IN THE DISTRICT COURT OF PONTOTOC COUNTY
STATE OF OKLAHOMA

FILED
AUG - 3 2020
KAREN DUNNIGAN Court Clerk
By Pontotoc County, Oklahoma
Deputy

STATE OF OKLAHOMA Plaintiff,	)	
vs.	)	Case No. CF-2019-544
TANNER WASHINGTON Defendant.	)	

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OVER ALLEGED CRIMES COMMITTED IN 'INDIAN COUNTRY' AND REQUEST FOR HEARING

COMES NOW the Defendant, James Robert Caldwell, by and through his attorney of record, Albert J. Hoch, Jr., trial counsel for the Oklahoma Indigent Defense System, and prays the Court dismiss with prejudice the charges alleged in the criminal Information filed against Mr. Washington in the above styled case because the State of Oklahoma lacks subject-matter jurisdiction to prosecute the defendant because 1) the alleged victim is a member of a federally recognized tribe possessing a quantum of Indian blood, and 2) the alleged crimes occurred within "Indian country." See *Major Crimes Act*, 18 U.S.C. §1153 and §1151, the *Indian Country Crimes Act*, 18 U.S.C. § 1152.

Request for Evidentiary Hearing

The defendant respectfully requests the Court set this motion for an evidentiary hearing to allow him to present documentary evidence and, potentially, testimonial evidence supporting the existence of Indian country jurisdiction in this case, and consequently federal pre-emption.

Indian Major Crimes Act and Indian Country Crimes Act

Originally enacted in 1885, the Indian Major Crimes Act, 18 U.S.C. §1153 establishes federal jurisdiction over 14 enumerated felonies committed by "any Indian ... against the person or property of another Indian or other person ... within the Indian country." § 1153(a). Among the enumerated offenses are murder, kidnapping, arson, burglary, assault with a dangerous weapon, and larceny of property valued in excess of $1000, which are offenses alleged against Mr. Born. The text of § 1153 and Supreme Court precedent clearly show that "federal jurisdiction over the offenses covered by the Indian Major Crimes Act is "exclusive" of state jurisdiction." "*Negonsott v. Samuels*, 507 U.S. 99, 103, 113 S. Ct. 119, 122 L. Ed. 2d 457 (1993) citing *United States v. John*, 437 U.S. 634, 651, 98 S.Ct. 2541, 2550, 57 L.Ed.2d 489 (1978) ("a state does not have jurisdiction over an offense that is subject to federal prosecution under §1153); See *Cravatt v. State*, 825 P.2d at 279 (recognizing murder prosecutions in Indian Country have been "specifically reserved to the United States").

The Indian Country Crimes Act, *18 U.S.C. § 1152*, extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country, except for those "offenses committed by one Indian against the person or property of another Indian." See F. Cohen, Handbook of Federal Indian Law 288 (1982 ed.). These latter offenses typically are subject to the jurisdiction of the concerned Indian tribe, unless they are among those enumerated in the Indian Major Crimes Act.

A prerequisite to federal jurisdiction under §1153 is that the perpetrator or victim must be an Indian. See *State v. Klindt*, 782 P.2d at 403. Section 1153(a) does not specifically define who is an "Indian" for purposes of falling within the auspices of the act. Courts have determined for a criminal defendant or victim to be subject to Section 1153, the court "must make factual findings that the defendant (1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." *Goforth v. State*, 644 P. 2d 114, 116 (Okl.Cr. 1982)(setting forth two elements to prove Indian status: significant percentage of Indian blood and recognition as an Indian by the federal government or by some tribe or society of Indians).

Although the defendant is not an enrolled member of a tribe, the State, pursuant to discovery requests, has reported to defense counsel that the alleged victim is a member of a federally-recognized tribe, and he possesses a CDIB showing his degree of Indian blood quantum 37/256 Chickasaw/Cherokee. **See Exhibit 1, Tribal Enrollment Verification**. Thus, he meets the

prerequisite of being an "Indian" for purposes of §1153 and §1152. The primary issue then for this Court to decide is whether the alleged crimes were committed by an Indian in "Indian Country.

The definition of Indian country is found in 18 U.S.C. 1151. Enacted in 1948 as a codification of existing case law, §1151 designates three categories of land as Indian country:

> 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.

Section 1151(a) is the type of "Indian country" at issue in this case. During the nineteenth century, the federal government began creating Indian "reservations", a legal description which has evolved over time and has gradually come to describe "federally-protected Indian tribal lands, meaning those lands which Congress has set apart for tribal and federal jurisdiction." *Murphy v. Royal*, 866 F.3d 1164, 1182 (10th Cir. 2017), citing *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987. For purposes of defining Indian country, the term 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.) *Indian Country, U.S.A.* at 973.

The Major Crimes Act applies to crimes committed within the boundaries of Indian reservations regardless of the ownership of the particular land on which the crimes were committed. *Murphy* at 1183, citing *United States v. Celestine*, 215 U.S. 278, 284-87 (1909) and *United States v. Thomas*, 151 U.S. 577, 585-86 (1894). The Court explained in *Celestine* that reservation status depends on the boundaries Congress draws, not on who owns the land inside the reservation's boundaries: "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Murphy* at 1183, citing *Celestine* 215 U.S. at 285.

In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962), an Indian sought federal habeas relief after being convicted in Washington state court of burglary, one of the Major Crimes Act's enumerated offenses. He argued the United States had exclusive jurisdiction because the crime occurred within an Indian

reservation and therefore within Indian country. *See* 368 U.S. at 352-54. The State of Washington argued that even though the crime occurred on land within the reservation's borders, the particular parcel was owned by a non-Indian. *See id.* at 357. Ruling for the Indian petitioner, the Supreme Court said Congress's definition of Indian country in § 1151(a) "squarely put to rest" this argument. *Id.* "Since the burglary with which [the defendant] was charged occurred on property plainly located within the limits of [the] reservation, the courts of Washington had no jurisdiction to try him for that offense." *Id.* at 359. Under § 1151(a), therefore, all lands within the boundaries of a reservation have Indian country status. *Murphy* at 1185.

The Court must decide whether Pontotoc County, Oklahoma is "land within the limits of an existing reservation under the jurisdiction of the United States government. " The defendant submits that Pontotoc County is such land.

Statement of Facts Regarding the Locus in Quo

The State alleges in the Information that the defendant committed the alleged acts within Pontotoc County. The political boundary lines for Pontotoc County were fashioned at the state constitutional convention in 1907 and established by the Oklahoma Constitution in Article 17, §8:

> **Pontotoc County.** Beginning on the center line of the Canadian River (sometimes called South Canadian), at its intersection with the range line between ranges three and four East; thence down along the center line of said Canadian River to its intersection with the range line between ranges eight and nine East; thence south along said range line to its intersection with the township line between townships two and three North; thence west along said township line to its intersection with the range line between ranges seven and eight East; thence south down along said range line to its intersection with the base line; thence west along said base line to its intersection with the range line between ranges four and five East; thence north along said range line to its intersection with the township line between townships one and two North; thence west along said township line to its intersection with the range line between ranges three and four East; thence north along said range line to the point of beginning. Ada is hereby designated the County Seat of Pontotoc County.

As will be shown, Pontotoc County, as established in 1907, is within the boundaries of the Chickasaw Nation's reservation that was established by treaty in 1855.

Statement of Facts Regarding the Chickasaw Nation's Reservation .

The Chickasaw Nation's reservation in Oklahoma was federally established within lands set aside by the federal government for the Choctaw Nation, and thus any discussion must involve

federal dealings with the Choctaws. The Chickasaws were neighbors of the Choctaws east of the Mississippi River, both tribes speaking practically the same language. *Choctaw & Chickasaw v. United States*, 34 Ct. Cl. 17, 95-97 (U.S. 1899). Around the time of the Revolutionary War, the Choctaws occupied a large portion of Mississippi and a portion of eastern Arkansas. The Chickasaws were a distinct nation, occupying a large tract of country in western Tennessee and northern Mississippi. *Id.*

After the United States won independence from Britain, it began to enter treaties with the Cherokee and Choctaw. In 1785, in the Treaty of Hopewell, November 28, 1785, 7 Stat. 18, the United States entered into a treaty of peace and friendship with the Cherokee Indians which established the boundaries of the Cherokee Nation (in the Southeast) and in which the Indians acknowledged themselves to be under the protection of the United States. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-23, 90 S. Ct. 1328, 1330 (1970). The next year, a similar treaty was concluded between the Choctaws and the United States. Treaty of Hopewell, January 3, 1786, 7 Stat. 21.

In following years, the United States entered into a number of additional treaties with both the Cherokees and Choctaws. By means of these treaties, the United States purchased large areas of land from the Indians to provide room for the increasing numbers of new settlers who were encroaching upon Indian lands during their westward migrations. *Choctaw Nation v. Oklahoma* at 623. Although the Indians were not considered to own the fee title to the land on which they lived, they did have the right to the exclusive use and occupancy of the land -- a right that could be ceded only to the United States. Moreover, the Indians continued to live on the land not ceded under their own laws and way of life, and their rights to those lands were "solemnly" guaranteed by the United States. *Id.*

The United States had acquired a large western territory in 1803 by the Louisiana Purchase, and it was soon proposed that the Indians be relocated on new lands west of the Mississippi. Agreeing to move westward, the Choctaw Nation ceded to the United States, in the Treaty of Doak's Stand, 7 Stat. 210 (1820), about one-half of its lands in Mississippi in exchange for a tract of land lying west of the Mississippi River and between the Arkansas and Red Rivers. By the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, the Choctaw Nation agreed to exchange

approximately half of its remaining Mississippi lands for a large tract of land in the Arkansas Territory and an even larger one farther west. *Choctaw Nation v. Oklahoma* at 623.

Agreeing to move westward, the Choctaw Nation ceded to the United States, in the Treaty of Doak's Stand, 7 Stat. 210 (1820), about one-half of its lands in Mississippi in exchange for a tract of land lying west of the Mississippi River and between the Arkansas and Red Rivers. *United States v. McAlester*, 604 F.2d 42, 62-63 (10th Cir. 1979) Before the United States could relocate the Indians on these new lands, however, at least part of the land that had been set aside in the Arkansas Territory was already settled. By the Treaty of January 20, 1825, 7 Stat. 234, the Choctaws were persuaded to retrocede the eastern portion of the land given them in the Treaty of Doak's Stand back to the United States. *Choctaw Nation v. Oklahoma at Id.*

By 1829, removal and relocation of tribes west of the Mississippi River became the official policy of the federal government. President Andrew Jackson began pushing for removal legislation shortly after his election in 1829. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 n.18 (8th Cir. 1997) "After one of the bitterest debates in the history of Congress," the Removal Act (4 Stat. 411) was enacted into law on May 28, 1830. *Id.* The Act authorized the President to enter into Indian treaties exchanging tribal lands in the southeast for land in the west. Further, as an inducement, the act authorized the President to grant a patent to tribes.

> "Be it enacted, etc., That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the river Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and move there, and to cause each of said districts to be so described, by natural or artificial marks, as to be easily distinguished from every other.
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> "2. And be it further enacted, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing **treaties**, for the whole or any part of portion [**153] of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, where the land claimed and occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto.
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> "3. And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guaranty to

> them, and their heirs or successors, the country [*94] so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided always, That such lands shall revert to the United States if the Indians become extinct or abandon the same." 4 Stat. 411

Though the Choctaw Nation had resisted further moves after its retrocession of land in 1825, the Indian Removal Act, and Mississippi's illegal extension of its laws to Choctaw territory, finally forced the Choctaw Nation to agree, in 1830, to relinquish all its lands east of the Mississippi River and to settle on lands west of the Arkansas Territory. *United States v. McAlester at 626.*

This was accomplished by the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), giving the Choctaw Nation fee simple ownership of the land "while they shall exist as a nation."

> "ART. 2. The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it; beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present treaty shall be ratified.

In addition, the United States pledged itself to secure to the Choctaws the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334.

A patent issued to the Choctaw Nation on March 23, 1842, confirming their ownership and granting the lands to the Choctaw Nation "to have and to hold the same, with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereto belonging, * * * "in fee simple to them [**67] and their descendants, to inure to them, while they shall exist as a nation and live on it,' liable to no transfer or alienation, except to the United States, or with their consent."*Id.*

As with the Choctaws, efforts were made after 1830 by the federal government to remove the Chickasaw tribe. The United States entered a succession of land-exchange treaties whose terms were not fulfilled. By the treaty of March 1, 1833 (7 Stat. L., 381), the Chickasaws were to cede to the United States all of their property lying east of the Mississippi. By its second article, the Government agreed to have the ceded Chickasaw lands east of the Mississippi surveyed and sold, and another article provided for a payment to the Chickasaws of the proceeds of such sale as compensation for said lands. The Chickasaws agreed to survey the land and procure homes for their people west of the Mississippi, suited to their wants and conditions. It was stipulated that should they fail to procure such a country to remove to and settle on, previous to the first public sale of their lands east of the Mississippi, they were to select out of the surveys in the Chickasaw Nation a comfortable settlement for their families, to include the then present improvements, if the land was good for cultivation, and if not, they might take it in any other place in the nation unoccupied by any other person. The Chickasaw could not find suitable lands in the west.

Following this came the treaty of May 24, 1834 (7 Stat. L., 450), in which it was provided that "the Chickasaws are about to abandon their homes which they have long cherished and loved, and, though hitherto unsuccessful, they still hope to find a country adequate to the wants of their people west of the Mississippi and within the limits of the United States. Should they do so, the Government of the United States hereby consents to protect and defend them against the inroads of any other tribe of Indians and *of the whites, and agrees to keep them without the limits of any State or Territory.*"

Under these conditions negotiations were commenced between the Choctaws and Chickasaws, at the instance and under the supervision of the Government, the result of which was that on January 17, 1837, a convention was entered into between the Choctaw and Chickasaw nations (11 Stat. L., 573), which was approved by the United States. Its third article provides as follows:

> "Article 3. The Chickasaws agree to pay the Choctaws, as a consideration for these rights and privileges, the sum of five hundred and thirty thousand dollars, thirty thousand of which shall be paid at the time and in the manner that the Choctaw annuity of 1837 is paid, and the remaining five hundred thousand dollars to be invested in some safe and secure stocks, under the direction of the Government of the United States, redeemable within a period of less than 20 years, and the Government of the United States shall cause the interest arising therefrom to be paid annually to the Choctaws in

> the following manner: twenty thousand dollars of which to be paid as the present Choctaw annuity is paid, for four years, and the residue to be subject to the control of the General Council of the Choctaws, and, after the expiration of four years, the whole of said interest to be subject to the entire control of the said council."

Under the agreement of 1837 the Choctaws sold to the Chickasaws certain rights and privileges, out of which grew some dissensions resulting in the **treaty** of June 22, 1855, proclaimed March 4, 1856 (11 Stat. L., 611), between the United States and both tribes. By article 1, the boundaries of the Choctaw and Chickasaw country were defined, and the country guaranteed to the Choctaws and Chickasaws, subject to the reversionary rights of the United States. By article 2, the "Chickasaw district" was reestablished to the ninety-eighth meridian on the west.

> ARTICLE 1. The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on the Arkansas River, one Hundred paces east of old Fort Smith, where the western boundary-line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crossed the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river; thence down said river to the place of beginning. And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, No part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same.
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> ARTICLE 2. A district for the Chickasaws is hereby established, bounded as follows, to wit: Beginning on the north bank of Red River, at the mouth of Island Bayou, where it empties into Red River, about twenty-six miles in a straight line, below the mouth of False Wachitta; thence running a northwesterly course, along the main channel of said bayou, to the junction of the three prongs of said bayou, nearest the dividing ridge between Wachitta and Low Blue Rivers, as laid down on Capt. R. L. Hunter's map; thence northerly along the eastern prong of Island Bayou to its source; thence due north to the Canadian River; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red River; and thence down Red River to the beginning: Provided, however, if the line running due north, from the eastern source of Island Bayou, to the main Canadian shall not include Allen's or Wapa-nacka Academy, within the Chickasaw District, then, an offset shall be made from said line, so as to leave said academy two miles within the Chickasaw district, north, west and south from the lines of boundary.

After the Civil War, the government entered into reconstruction treaties with the Five Tribes. As with the Creeks, Cherokees and Seminoles, the Choctaws and Chickasaws were required to abolish slavery and cede the western lands in the Indian Territory for the settlement

of friendly Indians. To secure homes on the ceded lands for such other "friendly" tribes, it was officially recommended that in all treaties thereafter to be made with the Five Tribes "terms should be insisted upon, and, if need be, enforced, for the purpose of locating non-reservation Indians." *Choctaw & Chickasaw v. United States*, 34 Ct. Cl. 17, 108-09 (U.S. 1899) citing Rep. Comr. Ind. Affs. for 1865, p. 34.) This report recognized (what the commissioners for the Government subsequently acted upon) the existence of rights which the tribes had previously acquired by treaty. Although the act of August, 1862 (12 Stat. L., 528), conferred power upon the President to abrogate treaties with hostile tribes, this authority was never exercised with respect to the treaties existing between the United States and the Choctaws and Chickasaws, nor was it generally exercised as to other Indians. *Id.*

> The results vindicated not only the beneficence but the wisdom of the policy of President Lincoln in refusing to declare the forfeitures, inasmuch as that policy tended to disarm the hostiles and bring them in subjection to the Government at a time when its military strength was sorely tried. The act clothed the President with discretion to declare the treaties abrogated if the same could be done consistently with good faith and legal and national obligations. Whatever the motive in permitting the obligations of Indian treaties to remain in effect, the fact cannot be obscured that the close of the war found every obligation with the civilized tribes unimpaired, just as if they had not taken up arms against the Government. *Id. at* 109.

The treaty between the United States and the Choctaws and Chickasaws proclaimed on July 10, 1866 (14 Stat. 769), after declaring that slavery should never exist in said nations, provides:

> "Article III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98[degrees] west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules and regulations as may be necessary to give all persons of African descent, resident in said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively.

In 1893, Congress enacted legislation which contemplated the dissolution of the tribal organizations and the distribution of the tribal property. *Heckman v. United States*, 224 U.S. 413, 431-32, 32 S. Ct. 424, 429 (1912) By § 15 of the act of March 3, 1893, c. 209 (27 Stat. 612, 645), it was provided: "The consent of the United States is hereby given to the allotment of lands in

severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States, . . . and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

As it happened east of the Mississippi River in the 1820's and 1830's, the encroachment of white settlers upon tribal lands in the Indian Territory prompted Congress to "change the arrangement" once again. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627, 90 S. Ct. 1328, 1332-33 (1970) By § 16 of the Act of March 3, 1893, 27 Stat. 645, a commission was created to negotiate with the Indian tribes that had been located in Oklahoma on the allotment of land to their individual members in preparation for the final dissolution of the tribes. Thereafter, the Indians -- including the Choctaws, Chickasaws, and Cherokees -- agreed to the allotment of their lands and the termination of tribal affairs. See Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716.

The Act of 1902 provided in part:

> 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.
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> 12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.
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> 16. All lands allotted to the members of said tribes, except such Alienable lands. land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

The abolition of the tribal governments did not come to pass, however. By joint resolution of March 2, 1906, Congress provided for the continuance of "the tribal existence and the present tribal governments" of the Five Civilized Tribes "in full force and effect for all purposes under existing laws," until all the property of the tribes should be distributed (34 Stat. 822). The following month, Congress preserved the "tribal existence" and "present tribal governments" of the Chickasaw Nation and the other four tribes, continuing them in full force and effect for all purposes authorized by law, "until otherwise provided by law. Act of April 26, 1906, § 28, 34 Stat. 148. In §27 of the same act, Congress provided for the disposition of all of the Chickasaw's lands with the provision that any remaining tribal property "be held in trust by the United States for the use and benefit of the Indians."

The way was thus paved for Oklahoma's admission to the Union "on an equal footing with the original States," conditioned on its disclaimer of all right and title to lands "owned or held by any Indian, tribe, or nation." Act of June 16, 1906, §§ 3, 4, 34 Stat. 270, 271, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627, 90 S. Ct. 1328, 1332-33 (1970) The Oklahoma Enabling Act expressly preserved federal authority over Indians and their lands and property. *Indian Country*, 829 F.2d at 975, citing Oklahoma Enabling Act, ch. 3335, § 1, 34 Stat. 267, 267-68 (1906); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309, 31 S.Ct. 578, 584, 55 L.Ed. 738 (1911). Congress was careful to provide that nothing in the creation of the State of Oklahoma should qualify this promise. Thus the Oklahoma Enabling Act (34 Stat. 267) provided that the Oklahoma Constitution should not 'limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.'

ARGUMENT

The State, not Defendant, Bears the Burden of Showing Reservation Disestablishment

At the outset, Defendant reiterates that the 10th Circuit in *Murphy v. Royal*, 866 F.3d 1164, 1205, *rehearing denied*, (10th Cir. 2017) found that the Oklahoma Court of Criminal Appeals had "flipped" the presumption that, under *Solem v. Bartlett, 465 U.S. 463* (1984) an Indian reservation

continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, and thereby improperly required Mr. Murphy to show the Creek Reservation had *not* been disestablished instead of requiring the State to show that it had been. *Murphy* at 1194. Thus, the State in this cases case must show that the Chickasaw reservation has been disestablished by the U.S. Congress.

The opinion of the 10th Circuit regarding the Creek Reservation in *Murphy v. Royal,* 866 F. 3d 1164 (10th Cir.), *amended on denial of rehearing en banc,* 875 F.3d 896 (10th Cir. 2017), does not hinder the Court from deciding whether Congress diminished the Chickasaw Reservation established in 1855. The Court can decide whether Congress diminished the reservation by applying U.S. Supreme Court precedent alone, which will be discussed below.

Notwithstanding the stay of mandate granted by the 10th Circuit in *Murphy v. Royal,* it is still a published opinion wherein the 10th Circuit determined Congress has not disestablished the Creek Reservation. *Id.* at 1233. Thus, this Court may accord to *Murphy* the same weight it would give other published 10th circuit opinions, potentially giving more deference to circuit opinions when such opinions involve questions of federal rather than state law in the same manner as the Court of Criminal Appeals. See *Dean v.* Crisp, 1975 OK CR 95 ¶ 4, 536 P.2d 961, 963 ([The Court] readily concede[s] the supremacy of the United States Supreme Court on federal constitutional questions, and [the Court] feel[s] that careful consideration is to be given to decisions of the inferior federal courts.")

Allotment on its own does not disestablish or diminish a reservation. See *Mattz v. Arnett,* 412 U.S. 481, 497, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973) (explaining allotment can be "completely consistent with continued reservation status"). The State contended in *Murphy* that the language opening the disputed area to settlement, by itself, constitutes evidence of intent to diminish. That assertion would hold true "only if continued reservation status were inconsistent with the mere opening of lands to settlement, and such is not the case." *DeCoteau,* 420 U.S. at 447. To the contrary, "[t]he mere fact that a reservation has been opened to non-Indian settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud Sioux,* 430 U.S. at 586-587.

In *Nebraska v. Parker*, 136 S. Ct. 1072, 1078, 194 L. Ed. 2d 152 (2016) the Supreme Court unanimously reaffirmed *Solem's* test for diminishment. The Court reiterated that only Congress

can divest land of its reservation status "and its intent to do so must be clear." *Id.* at 1078-79. *Parker* further underscored the importance of discerning congressional intent from statutory text, which is "the first and most important step" of the *Solem* framework. *Id.* at 1080.

Before examining the 1882 statute at issue, the Court reviewed its precedent and identified "[c]ommon textual indications" of a congressional intent to alter reservation boundaries. *Id.* at 1079. "[H]allmarks of diminishment" include: explicit references to cession or surrender of tribal interests; unconditional congressional commitments to compensate the tribe with a fixed sum for the total surrender of tribal claims to opened lands; and provisions restoring reservation lands to "the public domain." *Id.* The statute in *Parker* featured none of these hallmarks. *Id.* Rather, it provided for a government survey and appraisal of certain lands and for sales to non-Indians. *Id.*

The Court contrasted the statute with earlier nineteenth century treaties between the Omaha Tribe and United States that had addressed other lands and had "terminated the Tribe's jurisdiction over their land in unequivocal terms." *Id.* at 1080. "Our conclusion that Congress did not intend to diminish the reservation in 1882 is confirmed by the text of earlier treaties between the United States and the Tribe. *Id.* The *Parker* Court found that in drafting the 1882 Act, "Congress legislated against the backdrop of the 1854 and 1865 Treaties—both of which terminated the Tribe's jurisdiction over their land "in unequivocal terms." *Id.* The earlier treaties "ceded" the lands and "relinquished" any claims to then in exchange for a fixed sum. *Id.* The 1882 Act "speaks in much different terms, both in describing the way the individual parcels were to be sold to nonmembers and the way in which the Tribe would profit from those sales." *Id.*

The *Parker* court found that the change in language in the 1882 Act underminded petitioners' claim that Congress intended to do the same with the reservation's boundaries in 1882 as it did in 1854 and 1865. "Petitioners have failed at the first and most important step. They cannot establish that the text of the 1882 Act evinced an intent to diminish the reservation." *Id.*

Supreme Court precedent in addition to *Solem* and *Parker* confirm that the allotment acts effecting the Chickasaws should not be read as an expression of congressional intent to diminish the Chickasaw reservation. In finding that Congress diminished a reservation or terminated its reservation status, the Supreme Court has relied on explicit language designed to achieve that purpose. Thus in *Yankton Sioux*, the relevant legislation called for the tribe to "cede, sell,

relinquish, and convey to the United States all their claim, right, title, and interest in and to" the disputed land. 522 U.S. at 344 (citation omitted). The treaty at issue in *DeCoteau* contained identical language. See 420 U.S. at 445. In *Rosebud Sioux*, the tribe signed an agreement promising to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" to certain lands in exchange for $ 1,040,000. 430 U.S. at 591 & n.8. Those cases also all involved payment of a "sum certain" to the tribe in return for the abandonment of its land rights. See *Yankton Sioux*, 522 U.S. at 344 ("the United States pledges a fixed payment of $ 600,000"); *DeCoteau*, 420. U.S. at 441 ("$ 2,203,000 to pay the tribe for the ceded land").

The express language of cession and conveyance relied upon in those decisions closely mirrors language used in Choctaw and Chickasaw treaties of 1830, 1837, and 1866. The same language is not found in the allotment agreements. In addition to the lack of cession language, there is no language showing that lands allotted or unallotted had or would become part of the public domain. .

In 1914, the Supreme Court made a specific finding that, despite the allotment of tribal lands in severalty to its citizens, the lands of the Five Tribes had not become public lands. *Mo., K. & T. R. Co. v. United States*, 235 U.S. 37, 39-40, 35 S. Ct. 6, 7-8 (1914). The railroad company finished a southern railroad extension and acquired a right to land under § 9 of the act of July 25, 1866, c. 241, 14 Stat. 236. However, the grant or covenant under § 9 was subject to two conditions precedent. "Whenever the Indian title shall be extinguished" meant when and not until that occurred.

The Court, writing through Justice Holmes, found that the language contemplated it was something that might or might not come to pass. The proviso attached a further condition that if the Indian title should be extinguished, it had to be extinguished in such a way that the lands became a part of the public domain. *Id.*

On this literal reading of the statute the conditions have not been fulfilled. The land has remained continuously appropriated to the use of the Indians or has been sold for their benefit. It never for a moment has become a part of the public domain in the ordinary sense. *Newhall v. Sanger,* 92 U.S. 761, 763. *Union Pacific R. R. Co. v. Harris*, 215 U.S. 386, 388. It is argued that the grant attached the moment that the tribal title ceased, whatever it was. But, still looking only

at the face of the act and seeing the intent to respect the Indian rights, we cannot read it as preventing the United States from making the change from tribal to several possession or dealing with this land in any way deemed most beneficial for those whose rights were treated as paramount. The proviso that the land must become public land shows that a mere change from tribal title was not enough. Taken literally the grant only applied in case the Indians were removed or bought off the land. *Id.*

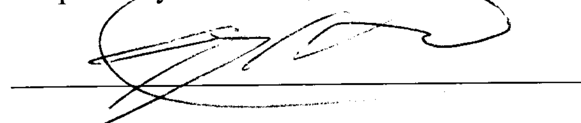
CONCLUSION

Defendant has shown and can show at the hearing that a reservation for the Chickasaw Nation was established by the United States government in the Indian Territory, and there is no evidence that Congress disestablished or diminished its boundaries as they stood in 1856 either before or after Oklahoma statehood. At the hearing on this motion, the State has the burden to introduce into evidence any treaty or legislation containing language establishing "an express congressional purpose to diminish" the Chickasaw reservation, or if no such language exists, the State can introduce any sources that "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." See *Solem v. Bartlett, 465 U.S. 463, 471 (1984).* If it cannot achieve this, the Court must find that Pontotoc County lies within the Chickasaw reservation, and thus constitutes Indian country under 18 U.S.C. §1151(a).

WHEREFORE, Because the alleged victim is an Indian, and because the alleged crimes in this case fall under either 18 U.S.C §1153 or 18 U.S.C §1152, because the alleged crimes occurred within the limits of an "Indian reservation under the jurisdiction of the United States Government, "notwithstanding the issuance of patents therein," the District Court of Pontotoc County lacks subject-matter jurisdiction over the State's attempted prosecution and must be dismissed.

Defendant respectfully requests this motion to dismiss for lack of subject matter jurisdiction be set for evidentiary hearing.

Respectfully submitted,

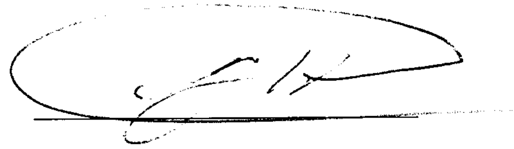


ALBERT J. HOCH, JR. OBA# 11862

ATTORNEY FOR DEFENDANT
803 Robert S. Kerr
Oklahoma City, Oklahoma 73106
Tel: (405) 521-1155
Fax: (405) 528-0308

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of August, 2020, a true and correct copy of the above and foregoing motion was hand-delivered to District Attorney's Office of Pontotoc County.



Albert J. Hoch, Jr.