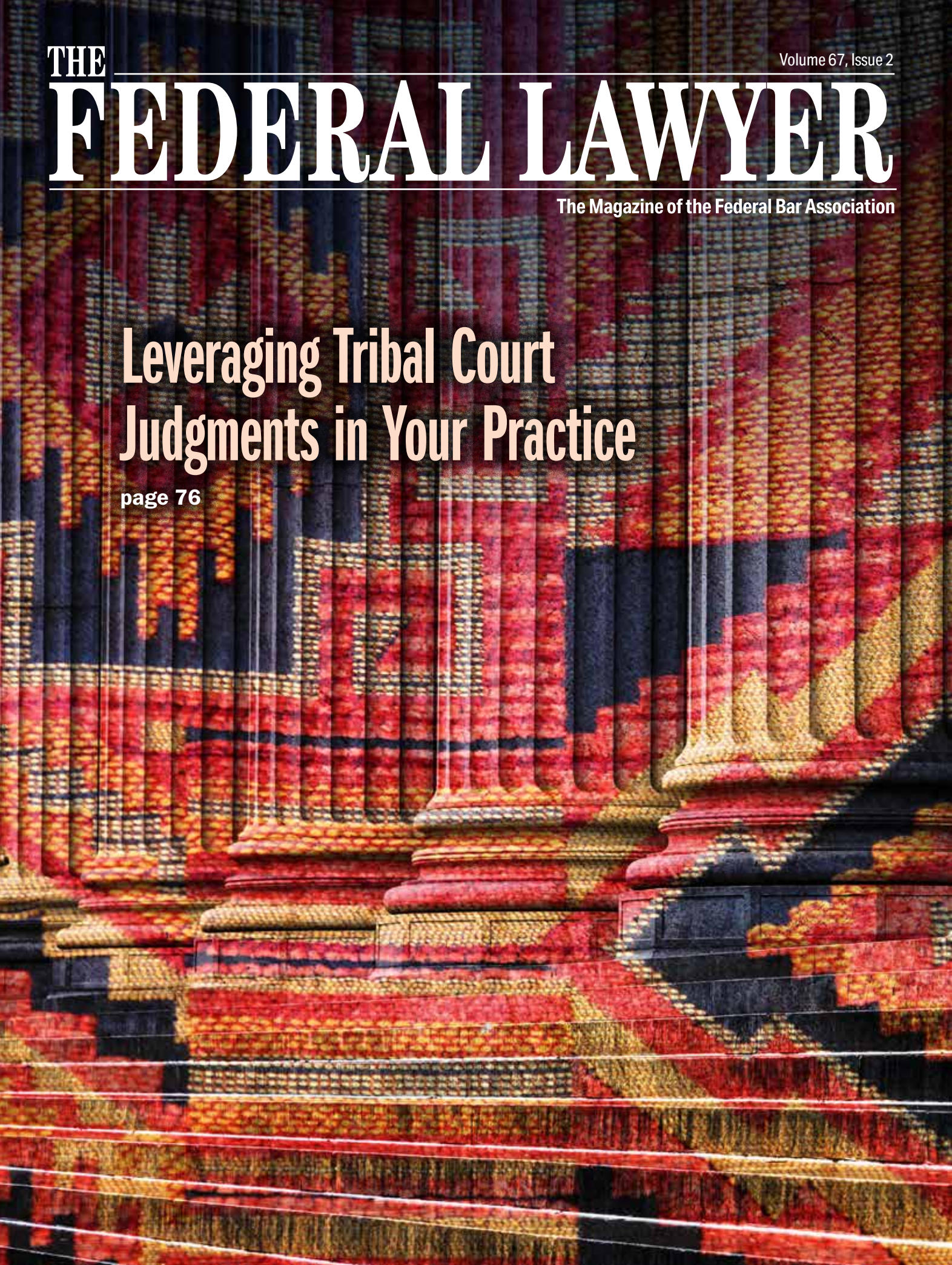
Volume 67, Issue 2

# THE FEDERAL LAWYER

The Magazine of the Federal Bar Association



## Leveraging Tribal Court Judgments in Your Practice

page 76

# Has the Earth Shattered Under Oklahoma? Predictions and Implications of *Sharp v. Murphy* (and *McGirt v. Oklahoma*)

MIKE MCBRIDE III

The Supreme Court of the United States most likely has decided *Sharp v. Murphy*[1] by the time you read this article—or not. *Murphy* is a capital murder case that has spanned two decades of appeals. The case means much more than whether an Oklahoma convict will live or die by execution. We will know whether the eastern half of Oklahoma, containing 1.8 million residents, including nearly a million people in the greater Tulsa area, remains an Indian reservation. If not, the Court may have created an "Oklahoma exception" to its consistent line of treaty "disestablishment" precedents.[2] To do so, the Court will have to hold that tribal powers became so degraded over the course of a century that Indian reservations ceased to exist in Oklahoma.

As I write this in the fall of 2019, *Murphy* may become one of the most momentous and controversial decisions in the modern history of federal Indian law. Oklahoma seeks to maintain its sovereignty over half the state—some 19 million acres. While the disestablishment question is specific to the Creek Nation, the decision impacts the "Five Tribes." The Five Tribes include some of the largest tribes in the country: the Muscogee (Creek), Cherokee, Choctaw, Chickasaw, and Seminole Nations. These nations desire a declaration that their homeland reservation boundaries within Oklahoma still exist intact. The Five Tribes all have similar 1866 treaty provisions.

At its core, the case decides whether Mr. Murphy's crime is subject to state or federal jurisdiction under "Indian country."[3] This Major Crimes law is an important benchmark delineating both civil and criminal jurisdiction on many issues between tribes and states. The Court will have decided whether Congress diminished or disestablished the Creek Nation's reservation and whether Oklahoma had jurisdiction to prosecute a crime committed by an Indian within Indian country.

## Unusual SCOTUS Discord

The Supreme Court has had a tough time with the issues. The briefing and the Nov. 27, 2018, oral argument were remarkable. In addition to Oklahoma and Murphy, the Court additionally permitted division of oral argument time between amici curiae Muscogee (Creek) Nation and the United States. Oklahoma included a picture of downtown Tulsa in its opening brief, "stimulating" additional questions and comments from Justice Breyer and counsel.[4] Oklahoma's lawyer, Lisa Blatt, had contentious exchanges with several justices during oral argument.[5] Days later, the Court ordered the parties to provide additional briefing on two more issues.[6] On June 27, 2019, the last day of the 2018 term, instead of releasing a decision, Chief Justice Roberts announced that the case would return for "reargument."[7]

In the modern history of the Court, reargument has occurred only in handful of cases, including landmark cases such as *Brown v. Board of Education,*[8] *Roe v. Wade,*[9] and *Citizens United v. FEC.*[10] Many have speculated as to what the Court may do, but Justice Neil Gor-

such's recusal[11] may mean that the justices sought the delay to hammer out agreements that would avoid a four-to-four split resulting in affirming the Tenth Circuit decision. Perhaps the justices ran out of time while working on a blockbuster decision creating the Oklahoma exception to established reservation diminishment precedent. Is another justice retirement on the horizon? A scheduled retirement most likely would have occurred during the summer break. Perhaps the justices await a companion case or two[12] with similar issues so that Justice Gorsuch can weigh in with the full complement of nine justices, without a recusal. It is doubtful that Justice Gorsuch would "un-recuse" to decide *Murphy.* Such a huge shift in the settled understanding of sovereignty over Eastern Oklahoma may be too much for a majority of the justices to stomach, despite stare decisis. The justices are having a hard time ducking very difficult issues in favor of an easier way to resolve the case than to decide the reservation diminishment issue head on.

In recent years, the Court has evenly split on other major federal Indian law cases:

- *Dollar General v. Mississippi Band of Choctaw Indians.*[13] By a four-to-four split, the Fifth Circuit Court of Appeals left a district court decision intact that affirmed the Choctaw tribal court jurisdiction to decide a suit against Dollar General regarding a non-Indian employee committing sexual assault against a minor tribal citizen.
- *Washington v. United States.*[14] A four-to-four deadlock affirmed the Ninth Circuit decision upholding a ruling that the state of Washington must redesign and rebuild road culverts to allow salmon to swim upstream to abide by tribal treaty rights to fish.

And in the last term, the Court has respected the force of treaties in another five-to-four decision. In *Herrara v. Wyoming*, the Court held that Wyoming statehood did not outweigh the Crow Tribe's treaty right to hunt on public lands.[15] Justice Gorsuch has affirmed tribal treaty rights in the recent decisions in which he participated, including *Herrara* and *Washington*. His special concurrence in the four-to-four affirmance in *Washington* is telling:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The state is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the court holds the parties to the terms of their deal. It is the least we could do.[16]

Regardless, I predict the Court's votes to resolve this issue will likely be close, whichever way it goes.

## Complicated History

The history of the controversy is long and very complicated. Most of what became Oklahoma was formerly Indian Territory,[17] a federal homeland reserve for forced migration of several hundred tribes.[18] The Five Tribes governed the area that became Eastern Oklahoma with little federal oversight or interference until the Civil War.[19] Following the Civil War, many tribal allegiances with the Confederacy led to the United States imposing a series of treaties in 1866, generally to take away some rights, take additional lands, and impose new restrictions on the Five Tribes.[20] The 1866 Treaty reservation boundary provisions are at issue in *Murphy*.

The Oklahoma Organic Act of 1890 defined the boundaries of Indian Territory and established Oklahoma Territory.[21] The passage of the General Allotment Act of 1887 prompted negotiations with the Five Tribes and other tribes settled among them to cede lands for "surplus" non-Indian capture and settlement and to divide parcels among tribal citizens.[22] While this act excepted the Five Tribes and some others, including the Osage Nation, the Dawes Commission negotiated agreements resulting in the Five Tribes Act and the Osage Allotment Acts of 1906.[23] Congress combined Oklahoma Territory with Indian Territory to create Oklahoma, the 46th state, in 1907, when Congress passed the Oklahoma Enabling Act.[24] Today, Oklahoma is home to 39 federally recognized Indian tribes, and about 12% of Oklahoma citizens identify themselves as Native American.

## Formal and Informal Reservations and Settled Expectations?

Most Oklahoma citizens have had a settled belief for more a century that Indian reservations ended at statehood. Earlier decisions in *Murphy* and *Osage Nation v. Irby*[25] concluded that Indian reservations within Oklahoma had become "disestablished" over time, but without pointing to any particular statutory text or specific legislative history.[26] The Tenth Circuit's 2017 holding in *Murphy* conflicts with its ruling in *Irby* in 2010. Otherwise, courts have not judicially determined the status of Oklahoma Indian reservations. Adding to the confusion, Congress has defined "reservation" to include "former Indian reservations in Oklahoma" in a number of laws in recent years.[27] The Supreme Court also recognized "informal reservations" without definition in *Oklahoma Tax Comm'n v. Sac & Fox Nation*[28] in 1993.

## Acknowledging Indian Country, and the Rise of Modern Tribal Courts Within Oklahoma

Only within the last four decades have Oklahoma courts come to acknowledge "Indian country" generally within Oklahoma. The tide turned with *Oklahoma v. Little Chief* in 1978.[29] The Oklahoma Court of Criminal Appeals acknowledged that a federal district court ruled that the state lacked jurisdiction to prosecute a murder occurring on Indian land. The decision effectively reversed many decades of prior decisions affirming state court convictions of Indians for crimes committed in Indian country. A body of scholarship chronicles the old decisions and the rise of modern tribal courts administered by the Bureau of Indian Affairs through the Court of Indian Offenses (C.F.R. Courts) under regulations at Part 11 of Title 25 of the Code of Federal Regulations or by tribal governments themselves within Oklahoma thereafter.[30]

## The Murder: Deadly Love Triangle

On Aug. 28, 1999, Patrick Dwayne Murphy, a citizen of the Muscogee (Creek) Nation, got into an argument with his live-in girlfriend, Patsy Jacobs. He had drunk heavily that day and reportedly consumed more than 20 beers. He told Patsy he was "going to get" her ex, George Jacobs (also a Creek citizen), and his family. He found Jacobs on a heavily tree-lined country road in rural McIntosh County, near Henryetta, Okla. Murphy confronted Jacobs, stabbed him many times, slashed his throat, and mutilated his body. He left him on the side of the road, where he died. Murphy confessed to killing

Jacobs. A state jury convicted him and sentenced him to death in the spring of 2000. Murphy appealed his conviction on many grounds and challenged his detention in federal courts for almost two decades thereafter.[31] After 17 years, the reservation-based jurisdiction argument became the first one to gain traction for post-conviction habeas corpus relief.

## Implications for the Decision

If Murphy wins, his conviction will be overturned and, at any retrial, the maximum penalty would be life in prison. The Creek Nation has not opted into the federal death penalty under the Major Crimes Act in federal court. Affirming *Murphy* would mean the federal and tribal governments, not Oklahoma, would have jurisdiction over crimes committed by or against Native Americans within those reservation boundaries. However, Supreme Court precedent provides that Indian tribes lack criminal jurisdiction over non-Indians, and tribal governments lack civil jurisdiction over non-Indians except in limited circumstances involving consensual relationships through licenses, contracts, leases, or actions having significant impacts on tribal health, safety, or political integrity.[32] This is a significant constraint on tribal powers over non-Indians; however, the existence of a reservation increases the possibility of tribal jurisdiction over non-Indians.

The ruling could significantly impact the relationships between the Five Tribes and the state, potentially resulting in dual regulation by the state and the Five Tribes and impacting the state's taxing authority over tribal citizens. Increased regulation also may affect businesses located and/or doing business within this large area and could affect the overall business climate in Oklahoma. For example, energy companies might have additional regulatory and tax issues regarding natural resource development. On the other hand, businesses might enjoy greater opportunities for tax credits and loans within this area. The Five Tribes likely would find it easier to place land into trust. Tribes within Eastern Oklahoma could more easily erect additional casinos, and their citizens could engage in greater tribally regulated smoke shop commerce. Under existing Supreme Court case law, Oklahoma would still have regulatory power over alcohol sales. It is difficult to predict the exact impact of the ruling from a business standpoint, and many issues likely would be resolved through additional legal actions. If the Court affirms *Murphy*, the Five Tribes' courts and the U.S. attorney's offices for the Northern and Eastern Districts of Oklahoma will have increased business.

## "Shattered Earth" and Stimulation

Oklahoma's counsel, Lisa Blatt, in her closing rebuttal at oral argument, made alarming predictions about whether over 2,000 prisoners in Oklahoma jails could challenge their convictions occurring on former Indian Territory: "That's 155 murderers, 113 rapists and over 200 felons who committed crimes against children."[33] "[A]nd this will stimulate you," Blatt argued.[34] She also suggested that under the Indian Child Welfare Act, "affirmance raises a spector of tearing families all across eastern Oklahoma, and probably beyond, for years, and years and years after the fact."[35]

But Oklahoma's fears are not as dire as they seem. Amici counsel Rijaz Kanji for Creek Nation addressed contemporary understandings and demonstrated that no turmoil would ensue if the Court affirmed *Murphy*. He noted that the Creek Nation has forged cooperative cross-deputization agreements with 40 of the 44 county and municipal jurisdictions within the Creek Nation reservation.[36] Kanji noted that "all sovereigns have an interest, a very common shared interest ... in law enforcement" and that close working relationships will continue.[37] He compared Tulsa with Tacoma, Wash., which lies within the Puyallup Reservation.[38] Kanji highlighted the precedents that restrict tribal authority over non-Indians on fee land within reservations, noting also that the state retains plenary power to tax and regulate activities over non-Indian fee lands within the reservation.[39] Moreover, he notes, "the Creeks are doing many things that pose no affront to the justifiable expectations of anybody but that, in fact, serve the expectations of all but hardened criminals."[40]

I believe that if the Court rules that the Five Tribes' reservations remain intact, life will go on with little disruption to most Indian and non-Indian citizens within Oklahoma. Non-Indians will not lose title to their property, and no one will get hauled into tribal court without their consent for activities having no connection to tribes or tribal authority. The Five Tribes and local governments will continue to work well together in providing services to their citizens. Tribal citizens are Oklahoma citizens as well. Oklahoma will continue to prosper, not shatter under shared governmental authority.

## An Update: *McGirt v. Oklahoma*

The Supreme Court granted certiorari in one of the companion cases, *McGirt v. Oklahoma*.[40] Jimcy McGirt is a 71-year-old citizen of the Seminole Nation of Oklahoma. He claims that his 1997 state court rape convictions stemming from sex crimes that occurred in Broken Arrow, a suburb of Tulsa, are invalid because they occurred within the historical boundaries of the Creek Nation. Like Murphy, McGirt claims that federal jurisdiction over such crimes committed by Indians is exclusive. It is possible that the Supreme Court could decide *McGirt* with Justice Gorsuch's participation. A ruling with a full complement of justices in *McGirt* could supplant a ruling in *Murphy*: A *McGirt* ruling could govern the outcome of *Murphy* without the Supreme Court deciding that case. ☉

***Author's Novel Coronavirus Postscript***

*On April 3, 2020, amid the COVID-19 pandemic, the Supreme Court announced the postponement of several oral arguments, including* McGirt v. Oklahoma, *scheduled for April 21. The justices neither set a date for argument resumption nor issued any orders for "reargument" of* Sharp v. Murphy. *The justices left no indication as to whether they will decide these cases this term or not. In these unprecedented times, it also leaves open the possibility of the Court conducting oral arguments remotely, deciding the cases on the briefs without additional arguments or continuing the cases to the next term in October 2020.*

*Mike McBride III chairs Crowe & Dunlevy's Indian Law & Gaming Practice out of the Tulsa office and is vice president of the International Masters of Gaming Law. He served as attorney general for the Seminole Nation of Oklahoma and as an amici curiae representative during the Tenth Circuit* Murphy v. Royal *appeal. Over the last 25 years, he has served the FBA in various roles, including as general counsel, national board member, Tenth Circuit vice president, chapter president for Northern and Eastern Oklahoma, and chair of the Indian Law Section.*

## Endnotes

[1]The Supreme Court docket for *Tommy Sharp, Interim Warden v. Patrick Dwayne Murphy*, No. 17-1107, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1107.html (last visited Nov. 1, 2019).

[2]*Solem v. Bartlett*, 465 U.S. 463 (1984)(Indian reservation boundaries will not be diminished except through specific congressional legislation); *Nebraska v. Parker*, 577 U.S.___, 136 S. Ct. 1072 (2016) (*per curiam,* 1882 Act did not diminish an Indian reservation because it lacked specific intent language).

[3]"Indian country" is defined at 18 U.S.C. § 1151. Congress originally enacted the statute, which codified common law up to 1948, to allow for federal criminal jurisdiction over crimes involving Indians. The Supreme Court has utilized the statute to define "Indian country" for "civil" jurisdictional purposes as well.

[4]Justice Breyer fixated on the picture in the brief: "And the reason there is a picture of Tulsa in the brief, I thought, was to stimulate me to ask such a question. (Laughter)." Transcript of Oral Argument at 66:25; 67:1-3, *Sharp v. Murphy,* No. 17-1107 (2018), https://www.supremecourt.gov/oral_arguments/audio/2018/17-1107 (last visited Nov. 1, 2019).

[5]*Id.* Justice Sotomayor asked the first few questions, just minutes into the argument, as is her custom, the most active SCOTUS inquisitor. The Justice inquired "exactly when" Congress disestablished Eastern Oklahoma as an Indian reservation, a key disestablishment test. Lisa Blatt, counsel for Oklahoma, responded "So, again, we don't have to give you a date. Rome did not fall in a day. We know it fell by 476, but it was sacked several times before that." *Id.* at 4: 2-25; 5; 6:1-13. Ms.Blatt had an even more testy exchange with Justice Kagan. With Justice Kagan's statement and questions, Ms. Blatt said, "No, that's fundamentally wrong in several respects." JUSTICE KAGAN: "Fundamentally wrong?" (Laughter.) ... JUSTICE KAGAN: "Factually and fundamentally?" (Laughter.) MS. BLATT: "And fundamentally." *Id.* at 7:13-25; 8:1-21. The rapid fire exchanges continued with Ms. Blatt interrupting Justice Kagan: JUSTICE KAGAN: "I'm still not getting it." MS. BLATT: "Okay. Let me—" JUSTICE KAGAN: "What is—just let me finish the question, yes?" *Id.* at 9:24-25; 10: 1-3.

[6]On December 4, 2018, the Court ordered:

> the parties, the Solicitor General and the Muscogee (Creek) Nation to file supplemental briefs addressing the two following questions: (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a).

[7]"The case is restored to the calendar for reargument." *See* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1107.html (last viewed Nov. 4, 2019).

[8]*Brown v. Board of Education*, 347 U.S. 483 (1953) (first argued in 1952, then reargued in 1953).

[9]*Roe v. Wade*, 410 U.S. 113 (1973) (first argued in 1971, then reargued in 1972).

[10]*Citizens United v. FEC,* 558 U.S. 310 (2010) (argued twice in 2009).

[11]Justice Neil Gorsuch, before his elevation to the Court, served on the U.S. Court of Appeals for the Tenth Circuit. He apparently participated in the Tenth Circuit's denial of the rehearing *en banc;* thus, he recused from further consideration at the Court. Megan Dollenmeyer, *Carpenter v. Murphy*: *A Matter of Life and Death for Tribal Sovereignty*, Univ. Cin. L. Rev. (Oct. 14, 2019), https://uclawreview.org/2018/10/14/carpenter-v-murphy-a-matter-of-life-and-death-for-tribal-sovereignty/ (last viewed Nov. 1, 2019).

[12]As of this writing, several appeals challenging Oklahoma state jurisdiction over Indian citizens who claimed the alleged crimes occurred within existing Indian reservations are pending before the Supreme Court. *See McGirt v. Oklahoma*, No. 18-9526 (appeal from Oklahoma Court of Criminal Appeals, Creek citizen alleges sex crime allegations took place on Creek reservation and state convictions are invalid) (petition for writ of certiorari filed April 17, 2019, distributed for conference five times); *Terry v. Oklahoma*, No. 18-8801 (appeal from Oklahoma Court of Criminal Appeals, a Cherokee citizen alleges his drug convictions that occurred within Miami, Okla., within the "Eight Tribes" reservation area and state convictions are invalid) (petition for writ of certiorari filed April 4, 2019, distributed for conference five times).

[13]*Dollar General v. Mississippi Band of Choctaw Indians*, 579 U.S. ___; 136 S. Ct. 2159 (2016).

[14]*Washington v. United States*, 584 U.S. ___; 138 S. Ct. 1832 (2018).

[15]*Herrara v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686 (2019) (Crow citizen could exercise Tribe's 1868 treaty right to hunt elk on "unoccupied lands of the United States" without complying with Wyoming hunting regulations within the Bighorn National Forest).

[16]*Washington v. United States*, 584 U.S. ___ (2018).

[17]*See generally*, Cohen's Handbook of Federal Indian Law § 4.07 [1] "History of Indian Territory" (2019, Nell Jessup Newton ed. 2017)("Cohen's Handbook").

[18]*See generally,* Rennard Strickland, The Indians in Oklahoma (Univ. Okla. Press 1980) and Angie Debo, A History of the Indians of the United States 127-149 (Univ. of Okla. Press 1970).

[19]*Id.*

[20]Cohen's Handbook at § 4.07 [1].

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]*Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011) (affirming district court's holding that the Osage Nation reservation had been disestablished and that "Oklahoma's longstanding reliance counsels against now establishing Osage county as a reservation.")

[26]*Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1291-1292 (E.D. Okla. 2007) ( "[T]here is no question, based on the history of Creek Nation, that Indian reservations do not exist in Oklahoma ... "; "[A] contrary conclusion would seriously disrupt the justifiable expectations of people living in the area ....").

[27]Cohen's Handbook at § 4.07 [1][b] & n. 41 (2019).

[28]*Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, ____ (1993) (state lacks jurisdiction to tax tribal members who live and work in Indian country, whether that territory consists of formal or informal reservations, allotted lands, or dependent Indian communities).

[29]*Oklahoma v. Little Chief*, 573 P. 2d 263 (Okla. Ct. Crim. App. 1978).

[30] *See generally* F. Browning Pipestem, *The Journey from* Ex Parte Crow Dog *to* Littlechief: *A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma*, 6 Am. Indian L. Rev. 1 (1978); F. Browning Pipestem & G. William Rice, *The Mythology of the Oklahoma Indians: A Survey of the Legal Status of Indian Tribes in Oklahoma*, 6 Am. Indian L. Rev. 259 (1978); Susan Work, *The "Terminated" Five Tribes of Oklahoma: The Effect of Federal Legislation and Administrative Treatment on the Government of the Seminole Nation*, 6 Am. Indian L. Rev. 81 (1978); 19 O.C.U.L.Rev. 1 (Spring 1994) (symposium on Tribal Courts): Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and Glimpse at the Road Ahead*, 19 O.C.U.L.Rev. 5 (1994); Mike McBride III, *Oklahoma's Civil-Adjudicatory Jurisdiction Over Indians in Indian Country: A Critical Commentary on* Lewis v. Sac & Fox Tribe Housing Authority, 19 O.C.U.L.Rev. 81 (1994).

[31] Murphy has appealed his cases in many forums over the decades with the names of many successive prison wardens as the nominal opposing parties; Sharp is the latest substituted warden party name. Murphy committed the brutal murder on Aug. 28, 1999. An Oklahoma state court jury convicted him and, in a second phase, concluded aggravating circumstances existed and condemned him to die in 2000. He appealed his death sentence in Oklahoma courts and sought habeas corpus relief on jurisdiction grounds in federal court:

- *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1291-1292 (E.D. Okla. 2007) (denying habeas corpus relief on federal jurisdiction claims that the crime occurred on "Indian country." "[T]here is no question, based on the history of Creek Nation, that Indian reservations do not exist in Oklahoma ... . "; "[A] contrary conclusion would seriously disrupt the justifiable expectations of people living in the area ... ."; "A careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process.")
- *Murphy v. Oklahoma*, 124 P. 3d 1198, 1206-1207 (Okla. Ct. Crim. App. 2005) (1/12 restricted fractional mineral interest from a Creek allotment was insufficient for the scene of the crime to constitute "Indian country" and thus no state jurisdiction; "A fractional interest in an observable mineral interest is insufficient contact with the situs in question to deprive the State of Oklahoma criminal jurisdiction"; "To allow this unobservable fractional interest to control the enforcement of laws on the surface of the land would be condoning a "checkerboard of alternating state and tribal jurisdictions . . . that 'would seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." The court denied post-conviction relief as to federal jurisdiction but granted relief as to Murphy's alleged mental retardation defense).
- *Murphy v. Royal*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007) (the district court rejected the jurisdictional arguments (among many) but granted Murphy a certificate of appealability on federal jurisdiction)
- *Murphy v. Royal*, 875 F. 3d 896 (10th Cir. 2017) (murder occurred on Indian country because under the Muscogee (Creek) Nation Treaty Congress had never taken the required steps "unequivocally" disestablish the Creek reservation; the court failed to apply *Solem v. Bartlett* three-part test therefore that "Congress has not disestablished the Creek Reservation, the crime in this case occurred within the Reservation's boundaries. The State of Oklahoma accordingly lacked jurisdiction to prosecute Mr. Murphy") On denying Oklahoma's motion for rehearing *en banc*, Chief Judge Tymkovich wrote a special concurrence strongly suggesting the Supreme Court should review this case noting that "Oklahoma claims the decision will have dramatic consequences for taxation, regulation, and law enforcement."
- *Royal v. Murphy*, No. 17-1107 (Petition for writ of certiorari on issue of "Whether the 1866 territorial boundaries of the Creek Nation within former Indian Territory of eastern Oklahoma constitute an 'Indian reservation' today under 18 U.S.C. § 1151(a)")

[32] *See generally, Montana v. United States*, 450 U.S. 544 (1981) and its growing progeny.

[33] REBUTTAL ARGUMENT OF LISA S. BLATT ON BEHALF OF THE PETITIONER

MS. BLATT: Thank you, Mr. Chief Justice.
Here are the two earth-shattering consequences that Congress can't fix, Sherrill can't fix, and this will stimulate you.
There are 2,000 prisoners in state court who committed a crime in the former Indian territory who self-identify as Native American.

This number is grossly under-inclusive because, if the victim was Native American, the state court also lacked jurisdiction. That's 155 murderers, 113 rapists, and over 200 felons who committed crimes against children. Here's why habeas is not going to help.

As -- as Footnote 5 in the Tenth Circuit's decision says, there are no apparent procedural bars in state court to lack of subject matter jurisdiction. The reopening of any of these cases would re-traumatize the victims, the families, and the communities. Nor is it clear that the federal government could retry any of these cases because the evidence is too stale or the statute of limitations has expired, which appears to be the case in about half of them.

Here's the earth-shattering consequence on the civil side. Under the Indian Child Welfare Act, any tribe, any parent, and any child can undo any prior Indian child welfare custody proceeding if the state court lacked jurisdiction because the Indian child lived on a reservation.

Affirmance raises a specter of tearing families all across eastern Oklahoma, and probably beyond, for years and years and years and years after the fact. ICWA also means -- and I don't see the tribe agreeing not to enforce ICWA -- ICWA also means that any Indian child welfare proceeding must be brought exclusively in tribal court, even over the parents' objection. That's on the consequences.

On the tribal sovereignty, with all due respect, I didn't hear an answer. The most that they said was they disbursed tribal funds. That is not sovereignty over non-Indian-owned fee land.

Thank you.

***continued on page 87***

**Has the Earth Shattered Under Oklahoma?** *continued from page 73*

Oral Argument transcript, 76:18-25, 77-78:1-18. https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1107_q86b.pdf (last visited Nov. 1, 2019).

[34] *Id.* at 75:24.

[35] *Id.* at 77:3-6. It is noted that Blatt was counsel of record in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (several sections of the Indian Child Welfare Act do not apply to Native American biological fathers who are not custodians of an Indian child involving the Cherokee Nation).

[36] *Id.* at 74:15-19.

[37] *Id.* at 68:2-11.

[38] *Id.* at 63:1-12.

[39] *Id.* at 64:15-22.

[40] *Id.* at 74: 18-22.

[40] *McGirt v. Oklahoma*, No. 18-9526, certiorari granted and granting motion to proceed *in forma pauperis* (U.S., Dec. 13, 2019).

[17] Minn. Gen. R. Prac. 10; Mich. Ct. R. 2.615.

[18] S.D.C.L. § 1-1-25.

[19] Practitioners must also be mindful of state statutes directly addressing Indian tribes and tribal court judgments. *See, e.g.*, Uniform Custody Jurisdiction and Enforcement Act, Minn. Stat. § 518D.104.

[20] *Coeur d'Alene Tribe*, 933 F.3d at 1060.

[21] *Id.*

[22] *Miccosukee Tribe of Indians v. Kraus-Anderson Const. Co.*, 607 F.3d 1268, 1275 (11th Cir. 2010).

[23] *Id.* at 1274-75.

[24] *MacArthur v. San Juan County*, 497 F.3d 1057, 1066 (10th Cir. 2007).

[25] *United States v. Long*, 870 F.3d 741, 747 (8th Cir. 2017).

[26] *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. Colo. L. Rev. 973 (Fall 2010) (listing some benefits and pitfalls of appearance in federal courts).