IN THE DISTRICT COURT OF OTTAWA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, **Plaintiff,**	)	
vs.	)	**CF-2022-215**
STEVEN FULLER, **Defendant.**	)	

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

COMES NOW Defendant, **STEVEN FULLER**, by and through his attorney of record, Terry D. Allen, Jr., and presents Defendant's *Motion to Dismiss for Lack of Subject Matter Jurisdiction*. In support of said motion, Defendant would show the Court as follows:

RELEVANT FACTS

1. On the 1st day of November, 2022, the State of Oklahoma filed its *Information* in the above-referenced cause of action wherein Defendant is charged with *COUNT 1: DUI 2ND SUBSEQUENT AFTER FORMER CONVICTION OF FELONY* in violation of 47 O.S. § 11-902, *COUNT 2: DRIVING WITH LICENSE CANCELLED/SUSPENDED/REVOKED* in violation of 47 O.S. § 6-303, *COUNT 3: FAILURE TO WEAR SEAT BELT* in violation of 47 O.S. § 12-417 and COUNT 4: *TRANSPORT OPEN CONTAINER OF ALCOHOL* in violation of 21 O.S. § 1220.
2. Defendant is an enrolled member of the Cherokee Nation of Oklahoma.
3. The events giving rise to the charges filed herein occurred within the limits of the Wyandotte Nation. See Exhibit A attached hereto and incorporated herein by reference

ARGUMENT AND AUTHORITIES

It is a fundamental statement of due process that, in order for a court to hear and decide litigation, it must have subject matter and in personam jurisdiction. In criminal

cases, jurisdiction is often conferred based upon a geographic area in which the crime occurred, and the Oklahoma Courts would be unable to hear a criminal case that occurred exclusively within the boundaries of the State of Texas. Likewise, under clearly established law, state courts cannot exercise jurisdiction over crimes committed by Indians in "Indian country". While it is expected that the State will attempt to address this argument as a novel issue of unsettled law, as will be discussed below, this motion has its roots in clearly established, long-standing law which is recognized in both state and federal court. As will be demonstrated below, the Cherokee Nation includes all of Washington, Nowata, Craig, Cherokee, Delaware, Adair, and Sequoyah Counties and parts of Tulsa, Rogers, Mayes, Ottawah, Wagoner, Muskogee, and McIntosh Counties, and has never been disestablished by Congress. Additionally, the Creek nation which includes all of Creek, Okmulgee, and Okfuskee Counties and parts of Hughes, McIntosh, Muskogee, Tulsa, Rogers, Wagoner and Mayes Counties and has never been disestablished – thus remaining "Indian Country" under established law.

The events that are alleged to have occurred to give rise to the current prosecution of Defendant occurred within Indian Country as the term is defined by 18 U.S. Code §§ 1151 et seq. Likewise, Defendant is a Native American.

Subject matter jurisdiction cannot be waived to confer jurisdiction upon a court lacking the power to adjudicate a particular type of controversy or issue. *Bowen v. State*, 1972 OK CR 146 at ¶ 8, 497 P.2d at 1097. In Oklahoma, "issues of subject matter jurisdiction are never waived and can even be raised on appeal." *Wallace v. State*, 1997 OK CR 1997, 935 P.2d 366, 372; *Wackerly v. State*, 2010 OK CR 16, 207 P.3d 397, 402.

I. PURSUANT TO *MURPHY V. ROYAL* AND *MCGIRT V. OKLAHOMA*, THE CHEROKEE NATION JURISDICTIONAL AREA IS "INDIAN COUNTRY" UNDER 18 U.S.C. § 1151(a).

In *Murphy v. Royal,* 875 F. 3d 896, 907-909, 966 (2017), certiorari granted 589 U.S. ____ (2019), the Tenth Circuit granted a *habeas corpus* petition arising from a state court conviction of an Indian person for murder. The Circuit ruled that federal, rather than state, jurisdiction applied to the crime because the murder occurred on an "Indian reservation" and, thus, in "Indian country" within the meaning of 18 U.S.C. § 1151(a).[1] The Court reasoned that the land in question was within the 1866 boundaries of the Muscogee (Creek) Reservation and that the Reservation had never been disestablished. *Murphy* at *18.

The Circuit court came to this conclusion by applying the three-part test set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984). Under that test, federal courts must presume that Congress does not intend to diminish or disestablish a reservation absent "clear and plain" evidence to the contrary. *Murphy* at *17-18. Reservations are only deemed diminished when there exists: (1) a clear congressional intent reflected in the text of a statute, *id.* at *17 (citing *Solem*, 465 U.S. at 470-71); (2) a history associated with enactment of the statute that "unequivocally reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," *id.* (citing *Solem*, 465 U.S. at 471) (alteration in original); or (3) "to a lesser extent," events occurring after passage of the statute that unambiguously show evidence of a congressional intent to diminish the reservation, *id.* at *18 (citing *Solem*, 465 U.S. at 471).

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[1] Although *Murphy* concerned criminal jurisdiction, and 18 U.S.C. § 1151 defines "Indian country" for purposes of federal criminal law, the definition of "Indian country" in section 1151 "also generally applies to questions of civil jurisdiction ... ." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (quoting *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 527 n.2 (1975)). Of course, Congress may also act through treaty or other statute to define the bounds of tribal civil jurisdiction in a particular case. *See Montana*, 450 U.S. at 564 (tribal power over non-members beyond the *Montana* rule "cannot survive without express congressional delegation").

Applying this test, the Tenth Circuit in *Murphy* concluded that the Muscogee (Creek) Reservation was originally established by a land patent authorized in an 1833 treaty, that the Reservation was diminished but reaffirmed in an 1866 treaty; and that, applying the *Solem* test, the boundaries set in 1866 had subsequently never been diminished or disestablished by any one of several statutes examined by the Court. *Id.* at *32-56. As discussed below, under the *Solem* test as applied by the Tenth Circuit, the Cherokee Nation Jurisdictional Area is Indian Country for the same reasons the Tenth Circuit concluded the land in question in *Murphy* is Indian Country.

In *McGirt v. Oklahoma*, 591 U.S. ____ (2020) [No. 18-9526], the United States Supreme Court pointed out that "wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of [the judiciary's] constitutionally assigned prerogatives." *Id. at page 7.* The Court in *McGirt* found that the Muskogee Creek Reservation has not been disestablished by the United States Congress. Therefore and in spite of the broken promises of the past century between the federal government and the Creek Nation, the State of Oklahoma has no jurisdiction to prosecute crimes of Native Americans which are covered by 18 U.S.C. §§ 1153(a), the Major Crimes Act (hereinafter "MCA"). *McGirt at page 36.*

In its per curiam opinion in *Sharp, Interim Warden v. Mruphy*, 591 U.S. ____ (2020) [No. 17-1107] the Tenth Circuit's decision "was affirmed for the reasons stated in *McGirt v. Oklahoma*" *Id.* We next consider these same elements for the Cherokee Nation Jurisdictional Area.

A. The Cherokee Nation's Reservation Was Established by a Treaty Land Patent that was Later Diminished but Reaffirmed in an 1866 Treaty.

The history of the Cherokee Nation Jurisdictional Area parallels the Muscogee

(Creek) Nation history recounted in *Murphy*. Like the Creek Nation, *Murphy* at *28, the Cherokee Nation was coerced into removing to a "vast tract of land in modern Oklahoma" promised to them in fee simple by treaty, specifically the 1835 Treaty of New Echota, arts. 2-3. In this Treaty the United States recognized the Nation's powers of self-government and promised the subject lands would never be put under the jurisdiction of a territory or state. Treaty of New Echota, art. 5; *see* 1846 Treaty of Washington, art. 1, Aug. 6, 1846, 9 Stat. 871 (confirming issuance of patent). Like the Creek Nation, *Murphy* at *28-29, the Cherokee Nation's landholdings were diminished in 1866, specifically by the 1866 Treaty, art. 16, authorizing the sale of some Cherokee lands, which was completed by the Act of March 3, 1893, ch. 209, § 10, 27 Stat. 612, 640. Also like the Creek Nation, the Cherokee Nation's 1866 Treaty guaranteed the Cherokee Nation's title to, and authority over, the reduced lands. 1866 Treaty, art. 31. The boundaries of those remaining lands are the boundaries of what the Cherokee Nation today calls the 14-county "Cherokee Nation Jurisdictional Area."[2]

Just as the *Murphy* court interpreted this history to have established a Muscogee (Creek) Reservation with boundaries defined by the Creek's 1866 treaty, *Murphy* at *32, it follows that the 14-county land area recognized by the Cherokee Nation's 1866 Treaty established a Cherokee Reservation.

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[2] The Cherokee Nation has long exercised governmental authority throughout the jurisdictional area, despite the fact that no federal court had acknowledged the existence of a "reservation" for any of the Five Tribes until the *Murphy* decision. Article II of the 1999 Constitution of the Cherokee Nation specifically defines the boundaries of the Cherokee Nation territory to include those lands "described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of March 3, 1893." In 2001, the Motor Vehicle Licensing Act defined the term "reservation boundaries of Cherokee Nation" to include "the territorial boundaries of the Nation as they existed as of January 1, 1900." 68 C.N.C.A. 1304.

As we next show, under the 3-part *Solem* test as construed in *Murphy*, this Reservation was never disestablished or diminished.

B. Pursuant to the First *Solem* Factor, None of the Statutes Relevant to the Cherokee Nation Demonstrate a Clear Congressional Intent to Disestablish the Cherokee Reservation.

Under the first and "most important" *Solem* factor, *Murphy* at *34, the Tenth Circuit considered whether the Muscogee (Creek) Reservation had been diminished by express statutory language, *id.* at *33-46. As part of this analysis, the Circuit court reviewed eight statutes passed from 1893 to 1906, dealing with the allotment of the Five Tribes' lands, the establishment of federal courts in the Indian Territory, and the authorization of the creation of the State of Oklahoma. *Id.* at *33.

Six of these statutes affected all Five Tribes, either because they dealt with territorial or state jurisdiction throughout the former Indian Territory, *see* Act of Mar. 3, 1893; Act of June 10, 1896, ch. 398, 29 Stat. 321; Act of June 7, 1897, ch. 3, 30 Stat. 62; Oklahoma Enabling Act of 1906, ch. 3335, 34 Stat. 267, or because they specifically applied to all Five Tribes, *see* Curtis Act of 1898, ch. 517, 30 Stat. 495; Five Tribes Act of 1906, ch. 1876, 34 Stat. 137. Two of the statutes reviewed in *Murphy* specifically applied to the Creek, *see* Creek Allotment Agreement of 1901, ch. 676 ,31 Stat. 861; Supplemental Creek Allotment Agreement of 1902, ch. 1323, 32 Stat. 500, but have parallels to Cherokee-specific allotment legislation, *see Murphy* at *36-39.

The Tenth Circuit determined that in none of these statutes had Congress included express language indicating intent to diminish the Muscogee (Creek) Reservation, *Murphy* at *42, which was especially probative given Congress' approval of treaties expressly dealing with the reservation's boundaries, *Murphy* at *43. To the contrary, Congress had

explicitly recognized the existence of Muscogee (Creek) Reservation boundaries in at least one subsequent act. *Id.* (quoting Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364). In all of these acts, Congress never indicated an intention to alter reservation boundaries, only to change title within those boundaries and shift governmental authority in the Indian Territory from tribes to the Territory or State. *Id.* at *44-46.

With respect to the six statutes that apply with equal force to the Muscogee (Creek) Nation and the Cherokee Nation, the *Murphy* Court's conclusion that none effected a disestablishment is equally binding here.

As for Cherokee-specific legislation, the Cherokee Allotment Agreement of 1902, ch. 1375, 32 Stat. 716, dealt with the allotment of lands in restricted fee, §§ 11-23, 32 Stat. at 717-19; reserved some lands from allotment for named schools, colleges, and other purposes; allowed for any of those "school[s] or college[s] in the Cherokee Nation" to seek additional acreage to be reserved for them, *id.* § 24, 32 Stat. at 719-20; provided for the creation of a citizenship roll as the basis for allotment, *id.* §§ 25-31, 32 Stat. at 721-21; created a Cherokee school fund, *id.* §§ 32-36, 32 Stat. at 721-22; permitted the creation of public roads along section lines, *id.* § 37, 32 Stat. at 722; provided for the establishment of townsites, *id.* §§ 38-57, 32 Stat. at 722-25, "in the Cherokee Nation," *id.* §§ 48-49, 32 Stat. at 724; and provided for the issuance of titles to the allotments, *id.* §§ 58-62, 32 Stat. at 725. The Agreement also provided that the Cherokee government would be abolished effective March 4, 1906, but this provision was suspended by the Five Tribes Act, *see* Doc. 86 at 13 n.9. In sum, and very much like the Creek Allotment Agreement and Supplemental Agreement addressed in *Murphy* at *36-39, the Cherokee-specific laws dealing with allotment did not disestablish the Cherokee Nation's reservation.

Moreover, just as Congress subsequently recognized the Muscogee (Creek) Reservation boundaries, *see id.* at *44, Congress subsequently recognized the Cherokee Nation's boundaries in legislation enacted throughout the late 19th and early 20th centuries. *See* Cherokee Allotment Agreement §§ 24, 48-49, 32 Stat. at 719-20, 724 (1901) (referring to schools, colleges, and townsites "in the Cherokee Nation"); Five Tribes Act §§ 12, 14, 16, 24 (referring to townsites and roads "in" the Nation); Oklahoma Enabling Act § 6 (establishing recording districts and congressional districts "in" and "comprise[d]" of the Cherokee Nation); Act of June 21, 1906, 34 Stat. at 342-43 (drawing recording districts in the Indian Territory with boundaries along the northern and western "boundary line[s] of the Cherokee Nation" and describing one of them as "lying within the boundaries of the Cherokee Nation").

In sum, the Tenth Circuit's decision in *Murphy* strongly supports the conclusion that the Cherokee Nation's Reservation was never disestablished by subsequent congressional action. At a minimum, this conclusion is both "plausible" and "colorable" for purposes of the tribal court exhaustion analysis.

C. Like the History Reviewed in *Murphy* Under the Second *Solem* Factor, the History Associated with the Enactment of these Acts Does Not Unequivocally Reveal a Widely-Held, Contemporaneous Understanding that the Cherokee Reservation Would Shrink as a Result of the Proposed Legislation.

The *Murphy* court determined that under the second *Solem* factor—whether contemporary historical evidence unequivocally reveals congressional intent to diminish the reservation, *Murphy* at *46 (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1080-81 (2016))—the evidence regarding the Muscogee (Creek) Reservation was mixed and therefore did not support disestablishment, *id.* at *47. Floor debates and reports regarding the Five Tribes' land status were either insufficient to show a widely-held understanding

of diminishment, *id.* at *47-48 (quoting *Parker*, 136 S. Ct. at 1080), or said nothing about Congress having an intent to disestablish the Five Tribes' reservations, *id.* at *48-49. They, therefore, could not meet the *Solem* standard in light of evidence entered by the petitioner and his tribe "show[ing] an understanding that the Reservation's borders continued," *id.* at *51.

Nothing in the record here supports the second *Solem* factor. Of course, the development of such a record and the initial evaluation of the historical evidence are best done by the tribal court. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

Even without the benefit of a full record here, *Murphy* strongly suggests that the plaintiffs will be unable to muster unequivocal evidence of a widely-held belief at the time of allotment that the Five Tribes' reservations were being disestablished. Evidence in *Murphy* showed that the Dawes Commission did not believe allotment would remove tribal governmental authority. *Murphy* at *49. Further, in 1900 the U.S. Attorney General opined that the Five Tribes had the power to exclude non-Indians and regulate activities within their boundaries, *id.* (citing 23 Op. Att'y Gen. 214, 215 (1900), 1900 WL 1001), and that even after the Curtis Act was passed the Secretary of the Interior still had the obligation to remove all persons "forbidden by treaty or law" from the Five Tribes' reservations, *id.* at *50 (citing 23 Op. Att'y Gen. at 220). These materials alone, already reviewed by the Tenth Circuit in *Murphy*, show there was never an unequivocal contemporary understanding that the Cherokee Reservation was being diminished by the allotment process, and they certainly demonstrate there is at the very least a "plausible" and "colorable" argument that *Solem*'s second factor cannot be satisfied here.

D. Like the Subsequent Events Reviewed in *Murphy* Under the Third *Solem* Factor, the Subsequent Events Pertinent Here Do Not Show Evidence of a Congressional Intent to Disestablish the Cherokee Reservation.

The Circuit in *Murphy* instructed that if neither of the first two *Solem* factors are met, "courts must accord 'traditional solicitude' to Indian tribes and conclude 'the old reservation boundaries' remain intact." *Murphy* at *56 (quoting *Solem*, 465 U.S. at 472). However, it nonetheless reviewed the third *Solem* factor and found no unambiguous evidence showing the Muscogee (Creek) Reservation was considered disestablished. *Id.* at *52-56. Although the State pointed to recent federal enactments using the term "former Indian reservations in Oklahoma," *id.* at *52, the court noted that these statutes did not indicate disestablishment because they "also include existing reservations within their definitions . . . and none of them reference the Muscogee (Creek) Reservation as being disestablished in particular," *id.* The same can be said of the Cherokee Nation, and the Circuit's contextual view of the term "former" is a complete answer to the plaintiffs' effort to draw a contrary inference from the same term, *see* Doc. 104 at 5-6.

Also, on the other side of the scale, the Circuit court noted that the Oklahoma Indian Welfare Act refers to "*existing* Indian reservations" in Oklahoma. *Id.* (quoting Pub. L. No. 74-816, § 1, 49 Stat. 1967, 1967 (1936) (emphasis added)). And it also explained that the assertion of state jurisdiction in a reservation area could not work a disestablishment on its own, *id.* at *54-55 (quoting *United States v. John*, 437 U.S. 634 (1978)). The court further noted that the Muscogee (Creek) Nation has "maintained a significant and continuous presence within the Reservation" by operating its government there, reorganizing it in 1979 under a new constitution, providing "extensive services within the Muscogee (Creek) Nation's borders," applying traffic laws and supporting

traditional properties in the Nation, and entering into cross-deputization agreements for law enforcement services within the Nation's boundaries, *id.* at *55—observations all equally applicable to the Cherokee Nation, *see* Doc. 86 at 15-19.

Because the third *Solem* factor cannot overcome the first two *Solem* factors, it cannot alone establish that the Cherokee Reservation was disestablished. Moreover, the pertinent judicially noticeable evidence submitted in *Murphy* falls far short of satisfying this *Solem* factor. Here too, then, Defendant has advanced at least a "plausible" and "colorable" argument that *Solem*'s third factor cannot be satisfied here.

II. TRIBAL COURT EXHAUSTION IS REQUIRED WHEN ASSESSING WHETHER A RESERVATION, ONCE CREATED BY TREATY, HAS SUBSEQUENTLY BEEN DISESTABLISHED.

The issue of whether the Cherokee Reservation still exists as Indian country under 18 U.S.C. 1151(a) must be exhausted in tribal court, unless it is "patently obvious" that the *Solem v. Bartlett* diminishment test has been met. *Vill. of Pender v. Parker*, No. 4:07CV3101, 2007 WL 2914871, at *1 (D. Neb. Oct. 4, 2007) (staying federal court proceedings for tribal court exhaustion of diminishment issue). *See also Smith v. Parker*, 996 F. Supp. 2d 815, 818 (D. Neb. 2014), *aff'd* 774 F.3d 1166 (8th Cir.), *aff'd sub nom. Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (considering diminishment issue after exhaustion); *Enlow v. Moore*, 134 F.3d 993, 995-96 (10th Cir. 1998) (finding tribal court remedies in dispute over boundaries of Indian country had been properly exhausted). Here, it is far from "patently obvious" that the *Solem* test can be met. To the contrary, all indications so far are that the Cherokee Nation's assertion that its reservation jurisdictional area remains "Indian country" today is not only "colorable" and "plausible;" it is likely to succeed given the Tenth Circuit's decisions in *Murphy*.

III. STATE COURT LACKS JURISDICTION EVEN IN THE EVENT THAT SOME PORTION OF THE ACTS ALLEGED OCCURRED WITHIN THE CREEK NATION.

E. The Creek Nation has never been disestablished and remains "Indian Country".

United States Supreme Court precedent requires that evidence of intent to disestablish be "unequivocal[]." *Nebraska v. Parker*, 136 S. Ct. 1072, 1080–81 (2016). The United States Supreme Court has previously explained in *Celestine* that reservation status depends upon the boundaries Congress draws, not upon 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." *United States v. Celestine*, 215 U.S. 278, 285 (1909).

The primary consideration before this court is whether the crime alleged occurred in Indian country. Federal law defines Indian country at 18 U.S.C. § 1151 to mean:

> (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.

18 U.S.C. § 1151 (paragraph breaks added).

If an area qualifies under any of these definitions, it is Indian country. See *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) ("Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."); see also *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967 at 973 (10th Cir.

1987) ("A formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status."). Id.

Courts do not lightly infer that Congress has exercised its power to disestablish or diminish a reservation. See *DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444 (1975) ("[The Supreme] Court does not lightly conclude that an Indian reservation has been terminated."). Indeed, the Supreme Court has said courts must approach these issues with a "presumption" that Congress did not intend to disestablish or diminish a reservation. *Solem v. Bartlett*, 465 U.S. 463, 481 (1984); see also *Absentee Shawnee Tribe v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988). The determination as to whether a reservation has been disestablished may lie with the courts, however "[The Supreme Court] requires that the congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *DeCoteau v. Dist. County Court for Tenth Judicial District*, 420 U.S. 425, 444 (1975) (ellipsis in original) (quotations omitted).

It is within this framework that the 10th Circuit Court of Appeals took up the case of Murphy versus Royal which specifically deals with the issue of whether the Creek nation has been disestablished by Congress.

> We conclude Congress has not disestablished the Creek Reservation. The most important evidence—the statutory text—fails to reveal disestablishment at step one. Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation's borders. The evidence of contemporaneous understanding and later history, which we consider at steps two and three, is mixed and falls far short of "unequivocally reveal[ing]" a congressional intent to disestablish.

Murphy v. Royal, Nos. 07-7068, 15-7041, 2017 U.S. App. LEXIS 22755, at *85 (10th Cir. Nov. 8, 2017)

The law in this matter is clear and well established. A reservation is established by

Congress and can only be disestablished by Congress. Specifically, with regards to the Creek nation, the 10th circuit found, as a matter of law, based upon the best facts that could be offered by the Attorney General of the State of Oklahoma, that the Creek Nation has never been disestablished and the Oklahoma Court of Criminal Appeals decision in the underlying state case to the contrary was against clearly established federal law. Now that the 10th circuit has spoken, this is a matter that is not properly before a state court, who would lack the authority to overrule a federal opinion. Because it is apparent that the establishment or disestablishment of a reservation lies with Congress, it would be a federal question and therefore the federal court's opinion is binding upon state courts.

F. The State of Oklahoma Has Never Acquired Jurisdiction Over Crimes Committed by Indians in "Indian Country"

The second question to be presented is whether the State of Oklahoma has acquired jurisdiction in Indian country. It is undisputed that is a possibility under existing law. However, as has been repeatedly determined in both federal and state courts, this is an option the State of Oklahoma has never exercised or availed itself of.

"[Q]uite simply the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country." *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (quotations omitted)). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

One important law enacted by Congress in 1953, "Public Law 280," addressed state jurisdiction. It allowed some states "to assert limited civil and broad criminal jurisdiction in Indian country." *Indian Country, U.S.A.*, 829 F.2d at 980 (citing ch. 505, 67 Stat. 588 (Aug. 15, 1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28

U.S.C. § 1360)). Public Law 280, "delegat[ed] to five, later six, states jurisdiction over most crimes . . . throughout most of the Indian country within their borders." *Cohen* at 537 (footnotes omitted). It "offered any other state the option of accepting the same jurisdiction," until a 1968 amendment "made subsequent assumptions of jurisdiction subject to Indian consent." Id. at 537-38; see 25 U.S.C. §§ 1321(a), 1322(a), 1326. Oklahoma chose not to use Public Law 280 to assert jurisdiction. State officials regarded the law as unnecessary because, in their view, Oklahoma already had full jurisdiction over Indians and their lands. *Indian Country, U.S.A.*, 829 F.2d at 980 n.6. But "[t]he State's 1953 position that Public Law 280 was unnecessary for Oklahoma . . . [has] been rejected by both federal and state courts." Id. (citing Tenth Circuit and Oklahoma cases). Oklahoma has not obtained tribal consent following the 1968 amendment and has, thus, never acquired jurisdiction over Indian country through Public Law 280. See *Cravatt,* 825 P.2d at 279 ("The State of Oklahoma has never acted pursuant to Public Law 83-280." (quoting *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989))); see also *Cohen* at 537-38 & n.47. 18 U.S.C. § 1162 specifically lists the states that have concurrent jurisdiction over offenses not listed in the Major Crimes Act that are committed by or against Indians in Indian Country. Oklahoma is not on that list. Therefore, under federal law, jurisdiction over Indians in Indian Country is limited to either the Federal or Tribal Courts. Congress has never passed a law conferring jurisdiction to Oklahoma for offenses under the Major Crimes Act. *McGirt v. Oklahoma*, 591 U.S. _____, pg. 36 (2020).

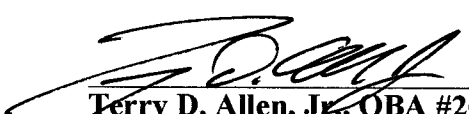
G. This is Clearly Established Law, Which Has been Recognized by the Tenth Circuit.

Following the August 4 decision in *Murphy*, the State sought a rehearing en banc in hopes that, if the 10th circuit court heard the case is a complete panel, it would reverse

the original decision of the Court. However, in issuing its order denying rehearing, Judge Tymkovich wrote in his concurring opinion, "En banc review is not appropriate when, as here, a panel opinion faithfully applies Supreme Court precedent. An en banc court would necessarily reach the same result since Supreme Court precedent precludes any other outcome." *Murphy v. Royal,* Nos. 07-7068, 15-7041, 2017 U.S. App. LEXIS 22755, at *68 (10th Cir. Nov. 8, 2017). In so writing, Judge Tymkovich clearly expressed what can be seen in a survey of the authorities listed in this brief, and those relied upon in the Murphy decision. That is, binding Supreme Court precedent along with both federal and state law spending decades yields the same outcome when applied to the facts as presented to the 10th Circuit Court of Appeals. The conclusion reached is not a new or novel application of law, rather it is the logical application of law to fact and is consistent with conclusions reached by court after court after court with the same matter is presented and the correct legal analysis is followed.

WHEREFORE premisis considered, Defendant respectfully requests that this Honorable Court dismiss this matter with prejudice, or in the alternative, that evidence be taken at the earliest convenience of the Court to conclusively prove the aforementioned allegations.

Respectfully Submitted,



Terry D. Allen, Jr., OBA #20608
112-B N. Vann
Pryor, OK 74361
918.825.6711 – telephone
918.825.0080 – facsimile
Attorney for Defendan

Certificate of Service

I do hereby certify that on the day of filing the above and foregoing document, I delivered the original of the foregoing instrument, via hand delivery to follow, to:

Hon. Becky Baird **Hand delivery**	**Ottawa County District Attorney** **Hand delivery**

Terry D. Allen, Jr.

EXHIBIT

A

Blumberg No. 5119

CWYB DBF

Citizen of the Cherokee Nation

Registry #: 168217
Approval Date: 10-26-1994
Issued Date: 06-16-2017
Expiration Date: INDEFINITE

Sex. M
DOB: 01-06-1958

Name: STEVEN LEON FULLER
Address: 30310 S 562 RD
AFTON, OK 74331

SIGNATURE

TRIBAL REGISTRAR

PRINCIPAL CHIEF

UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS TAHLEQUAH AGENCY

Certificate of Degree of Indian Blood

This is to certify that STEVEN LEON FULLER
born 01-06-1958 is 1/32 degree Indian blood
of the CHEROKEE Tribe.

10-21-1994
Date

TRIBAL REGISTRAR

PRINCIPAL CHIEF

[redacted]