla. Trib. 175, 186 (Muscogee (Cr.) S. Ct. 1994) (property located within the boundaries of the Muscogee (Creek) Nation retains its Indian country status); *see also Muscogee (Creek) Nation v. American Tobacco Co.*, 5 Okla. Trib. 401, No. CV-97-27, 1998 WL 1119774 (Muscogee (Cr.) D. Ct. Feb. 12, 1998) (recognizing "the possibility of jurisdiction over conduct occurring on non-Indian fee lands within the territorial and political jurisdiction of the Muscogee (Creek) Nation") (no publication page numbers available).

Sharon Blackwell, Creek Indian, is the former Deputy Commissioner for the Bureau of Indian Affairs ("BIA") and former Regional Solicitor for the BIA in the Tulsa office responsible for the management and protection of restricted interests of members of the Five Civilized Tribes. She concludes that the Creek treaties with the United States show that the Creek Nation has not been disestablished. *See* Supp. CR 153-155 (¶¶ 14-22). Ms. Blackwell says:

> It is my opinion that the Muscogee (Creek) Nation has not been disestablished and that the exterior territorial boundaries of the Creek Nation confirmed by Treaty represent the aerial extent of the political and territorial jurisdiction of the Creek Nation. Thus, I conclude that, regardless of title ownership as Indian or non-Indian, the Busby tract (and the surrounding area that falls within the territorial boundaries of the Creek Nation) is Indian country within the meaning of Federal Law.

Supp. CR 155 (¶ 22). Her conclusion is fully consistent with the relevant treaties and statutes.

On the question of disestablishment, the OCCA said only "If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here." App. 11a (¶ 52). Petitioner believes the resolution of this issue is mandated by existing Supreme Court precedent and the language of the treaties at issue and that, by refusing to reach the question, the OCCA flouted that established law. But, if the OCCA is correct, then the undecided character of this

question underscores why review by this Court is essential to resolve this question which significantly impacts the relationship between the Five Civilized tribes and federal and state governments.[13] The Court should grant review and rule, as the District of Columbia Circuit and Creek courts have already done, that the Muscogee (Creek) Nation has not been disestablished and this crime occurred in Indian country.

CONCLUSION

Mr. Murphy is an Indian. The crime occurred in Indian country. Jurisdiction over the crime is thus exclusively federal and the state's proceedings against Mr. Murphy were *void ab initio*. Mr. Murphy respectfully requests this Court grant his Petition for Writ of Certiorari to correct the Oklahoma Court of Criminal Appeals's errors in interpretation of federal laws and treaties and so that he may be released from his wrongfully imposed sentenced of death.

Respectfully submitted, this 3rd day of May, 2006,

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ATTORNEY FOR
PATRICK DWAYNE MURPHY

[13]The treaties signed by the Muscogee (Creek) Nation are in many ways identical to those signed by the other four Civilized Tribes. Thus, the OCCA's ruling on the Muscogee (Creek) Nation necessarily impacts those other Oklahoma tribes.

APPENDIX

Opinion of the Oklahoma Court of Criminal Appeals . . . . . Appendix 1a-12a

2005 OK CR 25

Patrick Dwayne MURPHY, Appellant

v.

STATE of Oklahoma, Appellee.

No. PCD-2004-321.

Court of Criminal Appeals of Oklahoma.

Dec. 7, 2005.

Background: Defendant was convicted in the District Court, McIntosh County, Steven W. Taylor, J., of first-degree murder with two aggravating circumstances and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, Lumpkin, V.P.J., 47 P.3d 876, affirmed. Defendant filed a second application for post-conviction relief, and the matter was remanded for evidentiary hearing.

Holdings: The Court of Criminal Appeals, Lumpkin, V.P.J., held that:

(1) state's interest in road where murder occurred on land allotted to Indian was an easement or right-of-way, not fee simple, for purposes of determining whether the murder occurred in Indian country and state had criminal jurisdiction;

(2) as a matter of first impression, one-twelfth interest that Indian citizen owned in mineral estate did not qualify the property as an Indian allotment;

(3) the road was not shown to be part of a Creek Nation reservation or a dependent Indian community; and

(4) defendant provided sufficient evidence to raise a fact question on mental retardation claim.

Application granted in part and denied in part; case remanded.

Lumpkin, V.P.J., disagreed in part.

1. Criminal Law ⇐1427

The Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. 22 Okl.St. Ann. § 1080 et seq.

2. Criminal Law ⇐1429(2), 1433(2)

Post-conviction claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are res judicata. 22 Okl.St.Ann. § 1080 et seq.

3. Criminal Law ⇐1439, 1440(1)

A capital post-conviction claim cannot be raised on direct appeal if (1) it is an ineffective assistance of trial or appellate counsel claim which meets the statute's definition of ineffective counsel or (2) the legal basis of the claim was not recognized or could not have been reasonably formulated from a decision of the United States Supreme Court, a federal appellate court, or an appellate court of state, or is a new rule of constitutional law given retroactive effect by the Supreme Court or an appellate court of state. U.S.C.A. Const.Amend. 6; 22 Okl.St.Ann. § 1089(D)(4)(b), (D)(9).

4. Highways ⇐21

Indians ⇐13(10), 36

Statute that ratified 1902 Creek Nation Treaty and provided for public highways or roads three rods in width on all section lines created an easement or right-of-way for public highways, with title to the underlying lands remaining in the Creek Nation and its subsequent allottees; thus, state's interest was an easement or right-of-way, not fee simple, for purposes of determining whether murder on the road occurred in Indian country and state had criminal jurisdiction. 18 U.S.C.A. § 1151(c); Act June 30, 1902, § 10, 32 Stat. 500.

5. Indians ⇐16.10(1), 36

One-twelfth interest that Indian citizen owned in mineral estate did not qualify the property as an Indian allotment for purposes of determining whether murder on road occurred in Indian country and state had criminal jurisdiction; the surface estate and 11/12ths of the mineral estate had been conveyed to non-Indians, Indian country characteristics were extinguished through conveyances to non-Indians, and state's contacts and interests in the property overwhelmed any fractional interest that Indian heir of

original allottee owned in an unseen mineral estate. 18 U.S.C.A. § 1151(c).

6. Criminal Law ⇐97(.5)

Criminal jurisdiction is determined according to where a crime occurred, which is largely a geographic fact determination.

7. Indians ⇐38(2)

An Indian citizen's fractional interest in an unobservable mineral interest is insufficient contact with the situs in question to deprive the state of criminal jurisdiction.

8. Indians ⇐36

Road where murder occurred on land allotted at one time to Indian was not shown to be part of a Creek Nation reservation or a dependent Indian community for purposes of determining whether crime occurred in Indian country and state had criminal jurisdiction; nothing established that individual allotments remained part of overall Creek nation still in existence, and there did not seem to be much federal superintendence over the land. 18 U.S.C.A. § 1151.

9. Criminal Law ⇐1655(5)

Post-conviction petitioner provided sufficient evidence to raise a fact question on mental retardation claim in capital murder prosecution.

10. Criminal Law ⇐1429(2), 1668(3)

Post-conviction petitioner waived any error relating to claim that lethal injection procedure violated prohibition against cruel and unusual punishment, where he failed to raise it in direct appeal brief and prior post-conviction application. U.S.C.A. Const. Amend. 8.

Gary Peterson, Kari Y. Hawkins, Oklahoma City, OK, for petitioner on appeal.

W.A., Drew Edmondson, Attorney General of Oklahoma, Preston Saul Draper, Assistant Attorney General, Oklahoma City, OK, for the State on appeal.

OPINION GRANTING IN PART PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

LUMPKIN, Vice-Presiding Judge.

¶ 1 Petitioner Patrick Dwayne Murphy was convicted of First Degree Murder in McIntosh County District Court case no. CF-1999-164A and sentenced to death. He appealed his conviction in case no. D-2000-705. We affirmed his conviction and sentence. *Murphy v. State*, 2002 OK CR 24, 47 P.3d 876. Petitioner then applied for post-conviction relief, but was denied. *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556 (resolving all claims, except mental retardation); *Murphy v. State*, 2003 OK CR 6, 66 P.3d 456 (denying mental retardation claim).

¶ 2 Petitioner filed his second post-conviction application, raising three issues. We remanded the matter to the District Court for an evidentiary hearing on his first claim, relating to jurisdiction. That hearing was held in December of 2004. The parties have since submitted supplemental briefs on the issues adjudicated therein. The last brief was submitted by the State on February 2, 2005.

[1, 2] ¶ 3 On numerous occasions this Court has set forth the narrow scope of review available under the amended Post-Conviction Procedure Act. *See e.g., McCarty v. State*, 1999 OK CR 24, ¶ 4, 989 P.2d 990, 993, *cert. denied*, 528 U.S. 1009, 120 S.Ct. 509, 145 L.Ed.2d 394 (1999). The Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Walker v. State*, 1997 OK CR 3, ¶ 3, 933 P.2d 327, 330, *cert. denied*, 521 U.S. 1125, 117 S.Ct. 2524, 138 L.Ed.2d 1024 (interpreting Act as amended). The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their judgments. Accordingly, claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata*. *Thomas v. State*, 1994 OK CR 85, ¶ 3, 888 P.2d 522, 525, *cert. denied*, 516 U.S. 840, 116 S.Ct. 123, 133 L.Ed.2d 73 (1995).

[3] ¶ 4 The new Act makes it more difficult for capital post-conviction applicants to avoid procedural bars. *Walker*, 1997 OK CR 3, ¶ 4, 933 P.2d at 331. Under 22 O.S.2001, § 1089(C)(1), only claims that "[w]ere not and could not have been raised" on direct appeal will be considered. A capital post-conviction claim could not have been raised on direct appeal if: (1) it is an ineffective assistance of trial or appellate counsel claim which meets the statute's definition of ineffective counsel; or (2) the legal basis of the claim was not recognized or could not have been reasonably formulated from a decision of the United States Supreme Court, a federal appellate court, or an appellate court of this State, or is a new rule of constitutional law given retroactive effect by the Supreme Court or an appellate court of this State. 22 O.S.2001, §§ 1089(D)(4)(b), 1089(D)(9).

¶ 5 Should a Petitioner meet this burden, this Court shall consider the claim only if it "[s]upport(s) a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 12 O.S.Supp.2001, § 1089(C)(2). As we said in *Walker*:

> The amendments to the capital post-conviction review statute reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent. Given the newly refined and limited review afforded capital post-conviction applicants, we must also emphasize the importance of direct appeal as the mechanism for raising all potentially meritorious claims. Because the direct appeal provides appellants their only opportunity to have this Court fully review ***all*** claims of error which might arguably warrant relief, we urge them to raise all such claims at that juncture.

Walker, 1997 OK CR 3, ¶ 5, 933 P.2d at 331 (omitted, emphasis in original). We now turn to Petitioner's claims.

¶ 6 In proposition one, Petitioner raises, for the first time, a jurisdictional issue. Petitioner claims that he and the victim are Indians and that the crime occurred in Indian country. Thus Petitioner claims jurisdiction is exclusively federal under 18 U.S.C. § 1153. As such, he claims his state court proceedings are void and that he should be immediately released from the State's custody.

¶ 7 The crucial issue here is decidedly simple, yet remarkably difficult to resolve. The record reflects Petitioner is an enrolled member of the Muscogee (Creek) Nation, as was the victim, George Jacobs. Both are "Indians" for purpose of 18 U.S.C. § 1153,[1] as both sides readily admit.

¶ 8 The decisive issue, then, is whether or not the crime occurred in "Indian country," [2] for if it did Oklahoma has no jurisdiction over the crime. *See Cravatt v. State*, 1992 OK CR 6, ¶ 7, 825 P.2d 277, 280 (murder prosecutions in Indian country have been "specifically reserved to the United States"); *State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 ("Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.").

¶ 9 The issue is fairly fact intensive at first, for we must pinpoint where exactly the crime occurred. But then, the matter becomes primarily legal, involving the definition of Indian country under federal law.

¶ 10 18 U.S.C. § 1151 has three categories of Indian country: Indian reservations; dependent Indian communities; and Indian allotments, the Indian titles to which have not been extinguished. *Eaves v. State*, 1990 OK CR 42, ¶ 2, 795 P.2d 1060, 1061. Petitioner's

1. "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder ... within the Indian Country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

2. "Indian Country" is defined as: "(a) all land within the limits of *any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, whether within or without the limits of a state, and (c) *all Indian allotments, the Indian titles to which have not been extinguished*, including rights-of-way running through the same." 18 U.S.C. § 1151 (emphasis added).

claim falls primarily under subsection (c), Indian allotments, although he also presented evidence that the area was part of a Creek reservation and a dependent Indian community.

¶ 11 We were sufficiently concerned about the factual and legal merits of this claim to remand the matter to the McIntosh County District Court for an evidentiary hearing.[3] This Court does not remand for evidentiary hearings on a whim. An application for evidentiary hearing and supporting affidavits "must contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004). Thereafter, if this Court determines "the requirements of Section 1089(D) of Title 22 have been met and issues of fact must be resolved by the District Court, it shall issue an order remanding to the District Court for an evidentiary hearing." Rule 9.7(D)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004).

¶ 12 At the evidentiary hearing, the parties presented diametrically opposed positions concerning whether or not the crime occurred in Indian country.

¶ 13 The State argued the crime occurred on a county road owned by the State of Oklahoma, a road that was never made a part of an Indian allotment and that is currently maintained by McIntosh County. Alternatively, the State argued that, should this Court find the title to the road was part of a former Creek Nation allotment, the Indian title thereto has been extinguished by prior conveyances from Creek allottees to non-Indians.

¶ 14 Petitioner, however, claimed the county road was an easement or right-of-way and that fee title to the land beneath that road was owned by a Creek allottee, not the State. The surface rights had since been conveyed away, but the allottee's heirs had maintained a mineral interest. Petitioner thus claimed the Indian title to the property had not been fully extinguished as required by federal statute and for that reason the whole tract remains Indian country.[4]

¶ 15 This issue—i.e., whether the conveyance of all surface rights to an Indian country allotment extinguishes the Indian title thereto, or whether the reservation of a small mineral interest (1/12th) by the Creek Indian allottees preserves the Indian title so that criminal jurisdiction remains federal—appears to be novel. The parties have submitted numerous cases that are, to varying degrees, relevant to the crucial issue and somewhat analogous on certain points. But none of the cases deal directly with the issue presented here.

¶ 16 We are thus left interpreting federal statutes, federal decisions, and state cases construing federal law in an attempt to resolve a matter of utmost importance: who has jurisdiction over the murder of George Jacobs?

¶ 17 The evidentiary hearing lasted one day. Following the hearing the Associate District Judge made findings of fact and conclusions of law.

¶ 18 As for the facts, the District Court found: the fatal wound (amputation of the victim's genitals) was inflicted while the victim was on the traveled portion of Vernon Road; the victim died in the ditch just off the east edge of Vernon Road, after his attackers dragged him there; all of Vernon Road, including the ditch where the victim was found, lies within a three rod area granted to the

3. The hearing addressed the following issues: (1) Where exactly did the crime occur? (2) Who "owns" title to the property upon which the crime occurred? (3) If some or all of the crime occurred on an easement, how does that factor into the ownership question? (4) How much of the crime occurred, if any, on an easement? (5) Did the crime occur in "Indian County," as defined by 18 U.S.C. § 1151? (6) Is jurisdiction over the crime exclusively federal?

4. The District Court did not admit any of Petitioner's evidence pertaining to the issue of a "dependent Indian community." This was error. Fortunately, however, Petitioner made an offer of proof and submitted substantial materials on this issue, as we discuss below.

public for highway purposes by the Supplemental Creek Agreement of 1902;[5] 100 % of the surface and 11/12ths of the minerals to the tract of land adjacent to and directly east of the crime scene is wholly unrestricted property, owned by non-Indians; and the remaining 1/12th mineral interest appears to be a restricted interest retained by Indian heirs of a Creek allottee.

¶ 19 The District Court's legal conclusions were as follows: Vernon Road lies on land ceded to the State, not an easement; the original Creek allottees took their land subject to the grant for a public highway; thus the land upon which the road lies was not part of the allotment; the State of Oklahoma owns title to the property on which the crime occurred; the crime did not occur in Indian country; assuming, *arguendo*, that Vernon Road does lie on an easement, said easement is perpetual and therefore not Indian country; assuming, *arguendo*, that the land under Vernon Road was conveyed to the Creek Indian allottees, the Indian title thereto has since been extinguished, as only a 1/12th mineral interest continues to be owned by Creek Indians; and criminal jurisdiction thus lies with the State pursuant to the reasoning of *Cravatt v. State*.

¶ 20 We agree with many of the District Court's findings and conclusions. But we cannot find factual or legal support for them all.

¶ 21 We readily accept the District Court's findings as to the source of the fatal wound and where it was inflicted. For jurisdictional purposes, the crime took place on both the northbound lane of Vernon Road (i.e., the road's eastern side in the N/2 SW/4 and the S/2 NW/4 of Section 27, Township 9 North, Range 13 East, McIntosh County) and the adjacent ditch. Plus, as the parties and District Court agree, both sites (the site of the fatal wound and the ditch where George Jacobs died) are within the boundaries of the three-rod (49.5 feet) area created along the section line by a 1902 Creek Nation Treaty with the United States. *See* Act of June 30, 1902, 32 Stat. 500, 502, § 10.

[4] ¶ 22 However, the record does not support the District Court's finding that the area in question lies on land that was "ceded to the State." We find the record, witness testimony, treaty language, and relevant cases all support a finding that the State of Oklahoma's interest in the area in question is in the nature of an easement or right-of way.[6]

¶ 23 The June 30, 1902 Act, which ratified an agreement between the United States and the Creek Nation, provided, in Paragraph 10, that "Public highways or roads 3 rods in width, being 1 and one-half rods on each side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others *shall take the title to such lands subject to this provision.*" (emphasis added). The language gives no indication that Oklahoma, which became a state in 1907, was granted fee simple title to the strip in question.

¶ 24 Prior to the passage of this Act, the Creek Nation already owned this same land in fee, as those lands had been long ago granted by the United States to the Creek Nation in exchange for the Creek's agreement to cede their land in Alabama and Georgia. *See Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967, 971 (10th Cir.1987). Even in 1890 when the Creek Nation's lands became part of what became Oklahoma Territory—the land reserved for the Five Civilized Tribes—the Creek's property remained Indian country owned in fee. *Id.* at 974, 977. When the lands were subsequently allotted to Creek Indians as per the Creek Allotment Act in 1901, "Congress was careful to preserve the authority of the government of the United States over the Indi-

5. 32 Stat. 500, 502.

6. This Court is not typically in the business of resolving title matters pertaining to Oklahoma property. Due to Oklahoma's unique appellate court system, which places authority for resolving civil matters with the Oklahoma Supreme Court and criminal matters with this Court, matters of this type, i.e., who owns title to the strip of land upon which Vernon Road and the adjacent ditch lie, would ordinarily arise in the Oklahoma Supreme Court. However, it is our job to determine if the property is Indian Country for purposes of criminal jurisdiction.

ans, their land and property, which it had prior to the passage of the act." *Id.* at 979 (quoting *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309, 31 S.Ct. 578, 584, 55 L.Ed. 738 (1911)).

¶ 25 The language pertaining to public roads in the 1902 Act was the Creek Nation's acknowledgement of the future State of Oklahoma's right to establish public highways along the section lines, without compensating the Creek Nation therefore. The Act thus creates an easement or right-of-way for public highways, with title to the underlying lands remaining in the Creek Nation and its subsequent allottees, who took their allotment subject to the right-of-way.[7]

¶ 26 This interpretation is consistent with testimony and exhibits admitted at the remanded evidentiary hearing. A title opinion admitted at the hearing and rendered by attorney Keith Ham [8] finds as follows:

> We understand that there is a roadway located upon the West side of captioned property, along or upon the Section 27 and Section 28 section line. Inasmuch as we did not find any easement or other conveyance for roadway purposes in favor of the State of Oklahoma (or agency thereof) or McIntosh County, the only apparent legal basis for the establishment or the existence of a roadway ... is pursuant to 32 Stat. 500. This statute provided that highways or roads may be established along all section lines located within the Creek or Muscogee Nation.... Captioned property is located within the boundaries of the Creek or Muscogee Nation and thus this statutory easement would apply to the above captioned property. This easement for roadway establishment *did not alter the fact that the allottee took title to his or her allotment and owned the fee simple title in and to their entire allotted land.* It is our opinion that the ownership of the minerals and mineral rights as owned by Joe McGilbray and Roy T. Ussrey [9] as restricted interests as set forth above *extends to the Section 27 and Section 28 section line.* In the event the roadway in the area of the Section 27 and Section 28 section line is located upon any portion of captioned property, *it is our opinion that Joe McGilbray and Roy T. Ussrey own their respective restricted ownership interest as set forth above in and under said roadway* insofar as the same is located upon captioned property.

(emphasis and added).

¶ 27 The State presented no expert testimony on title to the land in question that disagreed with Mr. Ham's opinion. Jeff Dell, an Assistant Realty Officer for the Creek Nation, rendered a title opinion on behalf of the State concerning the entire tract (N/2 SW/4 and S/2 NW/4 of Section 27, Township 9 North, Range 13 East, McIntosh County), which had originally been allotted to Lizzie Smith (and which is sometimes referred to as the "Busby tract"). The opinion was silent regarding any ownership in this tract by the State of Oklahoma. However, in an affidavit attached to Petitioner's Reply to the State's Response to Petitioner's Second Application for Post–Conviction Relief, Dell stated:

> I understand that the State of Oklahoma has taken the view that the restricted ownership interest of the Busby tract is immaterial to state jurisdiction because the section line county road known as the Vernon Road, also known as NS 398, which runs on the west side of the Busby tract is the situs of the mortal wounds to the victim in Mr. Murphy's case and the road is maintained by McIntosh County. I can express no opinion regarding the significance to jurisdiction of where the injuries occurred to the victim in Petitioner's case. I can, however, clarify that the State of Oklahoma does not own the Vernon Road as it runs on the west side of the Busby tract.

7. Paragraph 17 of the same Act allows the Creek allottees to lease the minerals to their lands, "with the approval of the Secretary of the Interior, and not otherwise."

8. Ham is an attorney in Bristow. He specializes in the area of title and regularly renders title opinions for banks, title companies, and the Creek Nation. He is a past president of the Creek County Bar Association and Muscogee (Creek) Nation Bar Association. Ham is well versed in the area of the Creek Allotment process.

9. McGilbray and Ussrey are Indian heirs to original Creek allottee Lizzie Smith.

> The Busby tract ownership, pursuant to 32 Stat. 500, 502 (1902), runs to the section line and title thereto is vested in the owners of the Busby tract and not the State of Oklahoma.

During the evidentiary hearing Dell testified the entire tract was within the historical boundaries of the Creek Nation. Moreover, some documents appear to indicate that the current non-Indian landowners of property abutting Vernon Road pay taxes with respect to the Vernon Road tract.

¶ 28 The Associate District Judge relied on Section 2, Article 16 of the State Constitution in finding the land in question was owned by the State and was not an easement. However, this constitutional provision was long ago studied by the Oklahoma Supreme Court in *Mills v. Glasscock*, 1909 OK 77, 110 P. 377, 378–79. There, the Court at all times treated the Constitutional provision as indicative of the State's acceptance of an easement or right-of-way along section lines for purpose of public highways.

¶ 29 As for other cases, *Kansas Natural Gas Co. v. Haskell*, 172 F. 545 (C.C.E.D.Okla.1909), and cases cited therein, is particularly instructive. There, in construing similar language from similar treaties between the United States and the Cherokees, the Federal Circuit Court for the Eastern District of Oklahoma found:

> The fee to the rural public highways in that portion of this state formerly comprising Indian Territory, and now the Eastern district, does not vest in the state for the benefit of the whole people, as premised by the defense; but it does vest in the abutting landowners. The public have only a perpetual servitude or easement therein.... It is clear, therefore, that the fee to the land comprising rural highways in what was formerly Indian Territory vests in the abutting landowners, subject only to the easement granted the public for highway purposes, following the rule of common law.

Id. at 567–68; *see also Paschall Properties v. Board of County Comm'rs*, 1987 OK 6, ¶ 6, 733 P.2d 878, 879 (finding similar language in Cherokee Allotment Act means allottees "take their title to these lands subject to this ability to establish roads"); *Oldfield v. Donelson*, 1977 OK 104, ¶ 7, 565 P.2d 37, 40 (State has an easement in Osage Nation section line roads).

[5] ¶ 30 It seems clear that title to the land upon which Vernon Road lies was conveyed to the Creek allottees who owned the property abutting the road. But now we must ascertain whether the Indian title to this particular tract has since been extinguished before state criminal jurisdiction may be exercised.

[6] ¶ 31 This is a challenging issue. Criminal jurisdiction is determined according to where a crime occurred, which is largely a geographic fact determination. In the instant case, the record shows the crime occurred on land originally allotted to Lizzie Smith, a member of the Creek Nation. However, all surface rights to the property have since been conveyed away to non-Indians. Thus, non-Indians own the actual physical property upon which the crime occurred, which suggests jurisdiction rightly belongs with the State.

¶ 32 However, not all of the fee interest in the original allotment has been conveyed to non-Indians. According to the evidentiary hearing record, while non-Indians own the surface and eleven twelfths of the minerals in the tract where the crime occurred, one twelfth of the mineral interest remains restricted with the Indian heirs of Lizzie Smith. The question is whether this small mineral interest is sufficient to qualify the property as an Indian allotment, the Indian title to which has not been extinguished, under 18 U.S.C. § 1151(c).[10]

10. A variation of this question might be whether the 1/12th mineral interest remains part of "Indian country" while the remaining interest is not. In other words, does title to the entire allotment have to be extinguished or can that allotment lose its Indian title distinction piece by piece? For example, if Lizzie Smith had conveyed the entire surface and minerals to the south half of her allotment, did that southern half lose its Indian Country label, or does it retain that label until all of the northern half is conveyed to non-Indians? And does this situation change if the conveyance was a one-half interest in the allotment as a whole?

¶ 33 We've found no definitive answer to this question.

¶ 34 The Associate District Judge, however, found the Indian title had indeed been extinguished:

> Even if the crime scene could be defined as Indian country based on the 1/12th restricted mineral interest remaining in the adjacent property, the wholly unrestricted surface ownership on both sides of Vernon Road, coupled with the State's compelling interest in enforcing its penal laws and protecting its citizens would permit the State to exercise jurisdiction in this case.

¶ 35 And yet, no witness at the evidentiary hearing took this position. Monta Sharon Blackwell, former Deputy Commissioner of Indians Affairs at the Department of the Interior, testified that the Indian title to the allotment formerly owned by Lizzie Smith had not been extinguished and that it remained Indian country as that expression is used under federal law. Ms. Blackwell testified that the Department of the Interior considered Indian mineral interests, as the dominant interests in the land, to be worthy of protection and that the mineral estate in this particular area was quite valuable. Furthermore, whenever an Indian attempted to sell an allotment, Department of the Interior representatives would encourage them to retain one half of the minerals. When asked if she would agree that the Indian title to the surface had been extinguished, Ms. Blackwell expressed doubt one could divide the surface and mineral estates "in that way." But she admitted she knew of no case that stood for the question presented here, i.e., whether a fractional restricted mineral interest is sufficient to confer criminal jurisdiction.

¶ 36 We, too, have not found a case that stands for that exact position,[11] although we have found several cases that are close,[12] analagous,[13] or at least somewhat relevant.[14]

11. But we've also been unable to find a case stating otherwise, i.e., that Indian title to a former allotment has been extinguished even though Indians have retained a fractional restricted mineral interest in the allotment.

12. In *Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277, the victim was killed on a former Indian allotment, the title of which was mixed—a 1/7th interest in the fee had been conveyed away to non-Indians. (Unlike the instant case, the surface and minerals had not been separated.) This Court found Oklahoma lacked criminal jurisdiction, ruling: "We do not find that this small interest in the property is sufficient to justify State intervention in a matter which would otherwise be statutorily reserved for the federal government." *Id.* at ¶ 19, 825 P.2d at 280. The Court then stated, "[W]e do not find that the State's interest, only marginally justified, outweighs the federal preemption in this case." *Id.* at ¶ 20; *but see Hanes v. State*, 1998 OK CR 74, 973 P.2d 330, 337 (a curiously convoluted case where the Court seems to find Indian title to the western half of the Grand river "at the location of the Miami city park" had been extinguished by conveyance in fee simple to the city of Miami).

13. *See, e.g., C.M.G. v. State*, 1979 OK CR 39, ¶ 7, 594 P.2d 798, 801 (finding a truism of Indian law is that doubtful expressions in Indian treaties and Acts of Congress dealing with Indians are to be resolved in favor of the Indians and that cases in which land claimed to be Indian country was found not to be have involved land to which the Indians "clearly and specifically had ceded all claim, right, title, and interest to the lands without any reservation whatsoever."); *United States v. Soldana*, 246 U.S. 530, 532–33, 38 S.Ct. 357, 358, 62 L.Ed. 870 (1918) (rejecting a claim that Crow reservation Indian title to the soil on which a railroad platform stood had been extinguished, regardless of whether or not the strip in question, which was owned by non-Indians, was a mere easement or limited fee.); *Ahboah v. Housing Authority of Kiowa Tribe*, 1983 OK 20, ¶ 16, 660 P.2d 625, 629, ("[T]he Supreme Court has held that an interest in Indian lands in less than fee simple, held by a non-Indian, does not deprive the lands of their Indian character.")

14. In *State v. Burnett*, 1983 OK CR 153, ¶ 8, 671 P.2d 1165, 1167, *overruled, in part, on a separate issue in State v. Klindt*, 1989 OK CR 75, ¶ 6, 782 P.2d 401, 403, the Court found the language "all Indian allotments, the Indian titles to which have not been extinguished" in 18 U.S.C. § 1151(c) was "broad enough to encompass all Indian allotments while the title to same shall be held in trust by the Government, *or while the same shall remain inalienable by the allottee without the consent of the United States.*" (emphasis added) (The testimony at the evidentiary hearing indicated the U.S. would have to approve any leases as to the remaining 1/12th restricted mineral interest.) *See also HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1254 (10th Cir.2000) (finding the "split nature of the surface and mineral estates does not alter the jurisdictional status of these lands" for Safe Drinking Water Act purposes: "[I]f ownership of mineral rights and the surface estate is split, and either is considered Indian lands, the Federal EPA will regulate the well under the Indian land program."); *Rose-*

But considering those authorities, the evidentiary hearing testimony, and the entire record before us, we remain unconvinced that the crime occurred on Indian country, at least under 18 U.S.C. § 1151(c), pertaining to allotments.

¶ 37 George Jacobs was murdered in McIntosh County in August of 1999. The crime occurred on a county section line road in a remarkably rural, heavily treed location, without any sort of improvement noticeable in the photographs, except perhaps a rickety barbed wire fence. The crime occurred approximately one mile north of the small town of Vernon, a town supposedly established by freed black slaves, and four or so miles from the equally small town of Hanna.

¶ 38 Authorities investigated the matter during the relevant time period. As a result state murder charges and a bill of particulars were filed against Petitioner. Trial was held in April of 2000, and Petitioner was convicted of First Degree Murder. Since then the matter has been continuously on appeal.

¶ 39 We find it significant that federal authorities have never attempted to exercise jurisdiction over this crime in the five years since it occurred. Meanwhile, the State of Oklahoma has spent considerable time and money prosecuting and defending Petitioner in the district and appellate courts.

¶ 40 This case presents two separate and distinct estates in land, i.e., a surface estate and a mineral estate, each subject to being severed and separately conveyed. The uncontradicted evidence shows that the surface estate was separated from the mineral estate on the land where the crime occurred. Also, 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.

bud Sioux Tribe v. Kneip, 430 U.S. 584, 604–605, 97 S.Ct. 1361, 1372, 51 L.Ed.2d 660 (1977) ("The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use," may create "justifiable expectations.")

¶ 41 Even 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.

[7] ¶ 42 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. When 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.[15] Here, the subject matter is criminal jurisdiction, and the State of Oklahoma's contacts and interests in the subject property overwhelm the fractional interest an Indian heir may own in an unseen mineral estate.

¶ 43 To allow this unobservable fractional interest to control the enforcement of laws on the surface of the land would be analogous to condoning the type of serious problems enunciated by the U.S. Supreme Court this term in *City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. ——, 125 S.Ct. 1478, 1493, 161 L.Ed.2d 386 (2005), i.e., a "checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN's behest" that "would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." While that case dealt with a tribe attempting to reestablish sovereignty over land purchased in fee from non-Indians, the principle still applies.

¶ 44 The 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. While some authorities sug-

15. For example, in the area of Due Process, the United States Supreme Court looks to a nonresident defendant's "minimum contacts" with a state to determine if jurisdiction can be exercised over that defendant. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The Court determines if a defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

gest, to varying degrees, that "Indian country" status may still be attached to the property in question, we have found no case holding that the retention of small (although not insignificant) mineral interest is enough in and of itself to prevent the Indian title from being considered extinguished under federal law, especially in the context of criminal jurisdiction.

¶ 45 Criminal jurisdiction has always been tied to geography, i.e., where the crime occurred. Common sense tells us that this issue has more to do with surface rights than underground minerals, since it is virtually impossible to commit a crime against a person within a mineral interest sub-surface strata. Plus, we see little, if any, value in a system that would require a title search to the extent required here, i.e., researching allotments, heirs of allottees, and fractional mineral interests,[16] in order to determine whether criminal jurisdiction is state or federal. Such a system would seriously burden both the state and federal governments.[17]

¶ 46 We therefore agree with the District Court's most important conclusion: that, pursuant to the reasoning in *Cravatt*, the Indian title to the tract formerly allotted to Lizzie Smith has been extinguished for purposes of criminal jurisdiction over the crime in question. Absent clear authority requiring a different interpretation, we refuse to vacate the state murder conviction and death sentence based on a theoretical interpretation of federal law.

[8] ¶ 47 The remaining issue, under proposition one, is whether or not the land in question is part of a Creek Nation reservation that has never been disestablished or is part of a dependent Indian community. Unfortunately, the District Court decided, based upon the Assistant District Attorney's urging, that these questions were beyond the scope of the evidentiary hearing, even though we clearly asked the Court to determine if the tract in question was Indian country under 18 U.S.C. § 1151.

¶ 48 Be that as it may, the error was alleviated when the District Court allowed Petitioner's counsel to make an extended offer of proof regarding the testimony and evidence that would have been presented on these two questions had that opportunity been given. Accordingly, we find the error was harmless. Even if the evidence had been admitted, it is insufficient to convince us that the tract in question qualifies as a reservation or dependent Indian community.

¶ 49 Petitioner's proffered expert, Monta Sharon Blackwell, stated by affidavit that "[t]here was never a formal Creek Nation 'reservation' but for practical purposes" certain treaty language was "tantamount to a reservation under Federal law." Thus, the "Creek Nation, historically and traditionally, is a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership."

¶ 50 Ms. Blackwell and Jeff Dell both took the position that the historical boundaries of the Creek Nation remained intact even after the various Creek lands were subjected to the allotment process, but no case is cited for the position that the individual Creek allotments remain part of an overall Creek reservation that still exists today.[18]

¶ 51 The best authority on this point is *Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d at 975, which treats the Creek Nation lands as a "reservation" as of 1866.[19] However, the Tenth Circuit declined

16. For example, some of the evidence presented on title takes the position that the heirs of Lizzie Smith (and one of her supposed heirs) have never been judicially determined. As such, we would need a quiet title suit in order to be certain that all surface rights have been conveyed to non-Indians.

17. Furthermore, if Petitioner's position is correct, then a great portion, if not most, of eastern Oklahoma would still be considered Indian country today. The tax implications alone would be staggering.

18. It seems redundant, however, to treat lands as both a reservation and an allotment. Section 1151 clearly makes a distinction between the two.

19. The case finds the term "reservation," for purposes of defining Indian country, "simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments." 829 F.2d at 973.

to answer the question of whether the exterior boundaries of the 1866 Creek Nation have been disestablished and expressly refused to express an opinion in that regard concerning allotted Creek lands. *See id.* at 975 n. 3, 980 n. 5.

¶ 52 If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here.

¶ 53 Regarding the issue of dependent Indian communities, the evidence supporting that claim is thin, especially in regard to the issue of dependency. Petitioner has submitted photos of some Indian cemeteries and churches within three to four miles of the site, and there is an Indian community center near the town of Hanna. Petitioner has also submitted evidence that the Creek Tribal Town of Weogufkee, reportedly one of the 44 original tribal towns and founded in 1858, is somewhere nearby. Also, there is evidence of Creek Nation voting districts in the area. No evidence was submitted regarding the exact Indian demographics of this region as it stands today.[20] However, an affidavit states that Weogufkee had a population of 750, but that was in 1935.

¶ 54 A dependent Indian Community refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements: first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527, 118 S.Ct. 948, 953, 140 L.Ed.2d 30 (1998). As an allotment, it is doubtful this particular tract could qualify as a part of a dependent Indian community. But, more importantly, there does not seem to be much federal superintendence. Most certainly, there is much less federal control in this case than there was in *Eaves v. State*, 1990 OK CR 42, 795 P.2d 1060, 1063, a case where we found a housing project owned by the Osage Tribal Housing Authority was not a dependent Indian community under 18 U.S.C. § 1151. We believe this case falls within the teaching of *United States v. Blair*, 913 F.Supp. 1503, 1512 (E.D.Okla.1995), and the tract in question is simply a "typical slice of rural eastern Oklahoma occupied by a mixed culture of people attempting to hold on to their agrarian roots." Proposition one thus fails.

¶ 55 In proposition two, Petitioner claims he was denied the right to a jury trial on the issue of mental retardation by our decision in his first post-conviction appeal. *See Murphy v. State*, 2003 OK CR 6, 66 P.3d 456. He claims this was arbitrary and capricious, a denial of equal protection, and a deprivation of rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments.

[9] ¶ 56 This Court's mental retardation jurisprudence has been in a state of flux since *Atkins v. Virginia* was handed down. Petitioner's mental retardation claim was the first such claim addressed by this Court in the aftermath of *Atkins*, and various procedural changes have taken place since that time. While the trial judge and our prior cases have voiced strong doubts about Petitioner's mental retardation claim, a majority of this Court now finds he has provided sufficient evidence in his post-conviction appeals to raise a fact question on this issue, thereby warranting a trial on Petitioner's mental retardation claim.[21]

20. No data from the U.S. Census Bureau was offered. However, Courts have often taken judicial notice of such data. *See e.g., Village Bank v. Seikel*, 1972 OK 123, 503 P.2d 550, 553. Hypothetically, were we to do the same here, it appears we would find that only 16.2 % of the residents of McIntosh County reported being American Indian, i.e., approximately 3,200 people over the entire county. On the other hand, white persons constituted 72.6 %, African Americans 4.1%, and Hispanics 1.3%. www.quickfacts.census.gov.

21. I personally disagree with the Court's resolution of proposition two for the following reasons. First, Petitioner is not mentally retarded. Second, he never made a *prima facie* showing of his claim, as his abbreviated IQ test was insufficient to get him past the required threshold of providing at least one IQ test score under 70. Third, the matter is *res judicata*, as three judges from this Court (myself, Judge C. Johnson, and Judge Lile) have previously rejected this identical claim in a previous appeal. And finally, the fact that Petitioner is the only defendant who was unable to sufficiently raise a fact question concerning his mental retardation claim does not mean he was treated differently. But I defer to the majority on this issue.

[10] ¶ 57 In proposition three, Petitioner claims, for the first time, that Oklahoma's lethal injection procedure violates the Eighth Amendment prohibition against cruel and unusual punishment.[22] He claims Oklahoma's "protocols" for carrying out such executions create a substantial risk of conscious suffocation or conscious suffering of excruciating pain and that several such Oklahoma executions have "gone wrong." [23]

¶ 58 Petitioner has waived any error relating to this claim by failing to raise it in his May 3, 2001 direct appeal brief and his February 7, 2002 post-conviction application. He admits the claim was available in March of 2001. Moreover, the statute upon which such executions are based, 22 O.S.2001, § 1014(A),[24] has not been amended since 1977.

DECISION

¶ 59 After carefully reviewing Petitioner's post-conviction application and supporting documentation, along with all matters from the remanded evidentiary hearing, we find relief is warranted with respect to his mental retardation claim. Accordingly, Petitioner's Application for Post–Conviction Relief is hereby **DENIED** with respect to propositions one and three, but **GRANTED** with respect to proposition two. This matter is hereby **REMANDED** to the District Court of McIntosh County for a jury trial on Petitioner's mental retardation claim, consistent with this opinion and the procedures adopted by this Court in our recent mental retardation jurisprudence.

CHAPEL, P.J., C. JOHNSON, A. JOHNSON and LEWIS, JJ.: concur.

22. Petitioner also claims the procedure violates the Fifth and Fourteenth Amendments, but he never explains how.

23. The specific allegations (chronicled by a report from an euthanasia panel and affidavits from Oklahoma State Penitentiary Warden Mike Mullin, physician Mike Heath, and two attorneys who witnessed the execution of Loyd Lafevers on January 30, 2001) are disconcerting. If true, they merit serious attention from the legislature and/or those in charge of the statutorily based responsibility of carrying out the execution "according to accepted standards of medical practice." (See below.) However, it appears Oklahoma's protocols, i.e., the exact drugs and distribution method, are not statutorily based. Corrections officials change those protocols from time to time, as new information is gathered. If Petitioner's allegations have merit, we have every reason to believe the necessary changes will be implemented.

24. The punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician, according to accepted standards of medical practice.