No. 05-10787

In the Supreme Court of the United States

PATRICK DWAYNE MURPHY, PETITIONER

v.

STATE OF OKLAHOMA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the State of Oklahoma lacked jurisdiction to prosecute petitioner, a member of the Muscogee (Creek) Nation, for the murder of another member of the Creek Nation, on the ground that the crime was committed on a restricted Indian allotment within the meaning of 18 U.S.C. 1151(c).

2. Whether the State of Oklahoma lacked jurisdiction to prosecute petitioner on the ground that the crime was committed within the limits of an Indian reservation within the meaning of 18 U.S.C. 1151(a).

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. "Criminal jurisdiction over offenses committed in 'Indian country,' 18 U.S.C. § 1151, 'is governed by a complex patchwork of federal, state, and tribal law.'" *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (quoting *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990)). Unless Congress has provided otherwise, crimes committed by or against an Indian in "Indian country" are subject to federal jurisdiction under 18 U.S.C. 1152. Crimes committed by an Indian against the person or property of another Indian are expressly excepted from that provision, and "typically are subject to the jurisdiction of the concerned Indian Tribe, unless [the crimes] are among those enumerated in the Indian Major Crimes Act," 18 U.S.C.

1153(a). *Negonsott*, 507 U.S. at 102. Federal jurisdiction under the Major Crimes Act ordinarily is exclusive of state jurisdiction. *Id.* at 103.

Under Section 1151, "Indian country" 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.

18 U.S.C. 1151. Outside of Indian country, crimes committed by or against Indians are generally subject to state jurisdiction to the same extent as crimes committed by non-Indians.

2. a. Petitioner is a member of the Muscogee (Creek) Nation. In August 1999, he murdered George Jacobs, who was also a member of the Creek Nation. *Murphy* v. *State*, 47 P.3d 876, 879-880 (Okla. Crim. App. 2002), cert. denied, 538 U.S. 985 (2003). Petitioner was convicted by the State of Oklahoma of first-degree murder and was sentenced to death. His conviction was affirmed on appeal. Pet. App. 2a-3a.

b. In his second application for state post-conviction relief, petitioner argued for the first time that jurisdiction over his crime was exclusively federal under the Major Crimes Act because he and the victim were Indians and the crime took place in Indian country. Pet. App. 2a-3a. It is undisputed that petitioner would not be subject to a capital sentence in a federal prosecution. See 18 U.S.C. 3598; Pet. 6.

The Oklahoma Court of Criminal Appeals held that the crime did not occur in Indian country. Pet. App. 1a-12a. The court explained that the crime occurred on a public road and an adjacent ditch. *Id.* at 5a. Although title to the underlying

land was originally "conveyed to * * * Creek allottees who owned the property abutting the road," "all surface rights to the property have since been conveyed away to non-Indians," "the surface estate was separated from the mineral estate," and 11/12ths of the mineral estate have been conveyed to non-Indians. *Id.* at 7a, 9a.

The court rejected petitioner's argument that the restricted fractional mineral interest held by heirs of the original allottee sufficed to render the tract an "Indian allotment[]" for purposes of that category of Indian country, 18 U.S.C. 1151(c). The court explained that "[c]riminal jurisdiction has always been tied to geography, i.e., where the crime occurred," and "[c]ommon sense" dictates "that this issue has more to do with surface rights than underground minerals." Pet. App. 10a. The court noted that the non-Indian owners of the surface estate pay state taxes on the tract. *Id.* at 7a. The court also saw "little, if any, value in a system that would require a title search to the extent" necessary under petitioner's theory—"i.e., researching allotments, heirs of allottees, and fractional mineral interests, in order to determine whether criminal jurisdiction is state or federal." *Id.* at 10a (footnote omitted). The court thus concluded that Indian title to the allotment "has been extinguished for purposes of criminal jurisdiction over the crime in question." *Ibid.*

The court next considered whether the site of the murder qualifies as Indian country on the basis that it lies within an Indian reservation, 18 U.S.C. 1151(a). The court found the evidence "insufficient to convince [it] that the tract in question qualifies as a reservation." Pet. App. 10a. The court also observed that it knew of "no cases" supporting that position, and noted that the Tenth Circuit had specifically declined "to answer the question of whether the exterior boundaries of the 1866 Creek Nation have been disestablished." *Id.* at 10a-11a (citing *Indian Country, U.S.A., Inc.* v. *Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 975 n.3 (1987), cert. denied, 487 U.S. 1218 (1988)). The court concluded that, "[i]f the federal

courts remain undecided on this particular issue, we refuse to step in and make such a finding here." *Id.* at 11a.[1]

ARGUMENT

The Oklahoma Court of Criminal Appeals correctly rejected petitioner's argument that his crime is within the exclusive jurisdiction of the United States, and there is no conflict in the federal and state courts on that issue. The petition for a writ of certiorari therefore should be denied.

A. The Land On Which The Crime Occurred Is Not An Indian Allotment For Purposes Of 18 U.S.C. 1151(c)

Petitioner contends (Pet. 12-17) that, because heirs of the original Creek allottee retain a restricted one-twelfth interest in the subsurface mineral estate, the land on which the murder occurred was an "Indian allotment[]" for purposes of the definition of Indian country in 18 U.S.C. 1151(c). Petitioner's claim lacks merit and does not warrant review.

1. The decision below does not conflict with any decision of this Court or any other court. Petitioner identifies no decision of any court holding that retention of only a fractional subsurface mineral interest could suffice to render land an "Indian allotment" subject to exclusive federal criminal jurisdiction over conduct occurring on the surface. Nor is the government aware of any such precedent. Cf. *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104, 1107 (9th Cir. 1981) (holding that, while land as to which Tribe had ceded surface interest to non-Indians is no longer part of reservation and thus is subject to state criminal jurisdiction, underlying mineral interest is held in trust by United States for Tribe and mineral interest is immune from state taxation), cert. denied, 459 U.S. 916 (1982); *Montana* v. *Crow Tribe of Indians*, 523 U.S. 696,

[1] The court also rejected petitioner's argument that the land qualified as Indian country as part of a "dependent Indian communit[y]," 18 U.S.C. 1151(b). Pet. App. 11a. Petitioner does not present that argument in this Court. See Pet. Reply Br. 4 & n.1.

701 (1998) (referring to exercise by State of "full legal authority" on same land despite trust status of mineral estate).

Contrary to petitioner's suggestion (Pet. 13), nothing in *United States* v. *Ramsey*, 271 U.S. 467 (1926), and *United States* v. *Pelican*, 232 U.S. 442 (1914), supports his argument. Those decisions stand only for the unremarkable proposition, now codified in 18 U.S.C. 1151(c), that Indian allotments constitute Indian country for purposes of criminal jurisdiction. See *Ramsey*, 271 U.S. at 470; *Pelican*, 232 U.S. at 444, 446. In neither case had the surface estate been transferred to non-Indians, and neither decision therefore addressed an allotment as to which the only remaining restricted Indian interest was a subsurface mineral interest.[2]

The Tenth Circuit's decision in *HRI, Inc.* v. *EPA*, 198 F.3d 1224 (2000), likewise does not assist petitioner. See Pet. 14, 15. That decision did not involve an allotment; the United States held the surface estate in trust for the Navajo Nation. 198 F.3d at 1231. The court concluded that the land was part of an Indian reservation within the meaning of 18 U.S.C. 1151(a), explaining that the "federal government directly retains title to the land in question, and exercises federal control over the acquisition of interests not only in the land itself but also in its use, just as it does for formal reservation land." 198 F.3d at 1253. Here, by contrast, the federal government does not hold title to the land or exercise control over it.[3]

2. The Oklahoma Court of Criminal Appeals correctly concluded that the land in question does not constitute an

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[2] This case likewise does not present the question whether a parcel remains an "allotment[]" under 18 U.S.C. 1151(c) where some interest in the surface estate has been conveyed to non-Indians but the allottee or his heirs retain a fractional interest in the surface estate. See Pet. 14 (citing *Cravatt* v. *State*, 825 P.2d 277, 280 (Okla. Crim. App. 1992)).

[3] The court in *HRI* held that the trust status of the surface estate was sufficient to render the land Indian country so as to support the exercise of jurisdiction by the Environmental Protection Agency under the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*

Indian allotment under 18 U.S.C. 1151(c), which defines "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." The text, rationale, and origins of that subsection make clear that the relevant focal point for determining whether the title to the allotment has been extinguished is the surface estate.

"Indian allotments" under Section 1151(c) encompass allotments held in trust by the United States for the benefit of Indians, as well as allotments held in fee by Indian allottees or their Indian heirs but subject to restrictions on alienation. See *Ramsey* (restricted allotment); *Pelican* (trust allotment); *Cohen's Handbook of Federal Indian Law* § 16.03[1], at 1039 (Nell J. Newton ed. 2005) (*Cohen's Handbook*). This Court has explained that the rationale for treating both types of allotments as Indian country is that "the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction." *Ramsey*, 271 U.S. at 471 (internal quotation marks omitted); see *Pelican*, 232 U.S. at 447 (lands "continued to be under the jurisdiction and control of Congress for all governmental purposes[] relating to the guardianship and protection of the Indians").

When the surface estate is unrestricted (and held by non-Indians), the United States does not "possess[] a supervisory control over the land" (*Ramsey*, 271 U.S. at 471) in any sense relevant to establishing exclusive federal jurisdiction over crimes committed there. Such land is not within the federal government's control "for all governmental purposes," *Pelican*, 232 U.S. at 447, but instead is within the jurisdiction of the *State* for all pertinent purposes. Whatever limited federal supervision may occasionally occur over the restricted subsurface mineral estate (see Pet. 14) has no relationship to—and does not limit—state jurisdiction over crimes committed on the surface. As the court below correctly explained,

"[c]riminal jurisdiction has always been tied to geography, i.e., where the crime occurred," and "[c]ommon sense" dictates "that this issue has more to do with surface rights than underground minerals." Pet. App. 10a. Indeed, "it is virtually impossible to commit a crime against a person within a mineral interest sub-surface strata." *Ibid.*

The history of Section 1151(c) further confirms that the relevant focal point is the surface estate. Congress intended that language to codify this Court's decisions in *Pelican* and *Ramsey*. See *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998); 18 U.S.C. 1151, Historical and Revision Notes; *Cohen's Handbook* § 16.03[1], at 1039-1040. Those decisions, as explained above, involved allotments as to which the entire fee was in trust or restricted status. In concluding that the allotment in *Pelican* was Indian country, the Court reasoned that the land retained "a distinctively Indian character, being devoted to Indian *occupancy*." 232 U.S. at 449 (emphasis added). When the surface estate is no longer subject to restriction and has been conveyed to non-Indians, the land is no longer "devoted to Indian occupancy." That understanding is supported by the specification in Section 1151(c) that "Indian allotments" include "rights-of-way running through the same." 18 U.S.C. 1151(c). Because a right-of-way runs across the surface, that specification underscores Congress's focus on control of the surface of allotted lands.

Petitioner contends (Pet. 13-14) that, because Section 1151(c) speaks of "Indian titles" in the plural when referring to "Indian allotments, the Indian titles to which have not been extinguished," all "titles" applicable to any allotment, even those to subsurface minerals, must be extinguished before the allotment loses its character as Indian country. That contention lacks merit. Section 1151(c) speaks of "Indian titles" in the plural because it also refers to "Indian allotments" in the plural. The reference to Indian "titles" therefore does not

suggest that Indian ownership of a subsurface mineral interest is sufficient to render the surface "Indian country."[4]

B. The Land On Which The Crime Occurred Is Not Within An Indian Reservation For Purposes Of 18 U.S.C. 1151(a)

Petitioner alternatively contends (Pet. 18-25) that, even if retention of a fractional subsurface mineral interest is insufficient to render the land an Indian allotment for purposes of 18 U.S.C. 1151(c), the land nonetheless constitutes Indian country because it lies within the territorial limits of an "Indian reservation" within the meaning of 18 U.S.C. 1151(a). In petitioner's view, the historic territory of the Creek Nation has never been disestablished, and *all* lands within the boundaries of the original Creek Nation are Indian country—and subject to exclusive federal jurisdiction—regardless of whether the particular parcel of land at issue is owned by Indians or non-Indians. Petitioner's argument lacks merit, and, if accepted, would effect a radical shift in jurisdiction over vast amounts of non-Indian lands in eastern Oklahoma. Review by this Court is not warranted.

1. There is no conflict in the lower courts on whether the original Creek reservation has been disestablished. No state or federal court has held that the historic boundaries of the Creek Nation remain intact and encompass an existing reservation. Cf. *Indian Country, U.S.A.*, 829 F.2d at 975 & n.3 (declining to "decide whether the exterior boundaries of the

[4] Petitioner relies (Pet. 14-15, 24) on the testimony of a former official of the Bureau of Indian Affairs (BIA). The position of the United States (including the BIA), however, as expressed in this brief, is that the crime in this case was not committed in Indian country for purposes of criminal jurisdiction under Section 1151. We are unaware of any instance in which the United States (or the BIA) has expressed a contrary position where the surface estate of an allotment is no longer subject to restriction and has been conveyed to non-Indians.

1866 Creek Nation have been disestablished").[5] The court below held that the evidence was "insufficient to convince [it] that the tract in question qualifies as a reservation," and found no case supporting "the position that the individual Creek allotments remain part of an overall Creek reservation that still exists today." Pet. App. 10a. After noting the Tenth Circuit's refusal in *Indian Country, U.S.A.*, to reach that question, the court observed that, "[i]f the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here." *Id.* at 11a.[6]

2. The decision of the Oklahoma Court of Criminal Appeals, insofar as it held that the original Creek reservation has been disestablished (see note 6, *supra)*, is correct. In determining whether a reservation has been disestablished,

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[5] Contrary to petitioner's suggestion (Pet. 22, 25), the district court in *Harjo* v. *Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), aff'd *sub nom. Harjo* v. *Andrus*, 581 F.2d 949 (D.C. Cir. 1978), held only that the Creek tribal *government* has not been completely dissolved. *Id.* at 1118. It did not consider whether the Creek *reservation* remains intact. See *id.* at 1124 ("Territorial sovereignty, however, is not the issue in this case; the issue here is much narrower. The relevant question is whether or not the tribal government of the Creeks had been stripped of its power to deal with *tribal* affairs as such.").

[6] Petitioner understands the court below to have "refus[ed] to reach the question" whether the original Creek reservation has been disestablished. Pet. 7. Although that is one possible interpretation of the court's decision, the court concluded that the evidence was "insufficient" to convince it that the Creek reservation remained established, Pet. App. 10a, and the court thus appears to have held, albeit a bit elliptically, that the Creek reservation has been disestablished. While the court subsequently observed that it would not make a finding that the Creek reservation remains intact in light of the absence of any federal court decision reaching that conclusion, *id.* at 11a, that observation appears to be in the nature of a confirmation of the court's holding that the Creek reservation has been disestablished, rather than a statement of refusal to reach the issue. In any event, the court plainly did not rule in petitioner's *favor* on the question whether the crime occurred on an Indian reservation, and in that respect, as explained *infra*, the court's decision was correct.

this Court looks to the language and purpose of the relevant Acts of Congress, the historical context in which those Acts were passed, and the subsequent treatment of the relevant lands. See *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998); *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994); *Solem* v. *Bartlett*, 465 U.S. 463, 470-472 (1984). Each of those considerations points to the same conclusion in this case. A series of Acts of Congress culminating in the grant of statehood to Oklahoma in 1906, as well as congressional action since that time, demonstrate that the historic territory of the Creek Nation was disestablished as part of the process of allotting those lands, displacing tribal jurisdiction, and establishing the supremacy of state law and state jurisdiction.

a. In the 1830s, five Indian Tribes—the Choctaw, Chickasaw, Creek, Cherokee, and Seminole—were removed from their homelands in the southeastern United States to the then-unsettled region west of Arkansas, in what is now the State of Oklahoma. In various treaties, those Tribes, sometimes called the "Five Civilized Tribes," see *Cohen's Handbook* § 4.07[1][a] at 294, received their new land in fee simple, with the right of perpetual self-government. *Ibid* ; *Atlantic & Pac. R.R.* v. *Mingus*, 165 U.S. 413, 436-437 (1897). After the Civil War, the Five Tribes ceded the western portion of their territory, but their right of self-government was reaffirmed. *E.g.*, Treaty with the Creek Indians, June 14, 1866, Art. X, 14 Stat. 788. In particular, title to the eastern portion of the Creek Nation lands remained in the Tribe's hands. Art. III, 14 Stat. 786; Art. IX, 14 Stat. 788 (referring to "reduced Creek reservation").

Over time, law enforcement became a problem in the area retained by the Five Tribes because tribal courts did not have jurisdiction over the increasing number of non-Indian residents. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S 191, 197-200 (1978). In the Act of May 2, 1890, ch. 182, 26 Stat. 81, Congress established the Territory of Oklahoma in the western portion of the Indian Territory, which had previ-

ously been ceded by the Five Tribes (§§ 1-28, 26 Stat. 81-93), and expanded the jurisdiction of the United States Court for the Indian Territory that it had established the previous year in the diminished Indian Territory (§§ 29-44, 26 Stat. 93-100). The 1890 Act did not divest the tribal courts of their "exclusive jurisdiction" over cases in which tribal members were the "sole parties." § 31, 26 Stat. 96. But the Act extended the jurisdiction of the United States court to all civil suits except those over which the tribal courts had exclusive jurisdiction. § 29, 26 Stat. 93-94. The 1890 Act also provided that the general laws of the United States that prohibit crimes in any place within the sole and exclusive jurisdiction of the United States "shall have the same force and effect in the Indian Territory as elsewhere in the United States." § 31, 26 Stat. 96. The criminal laws of Arkansas (with certain exceptions) were extended to the Indian Territory for offenses not governed by federal law. § 33, 26 Stat. 96-97.

b. Before long, Indians in the Indian Territory were brought under the same jurisdictional and substantive laws that applied to non-Indians in the territory in ways inconsistent with an intent to preserve the original Creek reservation. First, the Indian Department Appropriations Act of 1897, ch. 3, 30 Stat. 62, vested the United States courts in the Indian Territory with "exclusive jurisdiction" to try "*all* civil causes in law and equity" and "*all* criminal causes" for the punishment of offenses by "*any person*" in the Indian Territory after January 1, 1898. § 1, 30 Stat. 83 (emphasis added). The 1897 Act also made the laws of the United States and Arkansas then in force in the Indian Territory applicable to "all persons therein, *irrespective of race*." *Ibid.* (emphasis added).

Second, in 1898, Congress enacted the Curtis Act, ch. 517, 30 Stat. 495, to accomplish the allotment of the lands of the Five Tribes in preparation for the inclusion of those lands in a new State and dissolution of the Tribes. Section 28 of the Curtis Act (30 Stat. 504-505) abolished all tribal courts in the Indian Territory, and Section 26 of that Act (30 Stat. 504)

provided that "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory" (*ibid.*). In 1901, the Creek Nation entered into an allotment agreement with the United States. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861, as supplemented by the Act of June 30, 1902, ch. 1323, 32 Stat. 500. That agreement provided that it was not to "be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress," including, in particular, the Curtis Act. § 47, 31 Stat. 873. The agreement also provided that the tribal government would be abolished by 1906. § 46, 31 Stat. 872. The 1902 Act provided that the statutes of Arkansas in effect in the Indian Territory were to govern the descent and distribution of allotments (§ 6, 32 Stat. 501) and that all funds of the Creek Nation not needed to equalize the value of allotments were to be paid out on a per capita basis "on the dissolution of the Creek tribal government" (§ 14, 32 Stat. 503).

Third, in the Act of April 28, 1904, Congress once again provided that "[a]ll the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, *whether Indian, freedman, or otherwise*." Ch. 1824, § 2, 33 Stat. 573 (emphasis added); see *Stewart* v. *Keyes*, 295 U.S. 403, 409 (1935). In short, the series of "congressional enactments gradually came to the point where they displaced the tribal laws and put in force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as white persons." *Marlin* v. *Lewallen*, 276 U.S. 58, 62 (1928).

Fourth, in the Act of April 26, 1906, ch. 1876, 34 Stat. 137, entitled an Act to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory," the Secretary was directed to assume control of all schools of the Five Tribes until such time as a public school system was established under territorial or state government (§ 10, 34 Stat.

140) and to take possession of and sell all buildings used for tribal purposes (§ 15, 34 Stat. 143). Tribal taxes were abolished (§ 11, 34 Stat. 141), and the Secretary was directed to assume control over collection of all revenues accruing to the Tribes, "whether before or after dissolution of the tribal governments," and to pay all claims against the Tribes (*ibid.*). Any unallotted lands were to be sold, with the proceeds paid into the Treasury to the credit of the Tribe concerned; and when all claims against the Tribe were paid, "any remaining funds" were to be distributed to tribal members on a per capita basis (§ 17, 34 Stat. 143-144). The 1906 Act did extend the existence of the tribal governments of the Five Tribes "until otherwise provided by law," because of the difficulties of the allotment and enrollment process (§ 28, 34 Stat. 148), but the Act still expressly contemplated that the tribal governments would be dissolved (§§ 11, 27, 34 Stat. 141, 148). In the meantime, Congress authorized the Secretary to remove the principal chiefs of the Five Tribes and to appoint their successors, prohibited tribal governments from remaining in session for more than 30 days per year, and barred them from enacting legislation or entering into contracts involving their funds or land without the approval of the President of the United States (§§ 6, 28, 34 Stat. 139, 148).

c. The statehood process further underscores that the Creek reservation was not preserved. The Act of June 16, 1906, ch. 3335, 34 Stat. 267, authorized creation of the State of Oklahoma out of the Oklahoma and Indian Territories. Section 16 of the Act, 34 Stat. 276, provided that cases arising under federal law that were then pending in the district courts of the Oklahoma Territory and in the United States courts in the Indian Territory were to be transferred to the newly created United States District Courts for the Western and Eastern Districts of Oklahoma, respectively. Under Section 20 of the Act, 34 Stat. 277, all other cases pending in the district courts of the Oklahoma Territory and the United States courts in the Indian Territory—*i.e.*, cases of a local

nature—were to be decided by the courts of the State of Oklahoma. *Southern Sur. Co.* v. *Oklahoma*, 241 U.S. 582 (1916). That necessarily included cases involving Indians on Indian lands, to which the laws of Arkansas had been extended in 1897 and 1904. And in order to provide a uniform body of local law throughout the State, Congress extended the laws of the Oklahoma Territory to the Indian Territory until the new Oklahoma legislature should provide otherwise. §§ 2, 13, 21, 34 Stat. 268, 275, 277-278. See *Stewart*, 295 U.S. at 409-410; *Jefferson* v. *Fink*, 247 U.S. 288, 292-293 (1918).

3. The United States, in its amicus brief in support of the certiorari petition in *Oklahoma* v. *Brooks*, cert. denied, 490 U.S. 1031 (1989) (No. 88-1147), and in its response to the certiorari petition in *Sands* v. *United States*, cert. denied, 506 U.S. 1056 (1993) (No. 92-6105), took the position that, as a consequence of the series of statutes just described, the State of Oklahoma possesses jurisdiction over crimes committed by or against Indians throughout the former Indian Territory, regardless of the status of the land on which the crime was committed. That conclusion is reinforced by Congress's abolition of the Creek Nation's courts in 1898: Because federal jurisdiction in Indian country, where it applies, does not extend to crimes (except for major crimes covered by 18 U.S.C. 1153) committed by one Indian against the person or property of another, see 18 U.S.C. 1152, the absence of state jurisdiction over such crimes would have left a jurisdictional void. The United States accordingly supported certiorari in *Brooks* and did not oppose certiorari in *Sands* to resolve the question of the State's jurisdiction. This Court, however, denied certiorari in both cases.

The petition in this case assumes that, if the land at issue in this case is within the limits of an Indian reservation for purposes of 18 U.S.C. 1151(a) (or constitutes an allotment for purposes of 18 U.S.C. 1151(c)), the State then would lack criminal jurisdiction and jurisdiction instead would lie exclusively with the United States. That assumption is inconsis-

tent with the position taken by the United States in this Court in *Brooks* and *Sands*, *supra*. The Tenth Circuit and the Oklahoma Court of Criminal Appeals both have held, however, that jurisdiction over crimes committed by Indians on restricted allotments in eastern Oklahoma lies with the United States. See *United States* v. *Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992), cert. denied, 506 U.S. 1056 (1993); *Cravatt* v. *State*, 825 P.2d 277 (Okla. Crim. App. 1992); *State* v. *Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989).[7]

Because the state and federal courts are in agreement that the State lacks jurisdiction over crimes committed by Indians on restricted allotments in the former Indian Territory, we do not urge the Court to grant certiorari to address that question. There is no longer a jurisdictional void for nonmajor crimes between Indians on Creek allotments (see p. 14, *supra*), because the Creek Nation was authorized by the Oklahoma Indian Welfare Act, ch. 831, 49 Stat. 1967, to reinstate tribal courts. See *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). And because the United States has exercised criminal jurisdiction over crimes involving Indians on such lands in the wake of *Brooks* and *Sands*, an acceptance by this Court of the position asserted by the United States in those cases would call into question the validity of criminal convictions obtained by the United States in the intervening 15 years.[8]

4. Whether or not the State has jurisdiction over crimes committed by Indians on restricted allotments in the former

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[7] The Oklahoma Court of Criminal Appeals had previously held that the State had jurisdiction over a murder committed by one Indian against another on a restricted Five Tribes allotment. *Ex parte Nowabbi*, 61 P.2d 1139 (1936). That court, however, has since overruled *Nowabbi* and espoused the contrary view. *Klindt*, 782 P.2d at 404.

[8] If the Court were to grant certiorari in this case, the United States would assess at that time whether to reassert the position it took in its certiorari filings in *Brooks* and *Sands*, *supra*, in support of affirmance of the jurisdictional ruling of the Oklahoma Court of Criminal Appeals.

Indian Territory, the series of federal statutes described above demonstrates that the former reservation of the Creek Nation has been disestablished and that the State therefore has jurisdiction over such crimes on lands that are not subject to any federal restrictions. As noted above, there is no conflict between the state and federal courts on that question either, and it does not warrant review by this Court.

a. Although allotment of tribal lands does not in itself compel the conclusion that a Tribe's reservation has been disestablished, see, *e.g.*, *Solem* v. *Bartlett*, 465 U.S. 463 (1984); *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962), the purpose and context of the allotment acts for the Creek Nation and of the other laws enacted during the same period make clear that the Creek Nation's original territory was diminished and that unrestricted land within that former territory fails to qualify as Indian country. In *Solem*, *Mattz* and *Seymour*, the proceeds of the sale of unallotted lands were to be used by the United States or the Tribe on a continuing basis for the benefit of the Tribe or its members, and there were other indicia of continued existence of the reservation. See *Solem*, 465 U.S. at 473-474; *Mattz*, 412 U.S. at 495-496; *Seymour*, 368 U.S. at 355-356. Here, by contrast, the proceeds of the sale of unallotted lands (after payment of claims against the Tribe) were to be distributed to individual allottees, thereby eliminating any continuing tribal interest.

Moreover, other indicia cut strongly against continued existence of a reservation. Congress's elimination of the Creek Nation's tribal courts and subjection of the Indian Territory to state law to the exclusion of tribal law—together with provisions for dissolution of the tribal government—are difficult to square with any intention to maintain all of the Creek Nation's historic lands as a reservation for the Nation as an entity. Although Congress extended the Creek government in 1906, its tribal courts remained extinguished, the provisions subjecting Indians to state law remained in effect,

the 1906 Act itself expressly contemplated that the tribal government would be dissolved, and the tribal government was subject to substantial interim restrictions. That unique set of statutory provisions seems quite incompatible with a congressional intent to maintain the original Creek territory as an "Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. 1151(a).

Against this backdrop, petitioner errs in relying (Pet. 23) on the language of the 1901 Creek Allotment Act stating that the Act shall not affect provisions of the Treaties with the Tribe. That Act preserved those Treaties "except so far as inconsistent therewith" (§ 44, 31 Stat. 872), and preservation of the entirety of the original Creek territory for the Creek Nation, to the exclusion of state criminal jurisdiction, would be manifestly inconsistent with the Creek Allotment Act and related statutes affecting the Five Tribes.

b. Statutes enacted after Oklahoma's statehood reinforce the conclusion that the Five Tribes' original reservations were disestablished. First, in the Act of May 27, 1908, ch. 199, 35 Stat. 312, Congress eliminated all restrictions on alienation of allotments of persons having less than one-half Indian blood and permitted alienation of all but a 40-acre homestead for allottees having between one-half and three-quarters Indian blood. *Stewart*, 295 U.S. at 411-412, 415. By thus facilitating the settlement by non-Indians even on restricted allotments, Congress fortified the absence of any intention to preserve the entire Indian Territory as Indian country.

Congress also subjected the restricted lands of the members of the Five Tribes to state court jurisdiction. In the Act of June 14, 1918, ch. 101, 40 Stat. 606, Congress vested state courts with jurisdiction over the lands of allotted members of the Five Tribes in heirship proceedings and subjected the lands of full-blooded members to state laws governing the partition of real property. Subsequently, in the Act of April 10, 1926, ch. 115, § 1, 44 Stat. 239, Congress provided that restrictions on allotments were removed upon death, but that

a full-blooded member could convey inherited or devised restricted land only with the permission of the state court having jurisdiction over the estate. Section 2 of that Act, 44 Stat. 240, applied state statutes of limitation to restricted Indians of the Five Tribes and their heirs and grantees. Finally, Congress confirmed in 1947 that all restrictions on lands of members of the Five Tribes were to be removed upon the death of the original owner, but required state court approval of alienation if the heir was of one-half or more Indian blood. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731. Those provisions for extensive state court jurisdiction even over restricted Indian lands make clear that Congress had no intention to preserve the entire Indian Territory—especially *unrestricted* lands—as Indian country, in the form of continuing reservations. And because Congress also subjected Indians to the general civil and criminal jurisdiction of the State, at least on unrestricted lands, the former territories of the Five Tribes are not Indian reservations "under the jurisdiction of the United States" within the meaning of 18 U.S.C. 1151(a).

Indeed, in 1935, the Senate Committee on Indian Affairs explicitly recognized as much in connection with the enactment of the Oklahoma Indian Welfare Act, which provided for the organization of tribal governments in that State:

> After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, *all Indian reservations as such have ceased to exist* and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.
>
> * * * The Oklahoma Indians having made progress beyond the reservation plan, it was thought best not to encourage a return to reservation life.

S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (emphasis added). Subsequently, Congress, in a number of statutes, has explicitly defined the term "reservation" for specific statutory purposes to encompass "*former* Indian reservations in Oklahoma," thereby making clear that reservations in the former Indian Territory no longer exist. 25 U.S.C. 1452(d) (emphasis added).[9]

c. In a letter to the Attorney General dated August 17, 1942, the Secretary of the Interior similarly explained that, as a result of the various statutes culminating in the Oklahoma Enabling Act, the "Indian reservations" in the "Indian Territory * * * had lost their character as Indian country." U.S. Amicus Br. at 4a, *Oklahoma* v. *Brooks*, *supra* (No. 88-1147) (reprinting letter). This Court's decisions are to the same effect. In *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), the Court sustained the application of state estate taxes to restricted property of members of the Five Tribes. In the course of its decision, the Court explained that, while the Court had "held that a State might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status," that "condition * * * has not existed for many years in the State of Oklahoma." *Id.* at 602. "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy" and they "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603. For instance, the Court explained, "Oklahoma supplies for them and their children schools, roads, courts, police protection and all other benefits of an ordered society." *Id.* at 608-609. The Court later described its decision in *Oklahoma Tax Commission* as presenting a situation "where Indians have

[9] Accord 12 U.S.C. 4702(11); 16 U.S.C. 1722(6)(C); 25 U.S.C. 2020(d)(1) and (2) (Supp. IV 2004); 25 U.S.C. 3103(12), 3202(9); 29 U.S.C. 741(c); 33 U.S.C. 1377(c); 42 U.S.C. 2992c(2), 5318(n)(2).

left the reservation and become assimilated into the general community." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973) (emphasis added).

d. A final consideration weighing in favor of concluding that the original reservations of the Five Tribes have been disestablished is the settled understanding of the State of Oklahoma and the United States that the State has jurisdiction to try offenses committed by Indians on unrestricted lands within those original boundaries. The State and the federal government have operated on that understanding for nearly a century. Accepting petitioner's contrary view would call into question the jurisdictional validity of numerous criminal convictions obtained by the State during that period. See *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 215-216 (2005) (giving "heavy weight" to "justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by [the Tribe]"); *Hagen*, 510 U.S. at 421 (noting that the "State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened" to settlement, and that the "'jurisdictional history' * * * demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area"); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 604-605 (1977).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] The "current population situation," *Hagen*, 510 U.S. at 421, also supports finding disestablishment. Even by 1906, "four-fifths of the inhabitants of the Territory [had] no connection whatever with the tribes and [were] white people." H.R. Rep. No. 496, 59th Cong., 1st Sess. 10 (1906). See also *Joplin Mercantile Co.* v. *United States*, 236 U.S. 531, 544-545 (1915).

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