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MURPHY V. ROYAL: CRIME AND PROCEDURE

Kevin Cartwright*

Introduction

A man was killed in McIntosh County, Oklahoma, in August of 1999, kicking off nearly two decades of incorrect or incomplete judicial decisions. In April of 2000, Muscogee Creek citizen Patrick Dwayne Murphy was convicted of capital murder for this killing and sentenced to death after a jury trial.¹ As of this writing, Murphy remains in the custody of the Oklahoma Department of Corrections.² In the intervening eighteen years, Murphy and his attorneys have continually appealed his conviction. He applied twice for post-conviction relief in state court, twice for writs of certiorari to the United States Supreme Court, and twice for habeas relief in federal district court.³ In his brushes with the courts, Murphy twice acted as an unwitting test case. Following the United States Supreme Court's landmark *Atkins v. Virginia* decision, the Oklahoma Court of Criminal Appeals ("OCCA") used Murphy's appeal for post-conviction relief to set forth the standard Oklahoma would apply to determine the mental capacity of defendants in capital cases. More recently, Murphy's second appeal in federal court led to the Tenth Circuit Court of Appeals decision *Murphy v. Royal*. This case reemphasized the federal courts' delineation of Indian reservation boundaries and applied that framework to the unique situation of Indian tribes in Oklahoma. The circuit panel held that only the federal government, rather than the State of Oklahoma, had jurisdiction to try Murphy for the murder.⁴ The Tenth Circuit then ordered the district court below to grant Murphy's request for habeas relief.⁵

The shortsightedness of *Murphy v. Royal* stems from the panel only considering jurisdiction while ignoring more substantive claims. The procedural posture leading to *Murphy v. Royal* is convoluted, but Judge Matheson summarized every step in his opinion for the court.⁶ The opinion

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1. *Murphy v. Royal* (*Royal I*), 866 F.3d 1164, 1173 (10th Cir. 2017).

2. Murphy's continued custody in the Oklahoma Department of Corrections can be verified via a name search at OKLA. DEP'T OF CORRECTIONS: OK OFFENDER, <https://okoffender.doc.ok.gov> (last visited Aug. 13, 2018).

3. *Royal I*, 866 F.3d at 1173–78.

4. *Id.* at 1233.

5. *Id.* at 1178 n.16.

6. *Id.* at 1173–78.

illustrates the court's understanding of the number of hours and tribunals previously invested in the proceedings. The federal district and circuit courts granted Murphy certificates of appealability—a prerequisite for federal circuit courts to exercise jurisdiction over an appeal—on eight different issues.⁷ The Tenth Circuit could have decided issues concerning

- prosecutorial jurisdiction;
- Oklahoma's treatment of Murphy's *Atkins* claim;
- the aggravating circumstances that contributed to a death sentence;
- the admissibility of victim-impact statements;
- jury instructions;
- procedural fumbling by the federal district court;
- ineffective assistance of counsel; and
- cumulative error.⁸

Yet the panel ruled solely on the issue of jurisdiction, bypassing the remaining issues entirely.⁹

The panel's disinterest in considering Murphy's *Atkins* claim is disappointing for many reasons. To begin, a decision from the Tenth Circuit regarding how Oklahoma tests for mental capacity of defendants in capital cases would be useful for the State and all defendants in future proceedings. Furthermore, the panel knew of Murphy's numerous appeals prior to 2017, several of which referenced *Atkins*. An *Atkins* ruling would therefore have general utility while addressing a near-perennial claim of the party at hand.

Finally, Murphy pinballed throughout the court system for eighteen years between his first conviction and *Murphy v. Royal*. His death sentence has neither been carried out nor commuted, and now the State of Oklahoma has taken its case to the Supreme Court.¹⁰ While Murphy's request of habeas has been granted, his ordeal is far from over. The Supreme Court could reverse and remand on the matter of jurisdiction, returning the case to the Tenth Circuit to weigh Murphy's other appeals. Given the panel's knowledge of the issue and the general principles of equity and judicial

7. *Id.* at 1178 n.16.

8. *Id.*

9. *Id.*

10. *See* *Royal v. Murphy*, 138 S. Ct. 2026 (2018).

efficiency, the Tenth Circuit should have considered Murphy's *Atkins* claim.

This Note will touch on the history and jurisdictional holding of the *Murphy v. Royal* decision and will then examine Murphy's *Atkins* claim and offer alternatives to Oklahoma's system. Part I will address pieces of legislation pertinent to the procedural posture of *Murphy v. Royal*. Part II will delve into the factual and procedural background that occurred from 1999 to 2017, which led to this case appearing before the Tenth Circuit. Part III will review the panel's analysis in reaching its conclusions regarding jurisdiction. Part IV will examine Oklahoma's approach to mental retardation and the death penalty post-*Atkins*. Part V will discuss the implications resulting from the *Murphy v. Royal* decision. Part VI will offer alternative criteria courts could rely on when determining an individual's eligibility for the death penalty upon raising an *Atkins* challenge.

I. Relevant Legislation

A. Major Crimes Act

In 1883, the United States Supreme Court held that "federal and territorial courts lacked jurisdiction to try an Indian for the murder of another Indian committed in Indian country."¹¹ Congress responded with the Major Crimes Act in 1885.¹² In its current form, the Act grants the federal government exclusive jurisdiction over murder and other enumerated crimes when perpetrated by a Native American within Indian Country.¹³ Later additions to the Act go on to delineate the extents of Indian Country, namely that the term means

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.¹⁴

11. *Royal I*, 866 F.3d at 1183 (quoting *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883)).

12. Act of Mar. 3, 1885, ch. 341, 23 Stat. 385.

13. 18 U.S.C. § 1153 (2018).

14. *Id.* § 1151.

The Major Crimes Act sets up the jurisdictional conflict resolved in *Murphy v. Royal* so many years later. A Native American man committed murder. If the murder occurred in Indian Country, the federal government had the sole authority to prosecute him for the crime. If the murder occurred outside of Indian Country, the State of Oklahoma had the authority to prosecute. Acting under the assumption that Murphy was not in Indian Country when he committed murder, Oklahoma prosecuted and convicted him. Murphy's jurisdictional appeal to the federal government basically alleged that Oklahoma held Murphy in custody inappropriately.

B. Antiterrorism and Effective Death Penalty Act

The Antiterrorism and Effective Death Penalty Act ("AEDPA"),¹⁵ enacted in 1996, resulted in sweeping changes to existing habeas corpus practice in the federal courts. The primary purpose of the law was twofold. First, the statute intended to provide a "comprehensive approach to fighting terrorism both at home and abroad."¹⁶ Second, the act intended to pare down the appeals process for capital convicts on death row.¹⁷ For any case arising out of state court, a federal judge first has to issue a certificate of appealability to allow a federal court of appeals to rule on the appeal's merits.¹⁸ A court can only grant the certificate if the "applicant has made a substantial showing of the denial of a constitutional right."¹⁹ Barriers are further cemented in the AEDPA by prohibiting federal district courts from issuing writs of habeas for claims arising in state court.²⁰ An exception to this bar exists if the state court violates or unreasonably applies federal law.²¹

AEDPA is relevant to the *Murphy* decision as it presented two hurdles the applicant needed to overcome before the panel could proceed to the merits of the appeal. As a threshold matter, Murphy needed to show with substantiality that he had been denied a constitutional right in his state court proceeding. To win on a habeas claim, Murphy additionally had to prove that Oklahoma violated or unreasonably applied federal law.

15. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.)

16. Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630, 630 (Apr. 24, 1996), 1996 WL 203049.

17. *Id.* at 631.

18. 28 U.S.C. § 2253(c)(1) (2018).

19. *Id.* § 2253(c)(2).

20. *Id.* § 2254(d).

21. *Id.* § 2254 (d)(1).

II. Factual and Procedural History

The facts surrounding the murder in *Murphy* point to jealousy over a perceived love triangle. In 1999, Patrick Dwayne Murphy resided with Patsy Jacobs.²² Ms. Jacobs previously lived with the victim, George Jacobs, took his last name, and had a child with him.²³ A few days prior to the events of August 28 of that year, Murphy and Ms. Jacobs argued about Mr. Jacobs, and Murphy stated that he would “get Jacobs and his family one by one.”²⁴

On August 28, Jacobs drank heavily with his cousin.²⁵ Around 9:30 that night, Murphy and Jacobs traveled as passengers in separate vehicles going in opposite directions down a rural road in McIntosh County, Oklahoma.²⁶ At the time, Jacobs was passed out in the back of his truck while his cousin drove.²⁷ The vehicle that Murphy was riding in turned around and followed the vehicle that Jacobs was in, ultimately forcing that vehicle to stop.²⁸ Murphy and two other individuals emerged from their vehicle, dragged Jacobs from the truck, and began beating Jacobs and his cousin.²⁹ Jacobs’s cousin was able to flee briefly into the woods surrounding the road.³⁰ Returning a few minutes later, Jacobs’s cousin found Jacobs “barely breathing.”³¹ Shortly before, Jacobs’s cousin witnessed Murphy throw a knife into the woods.³² Murphy then forced Jacobs’s cousin to leave with him and his accomplices.³³ A passerby happened upon the scene and left to phone the police.³⁴ Returning a few minutes later, he found Jacobs breathing shallowly and observed that his genitals had been cut off and his neck had been slashed.³⁵ Jacobs died from the resulting blood loss.³⁶ The

22. *Murphy v. State (Murphy I)*, 2002 OK CR 24, ¶ 2, 47 P.3d 876, 879.

23. *Id.*

24. *Id.*

25. *Id.* ¶ 3, 47 P.3d at 879.

26. *Id.* ¶ 4, 47 P.3d at 879.

27. *Id.* ¶ 3, 47 P.3d at 879.

28. *Id.* ¶ 5, 47 P.3d at 879.

29. *Id.* ¶¶ 5–6, 47 P.3d at 879–80.

30. *Id.* ¶ 7, 47 P.3d at 880.

31. *Id.* ¶ 9, 47 P.3d at 880.

32. *Id.* ¶ 8, 47 P.3d at 880.

33. *Id.* ¶ 10, 47 P.3d at 880.

34. *Id.* ¶ 9, 47 P.3d at 880.

35. *Id.*

36. *Id.* ¶¶ 9, 15, 47 P.3d at 880.

confrontation leading to Jacobs's death was corroborated by Murphy's own boasting to Jacobs's cousin and to multiple other witnesses.³⁷

Murphy and his associates then tried to harm George Jacobs's son but were prevented by the mother of one of Murphy's accomplices.³⁸ That night, Murphy admitted his actions to Patsy Jacobs.³⁹ In 2000, Murphy was convicted for the murder of Jacobs in a jury trial.⁴⁰ The jury then sentenced Murphy to death because it found the murder and castration to be particularly heinous.⁴¹ Additionally, the jury believed Murphy to be a continuing threat, given his threats and attempt to harm Jacobs's minor son and other family members.⁴²

The OCCA heard Murphy's direct appeal of his conviction in May of 2002. Murphy raised arguments relating to voir dire, as well as the trial and sentencing stages of his trial, all of which failed to convince the court to reverse or remand his conviction.⁴³ In September of 2002, the OCCA convened again and issued an opinion on Murphy's application for post-conviction relief. The OCCA rejected almost all of Murphy's arguments.⁴⁴ However, in accordance with the recent *Atkins v. Virginia* decision, the OCCA remanded to the district court.⁴⁵ The OCCA instructed the district court to hold an evidentiary hearing to determine whether Murphy could put before the jury the question of his mental capacity for purposes of resentencing.⁴⁶

Murphy became the test case in Oklahoma for capital sentencing when a defendant claims mental retardation. The OCCA found itself in the position of creating state guidelines while the legislature and governor attempted to compromise and enact legislation concerning the issue.⁴⁷ Murphy had been unable to bring this claim on direct appeal, which was decided prior to the *Atkins* ruling, despite Murphy's request that his application be held in abeyance pending a decision.⁴⁸ Murphy was uniquely positioned in a post-conviction application for relief at the time the OCCA established rules for

37. *Id.* ¶¶ 10-11, 47 P.3d at 880.

38. *Id.* ¶ 12, 47 P.3d at 880.

39. *Id.* ¶ 13, 47 P.3d at 880.

40. *Royal I*, 866 F.3d 1164, 1173 (10th Cir. 2017).

41. *Murphy I*, 2002 OK CR 24, ¶ 1, 47 P.3d at 879.

42. *Id.*

43. *Id.* ¶ 64, 47 P.3d at 888.

44. *Murphy v. State (Murphy II)*, 2002 OK CR 32, ¶¶ 37-38, 54 P.3d 556, 569-70.

45. *Id.* ¶¶ 37, 39, 54 P.3d at 569-70.

46. *Id.*

47. *Id.* ¶¶ 26-36, 54 P.3d at 566-69.

48. *See id.* ¶¶ 29-31, 54 P.3d at 567-68.

Oklahoma to evaluate *Atkins* claims.⁴⁹ For this reason, the majority of the OCCA in 2005 found it appropriate to put Murphy's *Atkins* claim in front of a jury.⁵⁰ This decision was in spite of the district court previously finding Murphy's evidence of mental retardation insufficient to warrant a trial and the OCCA affirming the district court's finding in 2003.⁵¹

Murphy's post-conviction application to the OCCA in 2005 was also the only time any form of jurisdictional question in Murphy's case was addressed in state court. Prior to the written opinion, the OCCA ordered an evidentiary hearing to determine whether Jacobs's murder occurred in Indian Country.⁵² Such a determination would preclude state jurisdiction in accordance with the Major Crimes Act.⁵³ Both parties largely argued whether the crime had occurred on an Indian allotment, per the wording in 18 U.S.C. § 1151(c).⁵⁴ With respect to this question, the panel of judges holding the evidentiary hearing determined that all surface rights and eleven-twelfths of the mineral rights at the site of the murder had passed on to non-Indian owners.⁵⁵ In its view, the remaining one-twelfth mineral interest retained by Indian owners was insufficient to preserve federal jurisdiction.⁵⁶

Whether the murder occurred on an Indian reservation or in a dependent Indian community, however, was largely left unaddressed in the hearing. The OCCA considered this oversight a harmless omission based on a reading of *Indian Country, U.S.A., Inc. v. Oklahoma*.⁵⁷ It is this reading the Tenth Circuit ultimately found contrary to *Solem v. Bartlett* and the test to determine the extent of Indian reservations.⁵⁸ This erroneous application by the OCCA opened the door for the *Murphy v. Royal* decision. Ultimately, the Tenth Circuit held the federal government had jurisdiction under 18 U.S.C. § 1151(a) to prosecute Murphy.⁵⁹ The location of the murder occurred within the limits of the Creek Nation Indian Reservation as

49. *Murphy v. State (Murphy III)*, 2005 OK CR 25, ¶ 56 n.21, 124 P.3d 1198, 1208 n.21.

50. *Id.*

51. *Id.*

52. *Id.* ¶¶ 11-19, 124 P.3d at 1201-02.

53. 18 U.S.C. § 1153 (2018).

54. *Murphy III*, 2005 OK CR 25, ¶¶ 10-11, 124 P.3d at 1200-01.

55. *Id.* ¶ 18, 124 P.3d at 1201-02.

56. *Id.* ¶¶ 34, 41-46, 124 P.3d at 1205, 1206-07.

57. *Id.* ¶¶ 50-52, 124 P.3d at 1207-08 (citing *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 975 (10th Cir. 1987)).

58. *Royal I*, 866 F.3d 1164, 1193-94 (10th Cir. 2017).

59. *Id.* at 1233.

established by the federal government in 1866.⁶⁰ And vitally, the limits of the reservation were never disestablished.⁶¹

Meanwhile, Murphy's *Atkins* appeal continued in state court. In 2009, a jury found that Murphy was not mentally retarded, but the verdict was thrown out and a new trial scheduled because of errors in the voir dire process.⁶² Before that new trial commenced, the district court granted Oklahoma's motion to apply Murphy's claim to the new statutory rubric finally enacted by the State in 2006.⁶³ One provision in the law provided that individuals could not pursue a mental retardation claim if they scored a 76 or greater on an intelligence quotient ("IQ") examination.⁶⁴ The effect of this statute in the instant case was that it barred Murphy from continuing his *Atkins* claim due to scores he had received on IQ tests taken during the trial process.⁶⁵ In the most recent *Murphy* decision reached by the OCCA in 2012, the court held that such a statutory provision did not create an ex post facto law or punishment.⁶⁶ The court denied Murphy another jury trial to determine whether he was mentally retarded, again based on his exclusionary test scores.⁶⁷

The OCCA is the court of last resort for criminal matters in the State of Oklahoma. Thus, the procedural history is peppered with collateral habeas appeals to the District Court for the Eastern District of Oklahoma and the Tenth Circuit, as well as writs of certiorari to the United States Supreme Court. The federal district court heard two appeals prior to the Tenth Circuit issuing its ruling on jurisdiction. *Murphy v. Sirmons* in 2007 only briefly acknowledged the jurisdictional issue.⁶⁸ *Murphy v. Trammell* in 2015 gave a deeper treatment to Murphy's *Atkins* claim, including more recent case law, like *Hall v. Florida*.⁶⁹ At all points in the proceedings, the named defendant was the warden of the state correctional facility where Murphy was incarcerated, but the Oklahoma Attorney General's office argued and wrote on the briefs in all cases.

60. *Id.*

61. *Id.*

62. *Murphy v. State (Murphy IV)*, 2012 OK CR 8, ¶ 3, 281 P.3d 1283, 1287.

63. *Id.* ¶ 4, 281 P.3d at 1287.

64. 21 OKLA. STAT. § 701.10b (2011).

65. *Murphy IV*, 2012 OK CR 8, ¶ 38, 281 P.3d at 1293.

66. *Id.* ¶ 46, 281 P.3d at 1294.

67. *Id.* ¶ 47, 281 P.3d at 1294.

68. *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007).

69. *Murphy v. Trammell*, No. CIV-12-191-RAW-KEW, 2015 WL 2094548 (E.D. Okla. May 5, 2015).

III. Murphy v. Royal

The jurisdictional issue addressed by the Tenth Circuit is nuanced, yet straightforward in comparison to the history of the case heretofore. The Major Crimes Act grants the federal government jurisdiction over murder and certain other criminal acts perpetrated by Native Americans while in Indian Country.⁷⁰ Murphy's membership in the Muscogee Creek Nation was undisputed, so the issue presented was whether the location of the murder constituted Indian country.⁷¹ The panel explained this notion succinctly, stating:

Congress has defined Indian country broadly to include three categories of areas: (a) Indian reservations, (b) dependent Indian communities, and (c) Indian allotments. *See* 18 U.S.C. § 1151. The reservation clause concerns us here. All land within the borders of an Indian reservation—regardless of whether the tribe, individual Indians, or non-Indians hold title to a given tract of land—is Indian country unless Congress has disestablished the reservation or diminished its borders.⁷²

Having established an Indian reservation, only Congress had the power to disestablish or diminish it.⁷³ The standard for determining whether Congress disestablished or diminished a reservation has been proffered by the Supreme Court, and proof of disestablishment or diminishment is difficult to show without direct evidence of congressional intent.⁷⁴ In short, Oklahoma failed to show with sufficient indirect evidence that Congress intended to diminish the Muscogee Creek Reservation.⁷⁵ Despite occurring on land that no longer belonged to tribal members, the location of the murder was within the previously established and unchanged boundaries of the reservation.⁷⁶ Therefore, state jurisdiction was improper.⁷⁷

To reach the jurisdictional question, the Tenth Circuit first had to determine if its jurisdiction was appropriate under the AEDPA.⁷⁸ Normally, AEDPA would prohibit the federal government from granting habeas relief

70. 18 U.S.C. § 1153 (2018).

71. *Royal I*, 866 F.3d 1164, 1175 (10th Cir. 2017).

72. *Id.* at 1171.

73. *Id.* at 1172.

74. *Id.* at 1185–88.

75. *Id.* at 1205.

76. *Id.* at 1233.

77. *Id.*

78. *Id.* at 1192.

over a state's adjudication of a claim on its merits.⁷⁹ But this prohibition is ineffective when the state's decision is contrary to any federal laws clearly established by the Supreme Court.⁸⁰

After dispensing with the question of whether the circuit panel could consider the appeal, the panel could then turn to the history of the Major Crimes Act.⁸¹ This piece of legislation informed the Supreme Court's understanding of Indian Country, including reservations. Notably, the Tenth Circuit cited to *United States v. Celestine* and *Solem v. Bartlett* for its understanding of the boundaries of an Indian reservation.⁸² These cases held that reservations were extant regardless of who owned particular parcels of land within the boundaries.⁸³

Finally, the circuit panel referenced Supreme Court decisions holding that Congress alone had the power to disestablish or diminish Indian reservations.⁸⁴ This section of the opinion was broken down further, noting that there existed a longstanding presumption against disestablishment and diminishment of reservations.⁸⁵ The court also addressed in particularity the fact that the act of allotment alone was insufficient evidence of Congress's intent to disestablish or diminish a reservation.⁸⁶

Much of the remainder of the opinion dealt with the current test from *Solem v. Bartlett* for determining whether Congress intended to disestablish or diminish an extant Indian reservation. The three-pronged *Solem* test requires courts to first analyze the primary text of any document purporting to disestablish or diminish a reservation.⁸⁷ Prongs two and three require the court to consider events concurrent in time with the passage of a statute, and to a lesser extent, those events occurring subsequent to the passage of a statute.⁸⁸ *Solem* is a balancing test, with each prong carrying decreasing evidentiary weight. Additionally, ambiguities that crop up during the analysis should be resolved in the tribe's favor, a rule which must be given wide latitude.⁸⁹

79. *Id.*

80. *Id.*

81. *Id.* at 1182-83.

82. *Id.* at 1183.

83. *Id.*

84. *Id.* at 1185-88.

85. *Id.* at 1185-86.

86. *Id.* at 1186.

87. *Id.* at 1187-88.

88. *Id.* at 1188.

89. *Id.*

After describing the prongs of the *Solem* test, the Tenth Circuit applied the law to the facts pertinent to Murphy and Oklahoma. *Solem* was the law of the land long before the murder of Jacobs, and decisions by the Oklahoma Court of Criminal Appeals were contrary to the *Solem* decision.⁹⁰ These state decisions, contrary to established federal law, granted the Tenth Circuit jurisdiction to review Murphy's appeal.⁹¹ The court inspected the text of several documents that the State pointed to as evidence that the Muscogee Creek reservation was diminished at least beyond the location of the murder.⁹² The panel concluded there was no textual language supporting the State's position and proceeded to the secondary and tertiary prongs of the *Solem* test.⁹³

Within the second prong of the *Solem* test, the Tenth Circuit found mixed evidence that Congress intended to disestablish or diminish the Creek reservation, falling short of explicit statutory language.⁹⁴ This mixed evidence, however, was insufficient to abrogate a reservation according to the test, which requires unequivocal evidence of understood congressional intent.⁹⁵ Subsequent history of the land also both supported and opposed diminishment or disestablishment of the reservation.⁹⁶ Such mixed evidence was again insufficient to overcome any presumption against diminishment or disestablishment.⁹⁷ Accordingly, the Tenth Circuit held that the Muscogee Creek Reservation encompassed the location of the murder, making solely federal jurisdiction appropriate for prosecutorial purposes.⁹⁸

IV. Atkins v. Virginia

In 2002, the Supreme Court declared it a violation of the Eighth Amendment to execute individuals with mental retardation, overturning its previous decision from 1989.⁹⁹ This ruling provided guidance derived from the American Association on Mental Retardation (now known as the

90. *Id.* at 1193–95.

91. *Id.* at 1196.

92. *Id.* at 1206–18.

93. *Id.* at 1218.

94. *Id.* at 1221.

95. *Id.*

96. *Id.* at 1227.

97. *Id.* at 1228.

98. *Id.* at 1233.

99. *Atkins v. Virginia*, 536 U.S. 304 (2002).

American Association on Intellectual and Developmental Disabilities).¹⁰⁰ However, the Court left it to states to implement the *Atkins* ruling within the framework of existing criminal justice systems.¹⁰¹ During the timeframe of Murphy's appeals, two consecutive sets of criteria existed in the State of Oklahoma for determining the merits of defendants' *Atkins* claims in capital cases.

The first system was established by the OCCA during Murphy's first appeal for post-conviction relief.¹⁰² The rubric was to be implemented only as a placeholder until the state legislature and governor enacted statutory provisions for such appeals.¹⁰³ In fact, the OCCA claimed it based its procedure primarily on legislation passed by both state houses but vetoed by the governor.¹⁰⁴ The framework established by the OCCA was superseded in 2006 when Oklahoma legislators passed a statute, but the statute was not applied to Murphy until after his jury trial in 2009.¹⁰⁵ Of note, the section provides that

in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.¹⁰⁶

Due to multiple IQ test scores above this threshold, Murphy could not further pursue his *Atkins* claim in state court.¹⁰⁷

Between the denial of Murphy's second post-conviction relief appeal before the OCCA in 2012 and the opinion in his second federal habeas appeal in 2015, the Supreme Court decided *Hall v. Florida*.¹⁰⁸ Florida, like Oklahoma and other states attempting to implement *Atkins*, established its own state procedures to vet *Atkins* claims in capital cases.¹⁰⁹ Unlike

100. See *Use of Mental Retardation on this Website*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, <http://aaid.org/intellectual-disability/historical-context> (last visited Mar. 2, 2018).

101. *Atkins*, 536 U.S. at 317.

102. *Murphy II*, 2002 OK CR 32, ¶ 30, 54 P.3d 556, 567.

103. *Id.*

104. *Id.* ¶¶ 29-31, 54 P.3d at 567-68.

105. *Murphy IV*, 2012 OK CR 8, ¶ 4, 281 P.3d 1283, 1287.

106. 21 OKLA. STAT. § 701.10b (2011).

107. *Murphy IV*, 2012 OK CR 8, ¶ 38, 281 P.3d at 1293.

108. *Hall v. Florida*, 134 S. Ct. 1986 (2014).

109. *Id.* at 1992.

Oklahoma, Florida set a threshold bar on such claims at an IQ of 71 or higher, construing the Court's advice in *Atkins* narrowly.¹¹⁰ Here, though, the Court rejected Florida's system as unconstitutional because it did not allow for any measurement errors common to all forms of IQ tests.¹¹¹ The Court, however, specifically declined to consider whether states that allowed for measurement error could constitutionally set some higher IQ ceiling on claims.¹¹² The federal district court in *Murphy v. Trammell* considered *Hall v. Florida* in its ruling, but did not disturb Oklahoma's statutory provision.¹¹³ It was well within the federal district court's power to have done so, however, and it was within this panel's discretion to review *Hall* as well as the district court's application of the law.

V. Implications

The ruling in *Murphy v. Royal* has potentially sweeping implications. Construing the extent of Indian reservations broadly has particularly wide consequences in Oklahoma. Much of the eastern half of the state once fit the definition of traditional Indian Country by way of reservation, if not dependent community or allotment. Other defendants in capital and felony cases have already begun filing motions challenging state jurisdiction.¹¹⁴ Certainly, this will be an argument that defense attorneys may raise for all future major crimes perpetrated by Native American individuals in Indian Country. This seems to be one of the concerns alluded to in the concurrence.¹¹⁵ Chief Judge Tymkovich implies that the Supreme Court might want to act specific to Oklahoma, given the unparalleled prevalence of Indian reservations in the state.¹¹⁶

Beyond the Major Crimes Act, many other pieces of federal and state legislation may need reconsideration if originally enacted with incorrect assumptions about the extent of reservations. One frequent hypothetical is whether the entirety of Eastern Oklahoma, including the Tulsa metropolitan

110. *Id.*

111. *Id.* at 2001.

112. *Id.* at 1996.

113. *Murphy v. Trammell*, No. CIV-12-191-RAW-KEW, 2015 WL 2094548 (E.D. Okla. May 5, 2015).

114. *See Kincaid v. Bear*, No. CIV-1117-F, 2017 WL 5560424 (W.D. Okla. Nov. 8, 2017), *dismissed on other grounds*.

115. *See Murphy v. Royal (Royal II)*, 875 F.3d 896, 966-68 (10th Cir. 2017).

116. *Id.*

area, will now be more accessible for the development of Indian gaming.¹¹⁷ Given the resources required to develop property for gaming, many tribes will no doubt be waiting to see how the Supreme Court rules on this jurisdictional issue.

Such implications for casinos and other developments obviously do not impact Murphy directly as a defendant, but his position is also worth considering. If the decision stands, Murphy is much less likely to be executed simply because the jurisdiction of criminal prosecution changed from state to federal. Even if the federal government chooses to prosecute, the government has only executed three individuals since reinstating the federal death penalty in 1988.¹¹⁸ If federal rather than Oklahoma criminal law applies, a federal court may be required to determine if Oklahoma's process for *Atkins* claims constitutionally applies in a federal case or if a new test must be crafted for *Atkins* appeals in federal cases.

If the decision is reversed, the Tenth Circuit most likely will again have jurisdiction to weigh Murphy's other issues on which it granted certificates of appealability. While the *Murphy v. Royal* decision is a victory for Murphy, it is not an exoneration. The decision speaks volumes to an issue of jurisdiction raised by Murphy in only one of his appeals. It speaks not at all to *Atkins*, which was raised in nearly all of Murphy's appeals, nor to any of the remaining issues in the case. Given the possibility that the Tenth Circuit will again consider *Murphy*, the panel was derelict in its duty to perform justice. Through their inaction, this panel may have extended the circuitous path to justice and finality by several more years.

VI. Best Atkins Practices

Bright line rules seem a poor choice when determining an individual's capacity on a spectrum. While many states may impose an IQ number above which a defendant cannot raise an *Atkins* claim, utilization of this practice in most jurisdictions should not be conflated with ideal practices. The risk is that two functionally identical individuals with very similar IQ scores could be treated differently by the justice system because their IQ scores fall on opposite sides of an arbitrary cutoff.

117. Curtis Killman, *Experts: Court Ruling Overturning Native American Man's Murder Conviction, Death Penalty Could Have Huge Implications*, TULSA WORLD (Aug. 8, 2017), http://www.tulsaworld.com/news/courts/experts-court-ruling-overturning-native-american-man-s-murder-conviction/article_dd761b1d-2d9c-5542-8a50-771f2f92de85.html.

118. *Federal Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/federal-death-penalty> (last visited Jan. 7, 2018).

Supposing that two standard deviations on either side of the average may account for ninety-five percent of a population, such a test will still exclude one out of every twenty people. By allowing cutoff IQ scores in determining mental capacity in capital cases, states may not be fully complying with *Atkins*. In effect, states are saying that some margin of error is acceptable. Necessarily some percentage of individuals lacking the mental capacity to be executed will be barred from presenting evidence of their capacity because they scored too high on a test.

A more constitutional metric would be to weigh IQ scores on a sliding scale, giving greater weight to lower scores. Individuals whose test scores indicate mental retardation would more easily be able to prove such capacity. However, individuals who scored in borderline ranges would not be prohibited from providing other evidence that suggests mental retardation.

Additional constitutional concerns could be raised about defendants with average or above average IQs who still might not understand the criminality of their actions in narrow or specific areas. Likewise, individuals who did not exhibit mental retardation in their development but suffered some mental handicap in adulthood are not permitted to raise *Atkins* claims in Oklahoma.¹¹⁹ Oklahoma requires that evidence of mental retardation be exhibited and documented in an individual's childhood or adolescence for an *Atkins* claim.¹²⁰ In Oklahoma, age, like IQ scores, becomes an arbitrary cutoff preventing individuals from pursuing *Atkins* claims simply because mental retardation was first documented at eighteen instead of seventeen.

The American Association on Intellectual and Developmental Disabilities sets criteria that courts may use to categorize and qualify mental retardation. However, the association is not asked to gauge the constitutionality of executing the mentally deficient or handicapped. A broader carve out would better serve the constitutional due process rights of individuals defending against capital cases. Ideally, IQ scores would be persuasive but not dispositive, and there would be no requirement for defendants to exhibit symptoms prior to adulthood. Perhaps such findings from the American Association on Intellectual and Developmental Disabilities should be compared to findings from the American Psychiatric Association or the American Medical Association. A system that incorporates mental retardation criteria into a larger general category of

119. 21 OKLA. STAT. § 701.10b (2011).

120. *Id.*

defendants claiming incompetence to stand trial or unsuitability for the death penalty would be best practice.

Conclusion

The issue of boundaries of Indian reservations for prosecutorial purposes is worthwhile for federal courts to rule on, but it need not have been the standalone issue in *Murphy v. Royal*. Circuit courts have minimal impact on cases prior to reaching the appellate level. Once a ruling has been issued, courts again have little determination over future outcomes on appeal. When and where courts do have jurisdiction, they should use those opportunities to work toward justice. In *Murphy v. Royal*, the Tenth Circuit panel was well-versed in the facts leading to the appeal. The judges knew the case had meandered for eighteen years already. While they might only guess as to what will occur next, Murphy and some named Oklahoma official may very well appear before the Tenth Circuit again in a few years. Knowing this, the panel issued the narrowest possible ruling, kicking all other cans down the road. In so doing, and with full knowledge that some court may later have to determine the merits of these other seven appealable issues, the panel has not done justice for Oklahoma, nor for Murphy, nor for the surviving family of George Jacobs.