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Welcome to the Mvskoke Reservation: *Murphy v. Royal*, Criminal Jurisdiction, and Reservation Diminishment in Indian Country

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WELCOME TO THE MVSKOKE RESERVATION: *MURPHY V. ROYAL*, CRIMINAL JURISDICTION, AND RESERVATION DIMINISHMENT IN INDIAN COUNTRY

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By restoring the Muscogee Creek Nation to § 1151(a) Indian Country status, *Murphy v. Royal*[1] expanded the Muscogee Creek Nation's rights to prosecute, regulate, and adjudicate cases pertaining to or involving American Indians[2] or Alaska Natives within its reservation. While the Tenth Circuit's denial of en banc review for *Murphy* caused a stir, the jurisdictional impacts that the State of Oklahoma fears are minimal because the case primarily impacts Native Americans or transactions with Native Americans. Subsequently, *Murphy* should be upheld because it primarily decreases state jurisdiction for cases involving Indian persons and entities, rather than non-Indians, much of which was already within the Muscogee Creek Nation's jurisdiction. As a result, there is little change to the judicial expectation of the non-Indians living in the area.

This Comment offers an understanding of the Tenth Circuit's decision in *Murphy*, as well as the impacts the case might have on the residents of the Muscogee Creek Nation. Part I of this Comment provides an overview of the types of Indian Country and the Indian canons of construction. Part II discusses reservation diminishment cases leading up to *Murphy*, including relevant Tenth Circuit precedent. Part III examines *Murphy*, with an emphasis on the Tenth Circuit's application of the *Solem v. Bartlett*[3] test. Part IV analyzes how *Murphy* impacts federal, tribal, and state criminal jurisdiction in the Muscogee Creek Nation. Part V considers the impacts of *Murphy* on civil regulatory jurisdiction. Part VI examines how *Murphy* changes civil adjudicatory jurisdiction. Part VII revisits the actual impacts

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1. 875 F.3d 896 (10th Cir. 2017) (cert. granted *sub nom.* Royal v. Murphy, docket no. 17-1107).

2. The terms "Native American," "Indian," "American Indian," and "tribal/tribe(s)" are used interchangeably in this Comment. It is well established that Indians prefer to be identified by a tribe that they are a member of first, followed by all other terms. Nevertheless, when discussing federal Indian law, the scope and applicability is often broad, making specification of a single tribe difficult. Therefore, general terms will be utilized here. Additionally, the Muscogee Creek Nation may be referred to as the Creek Nation in some historical quotations.

3. 465 U.S. 463 (1984).

of the Muscogee Creek Nation's expanded jurisdiction and highlights the case's appellate progression.[4]

I. Relevant Indian Law Doctrines and Statutes

This section will briefly address relevant areas of federal Indian law that inform and shape the outcome in *Murphy*. These areas include: the Indian law canons of construction and the reserved rights doctrine; the statutory types of Indian Country; diminishment and disestablishment jurisprudence; and precedential Tenth Circuit cases about the Muscogee Creek Nation. Covering these topics is necessary to fully understand the outcome of *Murphy* and why changing the statutorily-defined types of Indian Country impacts jurisdiction.

A. The Indian Law Canons of Construction and the Reserved Rights Doctrine

The Indian law canons of construction are a set of foundational interpretive theories unique to Indian law. The first canon requires that "treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians."[5] The second canon expands on the first, stating that "all ambiguities are to be resolved" in favor of the Indians.[6] Third, all such treaties, agreements, statutes, and executive orders "are to be construed as the Indians would have understood them" at the time of their negotiation or passage.[7] Sometimes the first and second canons are combined into one, and, as in the 2012 edition of *Cohen's Handbook of Federal Indian Law*, the reserved rights doctrine is included among the canons as opposed to being viewed as a separate doctrine.[8] The reserved rights doctrine states that

4. In order to limit the scope of this Comment, I will not address the Antiterrorism and Effective Death Penalty Act ("AEDPA") claims present in *Murphy*. The habeas case law implicated by that analysis would make both the length and breadth of this Comment too unwieldy. Additionally, the AEDPA claims are less relevant to federal Indian law jurisprudence than other aspects of the case.

5. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1], at 113 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN].

6. *Id.*; *see also* Bryan v. Itasca Cty., 426 U.S. 373, 392 (1976) ("[W]e must be guided by that 'eminently sound and vital canon' that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'") (citation omitted) (quoting N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976), and Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918)).

7. COHEN, *supra* note 5, § 2.02[1], at 114; *see also* Nebraska v. Parker, 136 S. Ct. 1072, 1079 (2016).

8. COHEN, *supra* note 5, § 2.02[1], at 114.

"tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."[9] In other words, tribes retain all rights they had at the time they entered into negotiations with the United States unless they were expressly ceded.

The Indian law canons of construction are essential to the analysis of *Murphy*. The canons shape the Tenth Circuit's deference to tribes through the court's application of the *Solem* test, which is used to determine diminishment or disestablishment of a reservation, and the court's application of the canons to all of the documents analyzed by the federal courts in *Murphy*. Subsequently, the deference given to Native Americans by federal courts serves as an invaluable tool for Petitioner-Appellant Murphy and by extension the Muscogee Creek Nation during the ongoing appellate process.

B. Types of "Indian Country" – 18 U.S.C. § 1151

The statute most important to understanding tribal jurisdiction is 18 U.S.C. § 1151, which defines "Indian Country." This section delineates where concurrent federal and tribal jurisdiction may exist, to the exclusion of the states, for both criminal and civil claims where there is at least one Indian party.[10] Under § 1151, there are three different types of Indian Country, including:

> (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.[11]

The first type, § 1151(a) Indian Country, defines intact (as opposed to disestablished) reservations as those where tribal and federal jurisdiction coexist over all land within the bounds of that reservation, regardless of its owner's Indian status or the fee status of the land.[12] This section defines the

9. *Id.*

10. *E.g.*, DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist., 420 U.S. 425, 427 n.2 (1975).

11. 18 U.S.C. § 1151 (2012).

12. *Id.*

legal status of most reservations, including the typical reservation of the American popular imagination. These are reservations that have not been disestablished but may have been reduced in size through a process known as diminishment. The Tenth Circuit Court of Appeals concluded that the Muscogee Creek Nation possessed this type of jurisdiction within the boundaries of the 1866 treaty.[13]

The second category, § 1151(b) Indian Country, defines "dependent Indian communities."[14] This category arises from the Supreme Court's decision in *United States v. Sandoval*, where the Court held that although the Pueblos held their land in fee since their time under Spanish subjugation, they needed protection from the onslaught of American westward expansion much like the rest of the tribes.[15] The Court declared the resulting communities as "dependent Indian communities," which share complete jurisdiction with the federal government.[16] Pueblos are the typical example of § 1151(b) Indian Country, though there have been other applications of that category of Indian Country jurisdiction to off-reservation tribal trusts or restricted title holdings.[17] While case law indicates there could be § 1151(b) jurisdiction for off-reservation tribal property held in trust, that line of argumentation faced opposition in the Tenth Circuit.[18]

Lastly, § 1151(c) Indian Country applies to Indian allotments, including those within the boundaries of diminished and disestablished reservations.[19] Commonly seen in Oklahoma, § 1151(c) Indian Country gives tribes and the federal government jurisdiction over land currently held in restricted Indian fee or trust by the federal government on behalf of either tribes or individual Indians, regardless of whether it is within an § 1151(a) reservation. Unlike § 1151(a) Indian Country, § 1151(c) does not rely on reservation boundaries, but instead relies on the title of the land.[20] This is the type of Indian Country that most commonly leads to the infamous "checkerboard jurisdiction" problem, where § 1151(c) Indian Country parcels are scattered across a wide area of unrestricted fee land, especially

13. Murphy v. Royal, 875 F.3d 896, 937-38 (10th Cir. 2017); *see* Treaty with the Creeks, June 14, 1866, 14 Stat. 785.

14. 18 U.S.C. § 1151.

15. 231 U.S. 28, 46 (1913).

16. 18 U.S.C. § 1151 (2012); COHEN, *supra* note 5, § 3.04[2][c][iii], at 193-94.

17. COHEN, *supra* note 5, § 3.04[2][c][iii], at 193-96.

18. *See generally* Hydro Res., Inc. v. EPA, 608 F.3d 1131 (10th Cir. 2010) (en banc).

19. 18 U.S.C. § 1151(c).

20. *Id.*; *see also* COHEN, supra note 5, § 3.04[2][c][iv], at 197.

on disestablished reservations. The State of Oklahoma presumed that the Muscogee Creek Nation had § 1151(c) land in *Murphy v. State of Oklahoma*.[21]

II. Diminishment and Disestablishment

The body of case law addressing the reduction of tribal land base and jurisdiction is referred to as either the diminishment or disestablishment cases. The definition provided in *Yankton Sioux Tribe v. Gaffey* clarifies the difference between the two: "Although the terms 'diminished' and 'disestablished' have at times been used interchangeably, disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation" that occurred at some point in history.[22] Disestablished reservations typically have § 1151(c) Indian Country jurisdiction over tribally-owned lands, as well as trust or restricted Indian title lands. Diminished reservations, on the other hand, can have any type of § 1151 jurisdiction.

A. Who Has the Power to Diminish or Disestablish Reservations?

Congress is granted the majority of the formal power to deal with Indians through the Indian Commerce Clause, the modern "treaty" process, and various Supreme Court decisions.[23] In *United States v. Kagama*, the Court held that because of tribal dealings and treaties with the United States, the tribe had been rendered dependent on the United States due to the growth of its power.[24] The Court also stated that "[f]rom [tribes'] very weakness and helplessness . . . there arises the duty of protection, and with it the power."[25] The power so described is congressional plenary authority over Indian affairs, including the power to abrogate treaties.[26]

In *South Dakota v. Yankton Sioux Tribe*, the Court explained that this plenary authority also gives Congress the extra-constitutional, unilateral power to change and terminate the Indian Country status of land, thereby giving Congress the power to change the type of jurisdiction applicable to

21. 2005 OK CR 25, ¶ 47, 124 P.3d 1198, 1207.

22. 188 F.3d 1010, 1017 (8th Cir. 1999).

23. U.S. CONST. art. I, § 8, cl. 3. After the U.S. House of Representatives expressed displeasure over not having a role in Indian negotiations, Congress passed the Act of Mar. 3, 1871, ch. 106, 16 Stat. 471. Congress has since negotiated Indian statutes in lieu of treaties.

24. 118 U.S. 375, 383-84 (1886).

25. *Id.* at 384.

26. *Id.*

that land.[27] Subsequently, "the Supreme Court has said the 'touchstone' of whether a reservation's boundaries have been altered is congressional purpose."[28] The explanation of congressional plenary power included in *Yankton* contributed to the design of the dispositive test found in *Solem*, which is used to determine reservation disestablishment.

B. Solem v. Bartlett*: The Diminishment and Disestablishment Test*

In *Solem v. Bartlett*, the Supreme Court was faced with another habeas case pertaining to whether a reservation had been diminished or disestablished, this time involving a man appealing his ten-year sentence in South Dakota.[29] The reservation at issue was the Cheyenne River Sioux Reservation.[30] The question before the Court was whether the 1908 Cheyenne River Act diminished the boundaries of the Cheyenne River Sioux Reservation, rendering the locus of the crime outside of the Tribe's § 1151(a) Indian Country; or, whether the Act merely allowed for non-Indian settlement on the reservation, preserving the land's status as Indian Country.[31] Because the Supreme Court believed "[t]he effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage," the Court delineated a three-part test for disestablishment and diminishment to distinguish "surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries."[32]

First, the Court declared that "[d]iminishment . . . will not be lightly inferred": "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of the individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."[33] The Court then indicated that

> [t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and

27. 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); *see also* COHEN, *supra* note 5, § 3.04[3], at 198-99.

28. Murphy v. Royal, 875 F.3d 896, 918 (10th Cir. 2017) (quoting *Yankton*, 522 U.S. at 343).

29. 465 U.S. 463, 464-66 (1984).

30. *Id.*

31. *Id.* at 464-66 (citing Cheyenne River Act, ch. 218, 35 Stat. 460 (1908)).

32. *Id*. at 469, 470.

33. *Id.* at 470.

> total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.[34]

Further, if any language fitting the prior description is present in conjunction with an "unconditional commitment" to compensate a tribe for any unallotted land, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."[35]

The second *Solem* factor considers evidence of contemporaneous debates and negotiations surrounding the surplus land act, looking specifically for evidence that "unequivocally reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."[36] This second factor gives weight to the historical events surrounding the negotiations of a given treaty or statute. Examples of this type of evidence include contemporaneous legislative history, newspaper articles, and other types of historical record data. Prior to *Solem*, the Supreme Court allowed evidence under this category to prove congressional intent to diminish; since *Solem*, the second factor alone is insufficient to prove congressional intent.[37]

The third and last factor considers events occurring "after the passage of a surplus land act" as ancillary evidence of congressional intent and includes evidence such as "Congress's own treatment of the affected areas," as well as "the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open areas."[38] Further, the Court considers the demographics of the affected area as evidence that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, . . . *de facto*, if not *de jure*, diminishment may have occurred."[39] The third factor is the least persuasive, and "[w]hen both an act and its legislative history"—or the first two parts of the test—"fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [courts] are bound by [their] traditional solicitude for the Indian tribes to rule that diminishment

34. *Id.*

35. *Id*. at 470-71.

36. *Id.* at 471.

37. *See generally* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); *cf.* Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010) (post-*Solem* Tenth Circuit decision) (relying almost entirely on second factor evidence to find disestablishment of the Osage Nation Reservation).

38. *Solem*, 465 U.S. at 471.

39. *Id.*

did not take place . . ..”[40] Thus, the Court held that if the first and second factors both fail, the third factor also fails due to the requirements in the Indian canons of construction that statutes and treaties be liberally construed in favor of Native Americans and that ambiguities be interpreted in favor of the Native Americans.[41]

Solem also established that there is a presumption against disestablishment.[42] Subsequently, congressional intent to diminish or disestablish a reservation must be “clear and plain.”[43] This presumption supports the primacy of the first factor of the *Solem* test. In summary, the three-factor *Solem* test is the standard by which federal courts determine whether Congress intended to diminish or disestablish an Indian reservation.

C. Key Diminishment Cases After Solem

The Supreme Court has granted certiorari on several diminishment/disestablishment cases since *Solem*, the most important of which are *Hagen v. Utah* and *Nebraska v. Parker*.[44] In both of these cases, the Court applied the *Solem* test to determine whether the reservation at issue had been diminished or disestablished. The continual application of the *Solem* test by the Supreme Court supports the Tenth Circuit’s finding in *Murphy* that the *Solem* test is the governing law for diminishment and disestablishment cases. These cases also shape the Tenth Circuit’s application of the *Solem* test.

1. Hagen v. Utah

Ten years after its initial decision in *Solem*, the Supreme Court applied the *Solem* test in *Hagen v. Utah*.[45] In *Hagen*, the Court found that Congress had diminished the Uintah Indian Reservation, meaning the locus of the case at bar was not in Indian Country.[46] When applying the first *Solem* factor, the Court noted that it has “never required any particular form of words” to prove congressional intent to diminish or disestablish an Indian

40. *Id.* at 472.
41. COHEN, *supra* note 5, § 2.02[1], at 113-14.
42. *Solem*, 465 U.S. at 470-71, 481; *see also* COHEN, *supra* note 5, § 3.04[3], at 199.
43. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).
44. The other case of note, *Yankton*, 522 U.S. 329, also applies the *Solem* test but is not particularly distinctive in its argumentation or result.
45. 510 U.S. 399 (1994).
46. *Id.* at 421-22.

reservation.[47] As such, the acts that restored surplus Uintah Reservation lands to the public domain for a lump compensatory sum sufficiently evidenced congressional intent to diminish the reservation, satisfying the dispositive first factor of the *Solem* test.[48]

The Court then affirmed their conclusion with additional support from the second and third factors of the *Solem* test. When considering contemporaneous historical evidence, the Court emphasized how the relevant actions of both Congress and the Secretary of the Interior tracked the coincidental increase in congressional plenary power over Indian tribes and how that increase in power cemented congressional approval to open the surplus Uintah lands.[49] Finally, applying the third factor, the Court contrasted the facts in *Hagen* with the facts in *Solem* by evidencing the non-Indian character of the diminished Uintah lands.[50]

2. Nebraska v. Parker

In 2016, the Supreme Court unanimously reaffirmed their support of the *Solem* test in *Nebraska v. Parker*.[51] Based on the lack of any congressional intent to diminish or disestablish the Omaha Reservation, the Court held that the reservation remained intact.[52] Most importantly, the Court refused to apply the third *Solem* factor and did not allow demographics alone to refute the fact that the statutory language failed to satisfy the dispositive first *Solem* factor.[53]

The Court reiterated that the first factor of the "well settled" *Solem* test requires demonstrating the existence of some evidence of clear intent to diminish a given reservation. These factors include: "[e]xplicit reference[s] to cession or other language evidencing the present and total surrender of all tribal interests;"[54] "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," which, if provided in a lump sum payment along with explicit cession language, creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished;"[55] or, alternatively, "[a] statutory provision restoring

47. *Id.* at 411.
48. *Id.* at 414.
49. *Id.* at 416-20.
50. *Id.* at 420-21.
51. 136 S. Ct. 1072 (2016).
52. *Id.* at 1082.
53. COHEN, *supra* note 5, § 3.04[3] (Supp. 2017).
54. *Parker*, 136 S. Ct. at 1079 (quoting Solem v. Bartlett, 465 U.S. 463, 470-71 (1984)) (internal quotations omitted) (alteration in original).
55. *Id.*

portions of the reservation to 'the public domain' [to] signif[y] diminishment."[56] The Court then succinctly found the surplus land act in question did not indicate congressional intent to diminish or disestablish the Omaha Reservation, and thus failed the first factor of the *Solem* test.[57] Because the first factor failed, the Court upheld post-*Solem* precedent and refused to allow evidence from the second or third factors to be dispositive.[58] Even if the Court allowed this evidence, the second factor also failed because the contemporaneous legislative history did not provide any evidence of an intent to diminish.[59]

What distinguishes *Parker* from other post-*Solem* disestablishment cases is that the Court upheld *Solem* and refused to allow the third factor to be dispositive when asked to consider extensive third-factor evidence of disestablishment. The consideration of the demographic and federal treatment evidence allowed by the third *Solem* factor indicated a clear absence of a strong Omaha presence in the area for decades.[60] Nevertheless, the Court refused to overrule *Solem* and allow the federal and Nebraskan governments to have jurisdiction because it is not the Court's role to "'rewrite' the 1882 Act[61] in light of this subsequent demographic history," or to overvalue the "limited interpretive value" of subsequent federal treatment of the lands in question.[62]

D. Precedential Cases on the Status of Muscogee Creek Nation Indian Country

Two Tenth Circuit cases also inform the court's analysis in *Murphy*: *Indian Country, U.S.A. v. Oklahoma* and *Osage Nation v. Irby*. *Indian Country, U.S.A.* is a prior decision in which the Tenth Circuit discussed the Muscogee Creek Nation's reservation's lands as § 1151(a) lands rather than as § 1151(c) trust land, which ultimately laid groundwork for its decision in *Murphy*. *Osage Nation* is a disestablishment case in which the court moved away from the Supreme Court's post-*Solem* precedent and ruled that the Osage Nation's reservation had been disestablished based primarily on contemporaneous legislative history found under the second *Solem* factor.

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56. *Id.* (quoting Hagen v. Utah, 510 U.S. 399, 414 (1994)).
57. *Id.* at 1079-80.
58. *Id.* at 1080-82.
59. *Id.* at 1080.
60. *Id.* at 1081.
61. The 1882 Act enabled the Secretary of the Interior to sell part of the Omaha reservation for "use by the Sioux City and Nebraska Railroad Company." *See id.* at 1077.
62. *Id.* at 1082.

1. Indian Country, U.S.A. v. Oklahoma

In *Indian Country, U.S.A. v. Oklahoma*, the Tenth Circuit held that "the Creek Reservation continues to exist, at least in some form."[63] The Tenth Circuit in *Murphy* noted that while diminishment was not at issue when deciding *Indian Country, U.S.A.*, the court had decided that the "site at issue was 'part of the original treaty lands still held by the Creek Nation . . . . These lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. § 1151(a).'"[64] This language from *Indian Country, U.S.A.* indicates that the Tenth Circuit had begun to consider the Muscogee Creek Nation as § 1151(a) Indian Country as early as 1987.[65]

2. Osage Nation v. Irby

The State of Oklahoma relied heavily on the Tenth Circuit's holding in *Osage Nation v. Irby*[66] for its argument against the continued existence of the Muscogee Creek Nation reservation in *Murphy*. In *Osage*, the Tenth Circuit found the statutes in question to be ambiguous; therefore, the first factor of the *Solem* test was not conclusive.[67] Subsequently, the Tenth Circuit moved to the second *Solem* factor, finding clear legislative history supporting the conclusion that all parties knew and understood the Osage Allotment Act disestablished the Osage Reservation.[68] In regard to the second factor, the court cited historical evidence pertaining to how the Osage Allotment Act was negotiated, which "reflect[ed] clear congressional intent and Osage understanding that the reservation would be disestablished."[69] In regard to the third factor, the Tenth Circuit stated that the demographic shift after the Allotment Act supported the determination that the reservation had been disestablished.[70] Thus, despite no clear evidence of congressional intent to diminish the Osage Reservation as required by the first *Solem* factor, the Tenth Circuit broke with the Supreme Court's post-*Solem* precedent and concluded that the Osage Reservation had been disestablished based primarily on evidence from the second factor

63. Murphy v. Royal, 875 F.3d 896, 937 (10th Cir. 2017) (discussing Indian Country, U.S.A. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987)).

64. *Id.* (quoting *Indian Country, U.S.A.*, 829 F.2d at 976).

65. *See generally Indian Country, U.S.A.*, 829 F.2d 967.

66. 597 F.3d 1117 (10th Cir. 2010).

67. *Id.* at 1123-24.

68. *Id.* at 1124 (discussing the Osage Allotment Act, ch. 3572, 34 Stat. 539 (1906)).

69. *Id.*

70. *Id.* at 1127.

of the *Solem* test.[71] This ruling is alarming because if the Supreme Court were to find the second factor dispositive like the Tenth Circuit did here, the usefulness of the *Solem* test as a tool for protecting tribal land bases would significantly diminish.

III. Murphy v. Royal

A. Facts of the Case

Petitioner-Appellant Patrick Dwayne Murphy resided with Patsy Jacobs in August 1999.[72] Ms. Jacobs had a child, George Jr., from a prior relationship with the victim, George Jacobs.[73] Murphy and Ms. Jacobs had an argument concerning Mr. Jacobs, resulting in threats from Murphy that he was "'going to get' Mr. Jacobs and his family."[74] On the day of the crime, Mr. Jacobs was intoxicated and passed out in the back of his cousin, Mark Sumka's, truck when they drove past Murphy and his two passengers.[75] Both vehicles stopped, and though Murphy told Sumka "to turn off the car," Sumka drove away.[76] Murphy chased Sumka and forced Sumka's car off the road.[77] Murphy got out of his car and a fistfight ensued between the five men, during which Sumka fled the scene.[78] He returned to the scene of the fight five minutes later to find Murphy throwing a knife into the woods and Mr. Jacobs lying in a ditch "barely breathing."[79]

Mr. Jacobs was found later in the same ditch "with his face bloodied and slashes across his chest and stomach."[80] Additionally, Mr. Jacobs's genitals were severed before he was dragged from the roadway to the ditch where his throat and chest were cut.[81] Murphy confessed to Ms. Jacobs upon returning to her home that he murdered Mr. Jacobs.[82] The State subsequently charged Murphy with the first-degree murder of Mr. Jacobs and sought the death penalty.[83]

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71. *Id.* at 1126-28.
72. Murphy v. Royal, 875 F.3d 896, 904 (10th Cir. 2017).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 905.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

B. Relevant Procedural History[84]

A jury convicted Petitioner-Appellant Murphy of first-degree murder in 2000 in McIntosh County and sentenced him to death, partly due to the aggravating circumstances of the crime.[85] Murphy's conviction was affirmed twice, once in May of 2002, and again in March of 2003, on a direct appeal to the Oklahoma Court of Criminal Appeals (OCCA).[86]

His second application to the State of Oklahoma for post-conviction relief alleged that, among other things, "Oklahoma lacked jurisdiction because the Major Crimes Act gives the federal government exclusive jurisdiction to prosecute murders committed by Indians in Indian country."[87] In the resulting evidentiary hearing, Mr. Murphy argued the crime occurred in § 1151 Indian Country under all three subtypes.[88] The state court concluded that there was only state jurisdiction, not § 1151(c) Indian allotment land tribal jurisdiction, over the crime.[89] The state court did not determine if there was § 1151(a) reservation or § 1151(b) dependent Indian community jurisdiction, despite the OCCA's request for it to do so.[90]

From that initial state court decision, Murphy "appealed to the OCCA," which "denied relief on his jurisdictional . . . claims but granted limited relief on the *Atkins* claim" that pertained to whether Murphy was mentally competent to be executed.[91] With respect to the jurisdictional issue, the OCCA did not agree with the state district court's conclusion pertaining to the ownership of the road and the easement alongside of it, but upheld the finding that state jurisdiction was proper and that Murphy had shown insufficient evidence to prove the land in question was § 1151(a) or § 1151(b) Indian Country.[92]

After losing on his jurisdictional claim before the state, Murphy amended his federal habeas petition on December 28, 2005, to include that claim.[93] The U.S. District Court for the Eastern District of Oklahoma

84. For the complete procedural history, including extensive coverage of the habeas proceedings, see *id.* at 905-11.

85. *Id.* at 905

86. *Id.* at 905-06.

87. *Id.* at 907.

88. *Id.* at 907-08.

89. *Id.* at 908.

90. *Id.*

91. *Id.*

92. *Id.* at 908-09.

93. *Id.* at 910.

rejected all of his claims on August 1, 2007.[94] In this application, Mr. Murphy's jurisdictional claim only argued that the crime occurred either on § 1151(a) reservation land or § 1151(c) Indian allotment land, leaving out the § 1151(b) dependent Indian community argument.[95] The Eastern District of Oklahoma ruled that "the OCCA's decisions against Mr. Murphy on these theories were neither contrary to nor an unreasonable application of clearly established federal law" under the Antiterrorism and Effective Death Penalty Act (AEDPA).[96] Nevertheless, the Eastern District issued Murphy "three certificates of appealability ('COAs')."[97]

After a prolonged *Atkins* mental capacity appeal process, the Tenth Circuit granted the jurisdictional certificate of appealability sua sponte.[98] On August 8, 2017, the Tenth Circuit ruled that the State of Oklahoma did not have jurisdiction over the prosecution because the Muscogee Creek Nation had not been disestablished; instead, the reservation remained intact.[99] On November 9, 2017, the Tenth Circuit denied Oklahoma's petition for en banc review, with "no judge on the original panel or the en banc court request[ing] that a poll be called."[100]

C. Legal Analysis

The Tenth Circuit's analysis in *Murphy* dealt with three cumulative issues. First, the court addressed "[w]hether there was clearly established federal law as determined by the Supreme Court when the OCCA addressed Mr. Murphy's jurisdictional claim."[101] Second, the court examined "[w]hether the OCCA rendered a decision contrary to this clearly established law when it resolved Mr. Murphy's jurisdictional claim."[102] Third, the court considered "[w]hether the federal government has exclusive jurisdiction over Mr. Murphy's case."[103] To briefly answer the three issues, the Tenth Circuit found that *Solem* was clearly established law

94. *Id*.
95. *Id.*
96. *Id.* (citing Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) (2012)).
97. *Id.*
98. *Id.* at 911.
99. *Id.* at 966.
100. *Id.* at 901.
101. *Id.* at 921.
102. *Id.* Because the second issue pertains to the AEDPA analysis, it will not be addressed in this Comment.
103. *Id.*

when *Murphy* was originally decided.[104] Thus, the court found that the OCCA's decisions were contrary to clearly established law because not only did it not consider the *Solem* test in its approach, but its approach was incompatible with the *Solem* test.[105] Finally, the Tenth Circuit applied the *Solem* framework to the applicable treaties and statutes between the Muscogee Creek Nation and the United States to find the reservation still exists.[106] As a result, the Tenth Circuit held that the federal government had exclusive jurisdiction over Murphy's case because the crime occurred in Indian Country.[107]

D. First Issue: Whether the Solem *Test Is Clearly Established Federal Law*

The first issue addressed by the Tenth Circuit disposes of whether the *Solem* test qualified as clearly established law in 2005. The Tenth Circuit held that the test was clearly established law and had been treated as such in numerous Supreme Court decisions since the case was decided in 1984.[108] To support its decision, the Tenth Circuit noted that the Supreme Court, along with a lengthy list of federal circuit and district courts, continued to apply the *Solem* test in subsequent decisions spanning from the mid-1980s until the 2005 OCCA decision.[109] Subsequently, the Tenth Circuit held that *Solem* provided the governing test when the OCCA decided in 2005 whether the Muscogee Creek Nation had been disestablished.[110]

E. Second Issue: Whether Exclusive Federal Jurisdiction Is Proper

The Tenth Circuit then applied the *Solem* framework to the unique history surrounding the Muscogee Creek Nation reservation. In order for the State of Oklahoma to successfully prove disestablishment under the *Solem* test, it had to first show unequivocal statutory evidence of congressional intent to disestablish the boundaries of the Muscogee Creek Nation.[111] While both contemporaneous historical evidence and present demographic evidence can support the first *Solem* factor, current Supreme Court jurisprudence holds that the latter two portions of the *Solem* test are

104. *Id.* at 921-23.
105. *Id.* at 926-28.
106. *Id.* at 937-48.
107. *Id.* at 966.
108. *Id.* at 921-23.
109. *Id.* For examples of Supreme Court cases, *see generally South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994).
110. *Murphy*, 875 F.3d at 922-23 (noting the Supreme Court's recognition that a "legal framework for evaluating a given type of claim can constitute clearly established law").
111. *See* Solem v. Bartlett, 465 U.S. 463, 470-72 (1984).

insufficient to prove disestablishment or diminishment without the first.[112] The Tenth Circuit, however, does allow for the second *Solem* factor to prove disestablishment if the contemporaneous historical evidence incontrovertibly supports mutual understanding of the intent to disestablish the reservation.[113]

1. The First Solem *Factor*

The State of Oklahoma argued the "collective weight of eight different laws enacted between 1893 and 1906"—as opposed to express language of cession, a lump sum payment, or reference to returning the land to the public domain—proved congressional intent to diminish the Muscogee Creek Nation.[114] Nevertheless, the court found that none of the statutes satisfied the first factor of the *Solem* test.[115]

The Tenth Circuit addressed each statute in chronological order, beginning with the Act of March 3, 1893. The law in question was an appropriations act that also "gave 'the consent of the United States' to the allotment of lands 'within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and [S]eminoles.'"[116] The court noted, however, that this Act merely established the Dawes Commission and did not make any determination on the continued existence of the Muscogee Creek reservation.[117]

The Act of June 10, 1896, was likewise unpersuasive, as it once again merely appropriated funds for treaty negotiation with the Muscogee Creek Nation and provided instructions to the Dawes Commission "for the purpose of 'rectify[ing] the many inequalities and discriminations' in the [Indian] Territory and 'afford[ing] needful protection to the lives and property of all citizens and residents thereof.'"[118]

The third appropriations act cited by the State changed federal and tribal jurisdiction in the Indian Territory by granting exclusive jurisdiction to the United States.[119] It also made all legislation by the Five Tribes subject to

112. *Id.*

113. *See generally* Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010).

114. *Murphy*, 875 F.3d at 938.

115. *Id.* at 938-39.

116. *Id.* at 939-40 (quoting Act of Mar. 3, 1893, ch. 209, § 15, 27 Stat. 612, 645) (alternation in original).

117. *Id.*

118. *Id.* at 940 (quoting Act of June 10, 1896, ch. 398, 29 Stat. 321, 340) (first and third alterations in original).

119. *Id.* at 940-41 (citing Act of June 7, 1897, ch. 3, 30 Stat. 62).

the President of the United States' veto power.[120] Nevertheless, the Act of June 7, 1897, did not disestablish the Muscogee Creek Reservation.[121]

As its fourth supporting statute, the State proffered the Curtis Act. The Curtis Act abolished tribal courts, declared tribal law unenforceable, and transferred all tribal court cases to the federal court within the Indian Territory.[122] Federal payments were then dispersed to individual tribal members instead of tribes.[123] Finally, the Curtis Act included a default allotment plan and a proposed allotment plan for the Creeks; however, the Muscogee Creek Nation refused to ratify it and negotiated its own allotment agreement with the United States later.[124] Nevertheless, despite the fact that the Curtis Act reshaped governance in the Indian Territory, it did not change the borders of the Muscogee Creek Nation.[125]

The Muscogee Creek Nation negotiated its own individual allotment agreement which specified that it superseded any "conflicting federal statutes."[126] The Original Allotment Agreement of 1901 addressed four different issues: (1) general allotment, (2) town sites, (3) tribally-held lands, and (4) future Creek governance over areas within their borders.[127]

The Agreement provided that aside from those lands reserved for either tribal or town purposes, all Creek lands were to be "appraised and allotted among the citizens of the tribe" deemed eligible based on the tribal citizenship rolls.[128] Each Muscogee Creek citizen "would receive an allotment of 160 acres valued at $6.50 per acre."[129] Each allotment transferred "all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in [the] allotment certificate" in exchange for that allottee's consent to allotment and relinquishment of any claims to other Creek lands.[130] While the Creek citizens received their allotments in fee, the Secretary of the Interior still had to approve most

120. *Id.* at 941 (citing 30 Stat. at 84).

121. *Id.*

122. *Id.* (citing Curtis Act, ch. 517, §§ 26, 28, 30 Stat. 495, 504-05 (1898)).

123. *Id.* (citing Curtis Act § 19, 30 Stat. at 502).

124. *Id.* (citing Curtis Act § 11, 30 Stat. at 497-98).

125. *Id.*

126. *Id.* (citing Original Allotment Agreement, ch. 676, ¶¶ 41, 44, 31 Stat. 861, 872 (1901)).

127. *Id.* at 941-44.

128. *Id.* at 941-42 (quoting Original Allotment Agreement ¶¶ 2-3, 31 Stat. at 862-63) (internal quotations omitted).

129. *Id.* at 942 (citing Original Allotment Agreement ¶ 3, 31 Stat. at 862).

130. *Id.* (quoting Original Allotment Agreement ¶ 23, 31 Stat. at 868) (internal quotations omitted) (alteration in original).

encumbrances or alienations of their allotments, resulting in the type of Indian title known as restricted Indian fee.[131] Additional restrictions applied, as well.[132]

Any surplus lands were to be used, along with any funds from preceding treaties, "for the purpose of equalizing allotment[]" values for those tribal members who received less valuable tracts of land.[133] If a tribal member received an allotment worth more than the baseline value, then the difference could be charged against other entitlements the tribal member had right to claim.[134]

Town sites and tribal use lands were exempted from the general allotment provision. Towns of more than 200 residents were "surveyed, laid out, and appraised" before town commissions sold lots "for the benefit of the tribe."[135] Per the statute, "'[a]ny person,' not just Creek citizens, 'in rightful possession of any town lot having improvements thereon'" had right of first refusal.[136] The town commission auctioned off unimproved lots within a year of the appraisal.[137] At their option, the Creeks also reserved lands for tribal purposes, such as "Creek schools and orphan homes; cemeteries; a university; Creek courthouses, and churches and schools outside of towns."[138] If these properties ever fell into disuse, the act provided for auctioning them off to Creek citizens only.[139]

Lastly, the Original Allotment Agreement provided the roles of both tribal and federal government, at least temporarily, in the newly allotted Muscogee Creek Nation.[140] Creek governmental authority, though limited, did persist in the form of "legislative authority over both unallotted tribal lands and allotted lands" and numerous other functions.[141] While the Original Allotment Act envisioned continuing tribal authority as temporary, Congress negated the tribal government dissolution provision in the Act

131. *Id.* (citing Original Allotment Agreement ¶ 7, 31 Stat. at 863-64).

132. *Id.* (citing Original Allotment Agreement ¶ 37, 31 Stat. at 871).

133. *Id.* (quoting Original Allotment Agreement ¶ 9, 31 Stat. at 864).

134. *Id.* (citing Original Allotment Agreement ¶ 3, 31 Stat. at 862-63).

135. *Id.* at 943 (quoting Original Allotment Agreement ¶ 10, 31 Stat. at 864, 865) (internal quotations omitted).

136. *Id.* (quoting Original Allotment Agreement ¶ 11, 31 Stat. at 866).

137. *Id.* (citing Original Allotment Agreement ¶ 14, 31 Stat. at 866).

138. *Id.* (citing Original Allotment Agreement ¶ 24(c)-(p), 31 Stat. at 868-69) (citations omitted).

139. *Id.* (citing Original Allotment Agreement ¶ 24, 31 Stat. at 869).

140. *Id.*

141. *Id.* (citing Original Allotment Agreement ¶ 42, 31 Stat. at 872).

before the Muscogee Creek government ever dissolved.[142] Meanwhile, the United States assumed some powers that pertained directly to the movement of certain types of commercial and tax activities across the Creek Nation borders.[143] In sum, not only is there no evidence of disestablishment, but the Original Allotment Agreement repeatedly reaffirmed the borders of the Creek Nation.[144]

The Supplemental Allotment Agreement, Oklahoma's sixth supporting document, primarily served as a set of clarifications for the Original Allotment Agreement.[145] Most relevant to the present case is the fact that the Supplemental Agreement renewed the anti-encumbrance and alienation provisions as well as clarified the lease restrictions.[146] No provision in the Supplemental Agreement addressed the Muscogee Creek borders beyond recognizing them.[147]

Shortly after Congress reauthorized the continued existence of the Creek government on March 2, 1906—two days before statutory dissolution—it enacted the Five Tribes Act, which recognized the indefinite existence of the Creek Government while further restricting its power.[148] Most importantly, the new restrictions gave the Secretary of the Interior the power "to sell unallotted lands not otherwise provided for and deposit the proceeds into the Treasury for the Tribe's benefit."[149] The Tenth Circuit agreed that this Act also did not disestablish the Creek Reservation.[150]

Lastly, the Tenth Circuit considered the Oklahoma Enabling Act. The Enabling Act "granted permission to the inhabitants of both the Territory of Oklahoma and the Indian Territory to adopt a constitution and seek admittance into the Union as the State of Oklahoma."[151] In the Enabling Act, Congress explicitly prohibited the state constitution from in any way "limit[ing] or impair[ing] the rights of person or property pertaining to the Indians of said Territories" or to give the power to do so to the United States.[152] The Tenth Circuit, reiterating its analysis from *Osage Nation*,

142. *Id.* at 944.
143. *Id.* (citing Original Allotment Agreement ¶¶ 37-38, 31 Stat. at 871).
144. *Id.*
145. *Id.* at 944-45.
146. *Id.* at 945 (citing Supplemental Allotment Agreement, ch. 1323, ¶ 16, 32 Stat. 500, 503 (1902)).
147. *Id.*
148. *Id.* at 945-46.
149. *Id.* at 946 (citing Five Tribes Act, ch. 1876, § 16, 34 Stat. 137, 143 (1906)).
150. *Id.* at 947.
151. *Id.* (citing Oklahoma Enabling Act, ch. 3335, § 1, 34 Stat. 267, 267-68 (1906)).
152. *Id.*

once again found that the Oklahoma Enabling Act did not "contain [any] express termination language.[153]

After analyzing all eight statutes the State proffered to satisfy the first *Solem* factor, the Tenth Circuit provided three reasons why these statutes failed to disestablish the Muscogee Creek Reservation.[154] First, "the statutes lack[ed] any of the textual 'hallmarks' demonstrating congressional intent to disestablish, and no other language show[ed] Congress altered the Creek Reservation's boundaries."[155] Second, "specific statutory language—'[t]he most probative evidence of congressional intent'—shows Congress continued to recognize the Reservation's borders."[156] Lastly, the Tenth Circuit reasoned that "the State's reliance on the statutes' reforms of title and governance arrangements within the Reservation [was] unavailing because these changes did not disestablish the Reservation."[157]

The absence of any "hallmark" language of intended disestablishment in all of these statutes is the strongest evidence against disestablishment. Before listing numerous examples, the Tenth Circuit reiterated that "[t]he absence of such language is notable because Congress is fully capable of stating its intention to disestablish or diminish a reservation."[158] Further, the court noted that Congress went so far as to clearly delineate the boundaries of the Muscogee Creek Nation Reservation in several of the Acts cited by the State of Oklahoma.[159] While no magic phrase is required to prove congressional intent to diminish, the court found no statutory language, "whatever it may be," that satisfactorily established an express congressional intent to diminish the Muscogee Creek Nation Reservation.[160]

The Tenth Circuit pointed out that not only was there a lack of express textual language, but there was evidence of congressional *recognition* of the Muscogee Creek Reservation. Citing the Original Allotment Agreement's reservation of land for tribal purposes, the court recognized that "*Solem* explained that retention of lands for tribal purposes 'strongly suggests' continued reservation status."[161] Additionally, the absence of a "sum-certain

153. *Id.* at 948 (quoting Osage Nation v. Irby, 597 F.3d 1117, 1124 (10th Cir. 2010)).
154. *Id.* at 948.
155. *Id.*
156. *Id.* (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)) (alteration in original) (internal citation omitted).
157. *Id.*
158. *Id.* at 948-49.
159. *Id.* at 949-50.
160. *Id.* at 951 (quoting Wyoming v. EPA, 849 F.3d 861, 869 (10th Cir. 2017)).
161. *Id.*

payment to the Creek Nation for all—or even a portion of—its land" further supports the continued existence of the Muscogee Creek Nation Reservation.[162]

Lastly, the Tenth Circuit was not persuaded by the State of Oklahoma's argument that the title and governance edicts found in the congressional acts support disestablishment. The main reason the court found those arguments unpersuasive was because those questions, as addressed in the congressional acts cited by the State of Oklahoma, had nothing to do with the boundaries of the Muscogee Creek Nation Reservation.[163] Further, the Tenth Circuit recognized that "'the Supreme Court has required that specific congressional intent to diminish *boundaries* . . . be clearly established'" in the congressional acts.[164]

2. The Second Solem *Factor*

When examining the contemporaneous historical evidence, the Tenth Circuit distinguished its finding in *Osage Nation* from the facts of *Murphy*. The court acknowledged that even though it found disestablishment in *Osage Nation* based on the second factor of *Solem*, it did so because "the legislative history and the negotiation process [made] clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act."[165] Conversely, the court found no such explicit evidence in *Murphy*.[166] Further, the Tenth Circuit clarified that even if the State had proffered second factor evidence to support its argument under the first factor of the *Solem* test, the court would not have ruled in favor of disestablishment.[167] Since the first *Solem* factor is dispositive, the court held that

> [b]ecause no clear textual evidence shows Congress disestablished the Creek Reservation at step one, it is enough for us to say at step two that the "historical evidence in no way *unequivocally* reveal[s] a widely held, contemporaneous

162. *Id.*

163. *Id.*

164. *Id.* at 952 (quoting Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1394-95 (10th Cir. 1990)) (internal quotations omitted).

165. *Id.* at 954 (quoting Osage Nation v. Irby, 597 F.3d 1117, 1125 (10th Cir. 2010)) (internal quotations omitted) (alteration in original).

166. *Id.*

167. *Id.* at 954 n.64.

> understanding that the affected reservation would shrink as a result of the proposed legislation."[168]

3. The Third Solem *Factor*

The final factor of the *Solem* test considers evidence of federal and local treatment of the land, as well as the demographic history of the land since the point of alleged diminishment or disestablishment, with specific emphasis on evidence immediately following the enactment of the relevant laws.[169] Particular attention is paid to how Congress and the Bureau of Indian Affairs treated the land in question.[170] Importantly, *Solem* makes clear that evidence from this factor is the least persuasive, allowing the Tenth Circuit to follow the Supreme Court's trend of "never [having] relied solely on this third consideration to find diminishment."[171] In relation to Oklahoma's past assertions of jurisdiction in the Muscogee Creek Nation, the Tenth Circuit quoted its analysis in *Indian Country, U.S.A.*, reasserting that despite Oklahoma's encroachment on Creek jurisdiction,

> "the past failure to challenge Oklahoma's jurisdiction over Creek Nation lands, or to treat them as reservation lands, [did] not divest the federal government of its exclusive authority over relations with the Creek Nation or negate Congress' intent to protect Creek tribal lands and Creek governance with respect to those lands."[172]

F. Conclusion

The Tenth Circuit held that because the *Solem* analysis failed to prove diminishment or disestablishment of the Muscogee Creek Nation Reservation, the crime occurred on an § 1151(a) reservation.[173] Subsequently, Oklahoma lacked jurisdiction to prosecute Mr. Murphy, an Indian accused of committing a felony in Indian Country, because the Major Crimes Act grants exclusive jurisdiction of his case to the federal government.[174] As a result, "[t]he decision whether to prosecute Mr.

168. *Id.* at 959 (quoting Nebraska v. Parker, 136 S. Ct. 1072, 1080 (2016)) (second alteration in original).

169. *Id.* at 960.

170. *Id.* at 960-62.

171. *Id.* at 960 (quoting *Parker*, 136 S. Ct. at 1081) (internal quotations omitted).

172. *Id.* at 964 (quoting Indian Country, U.S.A. v. Oklahoma, 829 F.2d 967, 974 (10th Cir. 1987)).

173. *Id.* at 966.

174. *Id.* (citing 18 U.S.C. § 1153(a) (2012)).

Murphy in federal court rests with the United States" because his "state conviction and death sentence are . . . invalid."[175]

IV. Impacts of the Murphy Decision on Criminal Jurisdiction

This section examines how the *Murphy* decision will impact the lives of both Indian and non-Indian residents of the Muscogee Creek Reservation if *Murphy* remains the law. The jurisdictional areas addressed generally are: criminal, civil regulatory, and civil adjudicatory. Not every jurisdictional statute or sub-area of jurisdiction is addressed here. This Comment is meant to serve as an overview of the possible impacts on jurisdiction in the areas included in the Muscogee Creek Nation Reservation and is not exhaustive. This cursory introduction, however, illuminates the minimal impacts of the *Murphy* decision on the day-to-day life of Muscogee Creek Nation residents within the 1866 boundaries of the Muscogee Creek Nation as § 1151(a) Indian Country.

A. *Exclusive Federal Jurisdiction over Enumerated Felonies with an Indian Defendant: Major Crimes Act – 18 U.S.C. § 1153*

As a result of the *Murphy* decision, the federal government will have exclusive jurisdiction over enumerated felonies involving an Indian defendant. The statute giving exclusive jurisdiction over certain felonies perpetrated by an Indian is 18 U.S.C. § 1153, commonly known as the Major Crimes Act. The relevant section of the current statute is as follows:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [sexual abuse], incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.[176]

Originally enacted in 1885, the section that became the Major Crimes Act was the final provision of the Indian Department appropriations bill for

175. *Id.*
176. 18 U.S.C. § 1153 (Supp. II 2014).

that year.[177] Congress passed the Major Crimes Act in direct response to *Ex parte Crow Dog*[178] to give the federal judiciary complete control over the felony prosecution of Indians committing crimes in Indian Country.[179] In *Crow Dog*, the Supreme Court ruled that federal law had no role in prosecuting Indian-on-Indian crimes, and that the remedies demanded by the processes of the tribe of the wronged party were sufficient.[180]

Today, the Major Crimes Act remains one of the cardinal statutes for determining proper criminal jurisdiction in cases involving Native American defendants in Indian Country. If the locus of the crime is in Indian Country, the defendant is an enrolled member of a federally-recognized tribe, and the alleged crime is one of the enumerated felonies in § 1153, then federal courts have jurisdiction exclusive of the states. The Major Crimes Act is the statute that divested the State of Oklahoma of jurisdiction in *Murphy*.[181]

One unanswered question is whether the Major Crimes Act extinguishes tribal jurisdiction over these enumerated felonies.[182] This question is further complicated by the Tribal Law and Order Act of 2010, which amended the Indian Civil Rights Act to allow tribes to expand sentencing power from less than one year to up to three years per offense, and for a total of nine years per criminal proceeding.[183] As a result, tribes may elect to have felony sentencing power so long as the defendant is a person who "(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) is being prosecuted for an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States."[184] Tribes must also "[provide] indigent defense counsel and a law-trained and bar-licensed judge, make publicly available their laws and rules, and try the defendant in a court of record."[185] The Muscogee Creek Nation codified the sentencing expansion in 2010.[186]

177. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.
178. 109 U.S. 556 (1883).
179. COHEN, *supra* note 5, § 9.02[2][a], at 749-50.
180. *Crow Dog*, 109 U.S. at 406-07.
181. Murphy v. Royal, 875 F.3d 896, 966 (10th Cir. 2017).
182. COHEN, *supra* note 5, § 9.04, at 767-69.
183. 25 U.S.C. § 1302 (2012).
184. *Id.* § 1302(b).
185. COHEN, *supra* note 5, § 9.09, at 779.
186. MUSCOGEE CREEK NATION CODE § 10-210 (2010).

B. Almost Exclusive Federal Jurisdiction over Non-Indian Defendants and Concurrent Federal/Tribal Jurisdiction over Indian Defendants Against Non-Indian Plaintiffs: Indian Country Crimes Act

Because of *Murphy*, the Muscogee Creek Nation Tribal Court will now have concurrent jurisdiction over all unenumerated offenses—those not under the Major Crimes Act—involving Indian defendants against non-Indian plaintiffs on the reservation. The Indian Country Crimes Act, 18 U.S.C. § 1152, applies the "general laws of the United States" to all § 1151 Indian Country, minus three exceptions.[187] The first exception is that the Indian Country Crimes Act shall not apply to crimes "committed by one Indian against the person or property of another Indian."[188] The second exception is that the Indian Country Crimes Act does not apply to Indians already punished by their tribe for the same offense.[189] The final exception is that the Indian Country Crimes Act does not apply if the tribe reserved jurisdiction by treaty.[190]

As a result, all crimes committed by or against an Indian in which one party is a non-Indian can be prosecuted by the federal government under this statute, "[e]xcept as otherwise expressly provided by law."[191] Within § 1151 Indian Country, the only other sovereigns with the power to prosecute criminal cases involving one or more Indian parties are tribes, meaning tribes may have concurrent jurisdiction for some types of cases. But, because of *Oliphant v. Suquamish Indian Tribe*, tribal courts do not have jurisdiction over non-Indians for most crimes.[192] Subsequently, the Indian Country Crimes Act essentially grants exclusive jurisdiction to the federal government for most offenses committed in § 1151 Indian Country involving at least one non-Indian party. Additionally, § 1152 also provides the federal government with concurrent jurisdiction alongside tribal governments over crimes against non-Indians by an Indian defendant.[193]

At present, the only exception to the *Oliphant* decision that expands tribal concurrent jurisdiction over non-Indian defendants is the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013").[194] Under VAWA 2013, tribes may now elect to prosecute non-Indian perpetrators for

187. 18 U.S.C. § 1152 (2012).
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *See* 435 U.S. 191 (1978).
193. 18 U.S.C. § 1152 (2012).
194. *See specifically* 25 U.S.C.A. § 1304 (Westlaw through Pub. L. No. 115-93).

domestic violence, dating violence, or criminal violations of protective orders so long as the defendant "[has] ties to the Indian tribe."[195] In order to have sufficient ties to a tribe, the defendant must:

> (i) reside[] in the Indian country of the participating tribe;
>
> (ii) [be] employed in the Indian country of the participating tribe; or
>
> (iii) [be] a spouse, intimate partner, or dating partner of—
>
> (I) a member of the participating tribe; or
>
> (II) an Indian who resides in the Indian country of the participating tribe.[196]

Supporting increased comity between the federal and tribal courts on this issue, the Supreme Court has also held that tribal court convictions can be used to establish habitual offender status in federal court without violating the Sixth Amendment.[197] The Muscogee Creek Nation adopted the VAWA 2013 expansion in 2016.[198]

C. Exclusive Jurisdiction for Indian on Indian Unenumerated Felonies and Misdemeanors

As first recognized under *Talton v. Mayes*, tribes have the inherent sovereign power to prosecute tribal offenders.[199] Nevertheless, after *Duro v. Reina*, where the Court held that tribes lacked the "inherent or sovereign authority to prosecute . . . 'nonmember Indian[s],'"[200] Congress amended 25 U.S.C. § 1301 to delineate that tribes have the "inherent power . . . , hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[201] This legislation is known colloquially as "the *Duro*-fix."[202] Thus, since the Court in *Lara* held that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal

195. *Id.* § 1304(b)(4)(B), (c).
196. *Id.* § 1304(b)(4)(B).
197. *See* United States v. Bryant, 136 S. Ct. 1954 (2016).
198. MUSCOGEE CREEK NATION CODE ANN. § 16-038 (2016).
199. 163 U.S. 376 (1896); *see also* United States v. Lara, 541 U.S. 193 (2004); United States v. Wheeler, 435 U.S. 313 (1978).
200. *Lara*, 541 U.S. at 197 (emphasis omitted) (citing Duro v. Reina, 495 U.S. 676, 682 (1990)).
201. 25 U.S.C. § 1301(2) (2012).
202. COHEN, *supra* note 5, § 9.04, at 766.

jurisdiction,"[203] tribes once again have full criminal jurisdiction for crimes by Indians against another Indian, so long as tribal jurisdiction is not precluded by the Major Crimes Act. Because the Muscogee Creek Nation already properly had jurisdiction over this type of crime, *Murphy* will only expand the tribe's jurisdictional area.

D. Exclusive Jurisdiction over Non-Indian on Non-Indian Crimes in Indian Country

Due to the line of cases following *United States v. McBratney*, states have exclusive jurisdiction over crimes in which all parties are non-Indians.[204] Beginning with *McBratney*, the Supreme Court held that neither tribes nor the federal government have an interest in crimes involving only non-Indians that occur in Indian Country.[205] The latter two cases, *Ray* and *Draper*, merely extend the premise of *McBratney* to all states, regardless of the terms of their territorial governmental structure or enabling act.[206] *Murphy* will not change this jurisdiction whatsoever.

E. Criminal Jurisdiction and Murphy

If *Murphy* is upheld by the United States Supreme Court, the biggest impact to criminal jurisdiction will be that all cases involving an Indian victim or defendant will be heard in either tribal or federal court. This means that non-Indians will likely be tried in federal court if they commit a crime in Indian Country against an Indian. However, no crimes between solely non-Indians will be heard in tribal court.

As a result of increased prosecutorial responsibility, the Muscogee Creek Nation will have to absorb an increase in criminal prosecutions, as will the Eastern District of Oklahoma. Because the Muscogee Creek Nation has taken the VAWA 2013 special criminal jurisdiction expansion, the Tribe will be able to prosecute some non-Indians for domestic violence, dating violence, or for criminal violations of protective orders. By adopting the Tribal Law and Order Act of 2010 sentencing expansion, the Muscogee Creek Nation will be able to give short felony sentences, as well.

For law enforcement agencies, expansion of already existing cross-deputization agreements between local, state, and Muscogee Creek Nation law enforcement will ensure efficient policing continues on the Muscogee

203. *Lara*, 541 U.S. at 200.

204. *See generally* United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

205. *McBratney*, 104 U.S. at 621-22, 624.

206. *Draper*, 164 U.S. at 241-42, 246-47; *Ray*, 326 U.S. at 499.

Creek Nation Reservation. Cross-deputization agreements allow participating law enforcement agencies to arrest and transfer individuals who could be under the jurisdiction of any signatory agency without the fear of constitutional rights violations.[207] As of January 2018, the Muscogee Creek Nation already had cross-deputization agreements with several municipal, county, state, tribal, and federal law enforcement agencies, including the Bureau of Indian Affairs Office of Law Enforcement Services and Security (BIA OLESS),[208] Muskogee County,[209] and the City of Tulsa,[210] to name a few.[211]

Through cross-deputization agreements and increased inter-agency cooperation, there is a reasonable likelihood that state policing will suffer little to no negative impact, even in densely-populated areas like Tulsa. This conclusion is supported by evidence from cross-deputization agreements that are already in operation.[212]

V. Impacts on Civil Regulatory Jurisdiction

A. General Tribal Civil Regulatory Jurisdiction

First recognized in *Worcester v. Georgia*, tribes have inherent sovereign power to legislate and adjudicate civil conduct over not only their own members, but, unless otherwise limited by the federal government, also nonmember Indians and non-Indians who enter their jurisdictions.[213] Federal restrictions on Indian civil jurisdiction most commonly arise out of

207. *See generally* COHEN, *supra* note 5, § 6.05, at 588-94.

208. Muscogee Creek Nation Tribal Resolution 12-065 (May 19, 2012), https://www.sos.ok.gov/documents/filelog/89678.pdf.

209. Intergovernmental Cross-Deputization Agreement Between the United States, the Muscogee (Creek) Nation and the County of Muskogee (Apr. 15, 2002), https://www.sos.ok.gov/documents/filelog/57021.pdf (addendum).

210. Intergovernmental Cross-Deputization Agreement Between the United States, the Muscogee (Creek) Nation and the City of Tulsa (Jan. 18, 2006), https://www.sos.ok.gov/documents/filelog/63941.pdf.

211. Some compacts may have lapsed or changed by the time of publication.

212. Nicole Marshall, *Common Ground Found by Officers*, TULSA WORLD (Dec. 12, 2010), http://www.tulsaworld.com/news/local/common-ground-found-by-officers/article_72938327-38e9-580f-9ebc-84aaa5a6782e.html; D.E. Smoot, *County and Creek Law Enforcers Approve Agreement*, MUSKOGEE PHOENIX (Jun. 11, 2017), http://www.muskogeephoenix.com/news/county-and-creek-law-enforcers-approve-agreement/article_4d5539fe-69ca-586b-9411-a1a34266a7be.html.

213. 31 U.S. (6 Pet.) 515 (1832); COHEN, *supra* note 5, § 4.01[2][c], [f], at 216-18, 222; *id.* § 4.02[1], at 222-23; *id.* § 4.02[3], at 226-42; *see also* Williams v. Lee, 358 U.S. 217 (1959).

statutory or treaty abrogation.[214] Within the last forty years, the Supreme Court began to limit tribal sovereign authority pertaining to civil jurisdiction, primarily through the landmark case *Montana v. United States*.[215]

In *Montana*, the Supreme Court held that absent one of two exceptions, tribes do not have the authority to regulate non-Indian conduct on non-Indian-owned fee land within reservations.[216] These two exceptions are known as the *Montana 1* and *Montana 2* exceptions. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[217] Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[218] These two exceptions are the primary means by which Indian civil legislative authority applies to non-Indians on non-Indian-owned fee land in § 1151(a) Indian Country, and would be the only means by which non-Indians would feel an increase in Muscogee Creek Nation authority if *Murphy* is upheld. Otherwise, the Muscogee Creek Nation already has inherent regulatory authority over restricted or trust lands in its reservation. Therefore, the only expansion would be to non-Indian owned land, which is restricted by the *Montana* line of cases.

The cases following *Montana*, including *Atkinson Trading Co. v. Shirley*[219] and *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[220] indicate a preference for further limiting the *Montana 2* exception. *Brendale* limited the Yakima's authority to regulate zoning in areas of its reservation that the Court considered "open" or heavily populated by non-Indians while allowing tribal regulation in "closed" areas that had retained their "Indian character."[221] In *Atkinson Trading Co.,* the Supreme Court held that non-Indian owned fee lands included in an addition to the Diné (Navajo) reservation after their purchase by non-

214. COHEN, *supra* note 5, § 4.02[1]-[2], at 222-26.
215. 450 U.S. 544 (1981).
216. *Id.* at 565-66.
217. *Id.* at 565.
218. *Id.* at 566.
219. 532 U.S. 645 (2001).
220. 492 U.S. 408 (1989).
221. *Id.* at 437.

Indians were not under the civil regulatory jurisdiction of the tribe.[222] As a result, increases in regulatory authority granted to the Muscogee Creek Nation over non-Indian-owned fee land by the recognition of its reservation will typically be limited to the authority allowed by the *Montana* exceptions.

B. Environmental Regulation and Murphy

While the State of Oklahoma claims in its Petition for Writ of Certiorari that the Tenth Circuit's decision "open[s] up a Pandora's Box of questions regarding the State's regulatory power," several of these jurisdictional questions are simple matters of statutory application.[223] One of the questions proffered by the State was whether the State of Oklahoma will retain enforcement authority under Environmental Protection Agency ("EPA") statutes.[224] This question, however, has already been answered by Congress in favor of the State, and the Tenth Circuit's decision in *Murphy* does not impact the enforcement of the governing statute.

After Congress passed section 10211 as a rider on a transportation bill, the EPA is required to grant the State of Oklahoma enforcement authority over tribal lands if the State has an approved regulatory program for that statute and if the State requests such authority.[225] Further, Oklahoma tribes that qualify to participate in the EPA's Tribes As States ("TAS") program cannot do so without the State of Oklahoma's permission.[226] If the State does approve the tribe's application for TAS status, the tribe seeking such authority must also agree to enter into an environmental regulation compact agreement with the State.[227]

As a result, there are no circumstances in which the State of Oklahoma would lose this type of regulatory authority to the EPA without a clear act of Congress or the elimination of section 10211. Congress has expressly abrogated the rights of Oklahoma tribes to pursue TAS status without state consent and without any conditional language pertaining to the type of Indian Country the tribe possessed. Therefore, the type of Indian Country

222. 532 U.S. at 647.

223. Petition for Writ of Certiorari at 19, Royal v. Murphy, No. 17-1107 (U.S. Feb. 6, 2018), 2018 WL 776368.

224. *Id.*

225. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 10211, 119 Stat. 1144, 1937 (2005).

226. *Id.*

227. *Id.*

possessed by the Muscogee Creek Nation has no impact on Oklahoma's EPA statutory enforcement authority.

VI. Impacts on Civil Adjudicatory Jurisdiction

As discussed previously, Indian tribes have the inherent authority to regulate and adjudicate civil matters within their lands so long as that power has not been limited or divested.[228] On the reservation, the Muscogee Creek Nation will have exclusive civil adjudicatory jurisdiction. *Williams v. Lee* is the case that controls for conflicts in which an Indian defendant is sued by a non-Indian over a civil cause of action arising in Indian Country.[229] *Williams*, a civil jurisdiction case involving a licensed Indian trader's dispute with an individual tribal member on the Navajo reservation, set the foundational civil law standard that "absent [a] governing [a]ct[] of Congress, the question has always been whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[230] *Williams* sets the most liberal standard for determining whether tribal civil jurisdiction is proper because state jurisdiction over transactions on the reservation between Indians and non-Indians would impede tribal self-governance.[231] Subsequently, the Court generally recognizes that a tribe has inherent jurisdiction over transactions between members and non-members in its Indian Country.[232]

Tribal civil adjudicatory authority is, however, restricted. After *Strate v. A-1 Contractors*, the *Montana* test also applies to determine whether tribal civil adjudicatory jurisdiction exists for incidents arising from non-Indian conduct on non-Indian-owned fee land.[233] In *Strate*, the Court held that the right-of-way for the highway that ran through the reservation was not under tribal governance for purposes of civil adjudicatory jurisdiction.[234] The Court reasoned that the Tribe did not have a valid adjudicatory concern, "even though careless driving on a reservation highway threatens the health and safety of tribal members"; therefore, state jurisdiction sufficed.[235]

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228. COHEN, *supra* note 5, § 4.01[2][c], [f], at 216-18, 222; *id.* § 4.02[1], at 222-23; *id.* § 4.02[3], at 226-42.
229. 358 U.S. 217 (1959).
230. *Id.* at 219-20.
231. *Id.*
232. COHEN, *supra* note 5, § 6.01[1], at 489.
233. 520 U.S. 438 (1997).
234. *Id.* at 453.
235. COHEN, *supra* note 5, § 4.02[3][c], at 236.

Another important outcome of *Strate* is an additional implicit divestiture restriction on tribal civil adjudicatory jurisdiction arising from the *Montana* test. The Court held that "[a]s to nonmembers, . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[236] Subsequently, tribes are only able to adjudicate disputes over non-Indians that they also have regulatory authority over, unless an act of Congress has expanded their authority.

After *Strate*, civil conflicts exclusively between non-Indians will generally not fall under Muscogee Creek Nation jurisdiction as long as the locus of the conflict occurs on non-Indian-owned land, or if the non-Indian party has not consented to tribal jurisdiction. This outcome is supported by the result in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, in which the Supreme Court held that under the *Montana* test, tribes did not have jurisdiction over the on-reservation sale of non-Indian-owned fee land between non-Indian parties.[237] Thus, the expansion of Muscogee Creek Nation tribal jurisdiction over civil adjudicatory disputes will be limited to instances in which the non-tribal member has consented to jurisdiction, situations that trigger a *Montana* exception, or instances when federal law mandates tribal jurisdiction.

A. Civil Adjudicatory Jurisdiction and Murphy

Civil adjudicatory jurisdiction will be the area of the greatest tribal jurisdictional expansion if *Murphy* is upheld because the *Montana 1* exception governs consensual commercial relationships between tribes or tribal members and non-members. Because of *Strate*, civil adjudicatory jurisdiction over civil suits involving only non-members arising from incidents on non-member-owned land will not fall under tribal jurisdiction. The Muscogee Creek Nation, however, will have jurisdiction over potentially all commercial transactions between non-Indians and Indians on the reservation.

Civil adjudicatory jurisdiction will also expand if *Murphy* is upheld because of the changes to Indian Child Welfare Act jurisdiction that occurred when the Muscogee Creek Nation was recognized as a reservation. Per the Indian Child Welfare Act ("ICWA"), Muscogee Creek Nation Tribal Court is now the court of original jurisdiction for all ICWA claims arising on the reservation per § 1911.[238] As a result, all child welfare

236. *Strate*, 520 U.S. at 453.
237. 554 U.S. 316, 330 (2008).
238. 25 U.S.C. § 1911(a) (2012).

cases involving Indian children living within the boundaries of the Muscogee Creek Nation will be heard in Muscogee Creek Nation Tribal Court unless existing federal law places jurisdiction with the state.[239]

B. Federal Question and Diversity Jurisdiction: National Farmers Union Insurance Co. v. Crow Tribe & Iowa Mutual Insurance Co. v. LaPlante

Non-Indian defendants in the Muscogee Creek Nation Reservation who wish to contest the validity of tribal jurisdiction in a civil adjudicatory case will most likely be subject to the tribal exhaustion doctrine.[240] *National Farmers Union Insurance Co. v. Crow Tribe*[241] is the governing case for determining whether a civil case is properly before a tribal court. In *National Farmers Union,* the Court declared that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331."[242] Nevertheless, even though federal courts may adjudicate this jurisdictional question, *National Farmers Union* requires that non-Indian defendants must almost always first exhaust tribal remedies before getting into federal court on federal question jurisdiction.[243] The tribal exhaustion doctrine does not apply to bad faith assertions of jurisdiction, instances where there is clearly no tribal jurisdiction, or where it is futile due to the "'lack of an adequate opportunity to challenge the court's jurisdiction.'"[244]

The Supreme Court extended the *National Farmers Union* analysis to diversity jurisdiction in *Iowa Mutual Insurance Co. v. LaPlante*.[245] Citing *National Farmers Union*, the Court required exhaustion of tribal remedies before allowing the question of tribal jurisdictional validity to be heard in federal district court.[246] Once again, its reasoning was that "proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors'" before assuming federal jurisdiction, in keeping with "[the] federal policy of promoting tribal self-government."[247]

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239. *Id.*

240. For other possible exceptions, see COHEN, *supra* note 5, § 7.04[3], at 630-36.

241. 471 U.S. 845 (1985).

242. *Id.* at 852.

243. *Id.* at 856-57.

244. COHEN, *supra* note 5, § 7.04[3], at 631 (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 n.21 (1985)).

245. 480 U.S. 9 (1987).

246. *Id.* at 16.

247. *Id.* at 16-17 (quoting *Nat'l Farmers Union*, 471 U.S. at 857).

The one limited instance in which state jurisdiction may be proper is characterized in *Nevada v. Hicks*.[248] After *Hicks*, tribes may not assert jurisdiction over civil adjudicatory claims against state law enforcement officers who enter tribal land to execute a search warrant on a tribal member suspected of violating state law while off the reservation.[249] This case could be limited entirely to its facts, as the Court emphasized that "*[s]elf*-government and *internal* relations are not directly at issue here, since the issue is whether the Tribe's law will apply, not to their own members, but to a narrow category of outsiders," including non-tribal law enforcement officers.[250]

The jurisdictional expansion caused by the *Murphy* decision will increase the possibility of appearing in tribal court, and, as a result, the possibility that a client will encounter the tribal court exhaustion doctrine. Still, even if it does apply to a given civil action, there are numerous exceptions to the doctrine, particularly through contractual language.[251] Thus, it is quite possible for a client to reach federal court on a jurisdictional question without having to exhaust tribal remedies.

VII. Conclusion

The Tenth Circuit's decision in *Murphy v. Royal* properly recognizes the Muscogee Creek Nation as an intact reservation with § 1151(a) jurisdiction based on governing Supreme Court jurisprudence. Recognizing the Muscogee Creek Nation Reservation as § 1151(a) jurisdiction primarily expands Muscogee Creek Nation jurisdiction over Indian residents of the Reservation while only automatically increasing its jurisdiction over non-Indians in limited circumstances, such as VAWA 2013 criminal cases and some civil regulatory capacities. Subsequently, non-Indian residents of the Muscogee Creek Nation will see minimal, if any, change in jurisdiction that impacts their day-to-day lives without their consent.

The Tenth Circuit denied *en banc* review of *Murphy* on November 9th, 2017.[252] Chief Judge Tymkovich issued a concurrence along with the denial, noting first that an "en banc court would necessarily reach the same result, since Supreme Court precedent precludes any other outcome."[253] As

248. 533 U.S. 353 (2001).
249. *Id.* at 364.
250. *Id.* at 371.
251. *See generally* COHEN, *supra* note 5, § 7.04[3], at 630-36.
252. Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017).
253. *Id.* at 966.

he plainly states, the primary purpose of his concurrence is to encourage Supreme Court review.[254] The State, on behalf of the warden, filed its petition for writ of certiorari on February 6, 2018.[255] The U.S. Supreme Court granted certiorari on May 21, 2018.

254. *Id.* at 966-68.
255. Petition for Writ of Certiorari, *supra* note 223.