



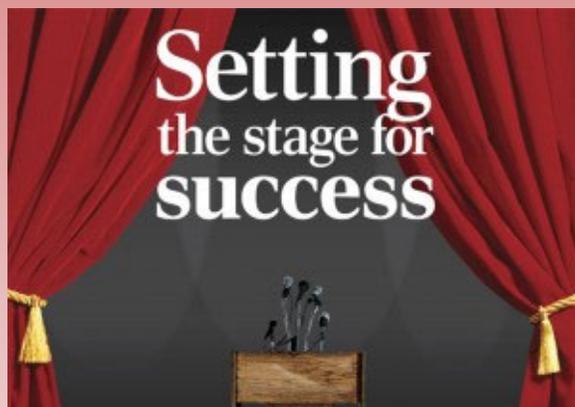
**How did we get from
there to here?**

1

**BIG
SHOUT
OUT!!**

**For the Attorneys Fighting for Muscogee
Creek Nation (MCN) 1976, 1978, 1988,
1992, 2017-20**

2



What came before?

3

- National Indian Youth Council
 - “The Nation’s second oldest American Indian Organization” founded in 1961 (Thomas Leubeen, Jr.)
 - Institute for the Development of Indian Law (Robert G. Vaughn) (now professor emeritus at American University Washington School of Law)
 - Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976) (finding “inescapable” that MCN’s government survived Congress’s intention in the late nineteenth and early twentieth century to terminate it).**
-

4

- Thomas Leubben, Jr., John J. Kelly & Marcia J. Wilson – National Indian Youth Council

***Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) (holding district court in *Harjo v. Kleppe* did not abuse its discretion in allowing MCN to re-establish its own constitutional government).**

5

“It does not matter whether we win or lose, it only matters that we keep fighting.”

**Remembrance of Marcia
Wilson**

6

- Attending bi-camera Creek legislative meetings (then not an entirely elected body) with their client, Alan Harjo, in Okmulgee, Oklahoma was “extraordinary” – “very memorable.”

Remembrances of John J. Kelly (Former United States Attorney for New Mexico)

7

- Oklahoma Indian Legal Services
- Susan Work (Choctaw)
- M. Leah Harjo (Creek)



***Muscogee Creek Nation v. Hauer*, 831 F.2d 1439, (C.A. D.C. Cir. 1988). Cited by the majority in *McGirt* acknowledging a “new national policy” in 1936 and the “reversal of attitude” by Congress “enabling the Creek government to resume many of its previously suspended functions.”**

8

- L. Susan Work (Choctaw)
- Leah A. Harjo (Creek)
Oklahoma Indian Legal Services
- Reid Peyton Chambers, Sonosky, Chambers & Sachese, Attorneys for Muscogee (Creek) Nation

Hodel v. Muscogee, 488 U.S. 1010
(1989) (denying certiorari)

9

- D. Greg Bledsoe
- John Echols
- Lorraine Echols
- Geoffrey M. Standing Bear (Osage) (now Chief of the Osage Nation)

***Indian Country U.S.A. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) (recognizing MCN reservation still exists but reserving question whether 1866 boundaries remain intact).**

10

- Susan Work (Choctaw)
- M. Leah Harjo (Creek)
- (Amicus for MCN)

***United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992), again cited in *McGirt* rejecting Oklahoma’s “frequently raised” but rarely “accepted” argument that Oklahoma retained jurisdiction over crimes committed by Indians in Indian country as part of a “established and enlightened policy of applying the same law in the same courts to everyone.”**

11

McGurphy

From Murphy to McGirt

12

- **Step 1: Is “the first and most important step.”** *Parker v. Nebraska*, 136 S. Ct. 1072, 1080 (2016)
- **Step 1: Statutory text disestablishing or diminishing the reservation is “the most probative evidence” of disestablishment.**
- **Step 1: “State concedes that not one of the eight statutes [it relies on] contains particular language that disestablished the Creek Reservation.”** *Murphy v. Royal*

Key Findings from *Murphy*

13

- “[Oklahoma] reads *Solem* as requiring us to examine the **laws passed by Congress** at the first step, contemporary events at the second, and even later events and demographics at the third. On the State’s account, we have so far finished only the first step, two more await.
- **This is mistaken.** When interpreting **Congress’s work** in this arena, no less than any other, our charge is usually to ascertain and follow **the original meaning of the law before us.** That is the only “step” proper for a court of law.”

McGirt: The Only Step

14



Now, how did we get here again?

15

**It began at the Scene
of the Crime**

16

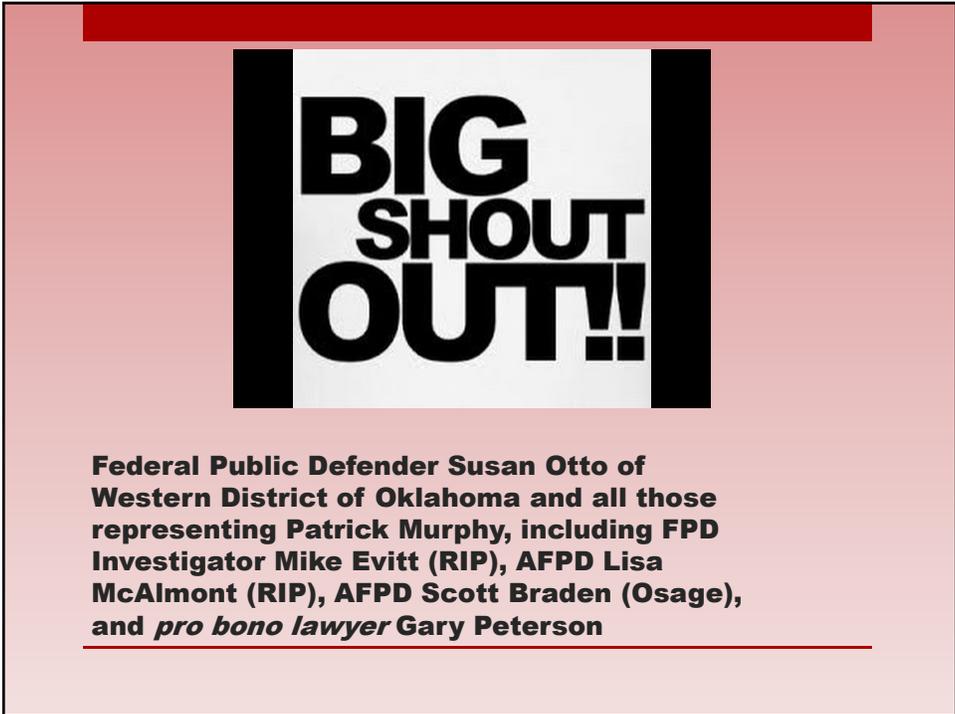
**I Chose The Road
Less Traveled.
Now, Where The
Hell Am I?**

**OSBI Crime Scene Expert Did Not Site
Crime Scene Correctly**

17

- **Crime occurred on a road running through a Creek allotment with fractional restricted interests in the mineral estate. Federal Public Defender Office then presented never-before-raised Indian country issues (allotment and reservation) in the federal habeas petition, and simultaneously moved to exhaust the claim in a successor state post-conviction action.**
-

18



BIG SHOUT OUT!!

**Federal Public Defender Susan Otto of
Western District of Oklahoma and all those
representing Patrick Murphy, including FPD
Investigator Mike Evitt (RIP), AFPD Lisa
McAlmont (RIP), AFPD Scott Braden (Osage),
and *pro bono* lawyer Gary Peterson**

INDIAN COUNTRY CRIMINAL JURISDICTIONAL CHART

for crimes committed within Indian Country as defined by 18 U.S.C. § 1151(a), (b) & (c) -
 (a) formal [recognized treaty boundaries] & informal [tribal trust lands] reservations (including rights-of-way/roads),
 (b) dependent Indian communities, & (c) Indian allotments held in trust or restricted status (including rights-of-way/roads).
 (where no congressional grant of jurisdiction to state government over the Indian country involved exists)

INDIAN OFFENDER:

1. VICTIM CRIMES: FOR OFFENSES AGAINST A VICTIM'S PERSON OR PROPERTY

<i>WHO IS THE VICTIM?</i>	<i>WHAT WAS THE CRIME?</i>	<i>JURISDICTION</i>
INDIAN (enrolled or recognized as Indian by a government entity <u>and</u> possessing some degree of Indian blood)	Major Crimes Act crimes: Murder; manslaughter; kidnapping; maiming; sexual abuse/assault under Ch. 109-A; <u>incest</u> ; assault with intent to commit murder or in violation of 18 U.S.C. § 2241 or §2242; assault with intent to commit any felony; assault with a dangerous weapon; assault resulting in serious bodily injury; assault resulting in substantial bodily injury of a spouse, intimate partner or dating partner; assault on a person under 16 years old; assault of a spouse, intimate partner or dating partner by strangulation; <u>felony child abuse</u> or neglect; arson; <u>burglary</u> ; robbery; felony theft under 18 U.S.C. § 661. (Authority: Major Crimes Act - 18 U.S.C. § 1153 & state code where underlined)	FEDERAL
	All remaining crimes contained in tribal code: (Authority: tribal code or 25 CFR Pt. 11, if a CFR Court of Indian Offenses)	TRIBAL *
NON-INDIAN	Major Crimes Act crimes: Murder; manslaughter; kidnapping; maiming; sexual abuse/assault under Ch. 109-A; <u>incest</u> ; assault with intent to commit murder or in violation of 18 U.S.C. § 2241 or §2242; assault with intent to commit any felony; assault with a dangerous weapon; assault resulting in serious bodily injury; assault resulting in substantial bodily injury of a spouse, intimate partner or dating partner; assault on a person under 16 years old; assault of a spouse, intimate partner or dating partner by strangulation; <u>felony child abuse</u> or neglect; arson; <u>burglary</u> ; robbery; felony theft under 18 U.S.C. § 661. (Authority: Major Crimes Act - 18 U.S.C. § 1153 & state code where underlined)	FEDERAL
	Other federal crimes (unless tribe has punished Indian defendant), including crimes contained in state code (where there is no federal statute for the category of offense) under the Assimilative Crimes Act: (Authority: General Crimes Act - 18 U.S.C. §§ 1152 and 13)	FEDERAL
	All remaining crimes contained in tribal code: (Authority: tribal code or 25 CFR Pt. 11, if a CFR Court of Indian Offenses)	TRIBAL *

2. VICTIMLESS CRIMES: NO VICTIM'S PERSON OR PROPERTY INVOLVED IN CRIME

(e.g., traffic offenses, disorderly conduct, prostitution, etc.)

a. Crimes in state code (where there is no federal statute for the category of offense) under the Assimilative Crimes Act. (Authority: 18 U.S.C. §§ 1152 and 13)	FEDERAL
b. Crimes in tribal code. (Authority: tribal code or 25 CFR Pt. 11, if CFR Court)	TRIBAL *

* limited to 1 year sentence & \$5,000. fine, unless tribe approved under Tribal Law & Order Act for 3 yr. felonies.

3. GENERAL FEDERAL CRIMES: OTHER FEDERAL CRIMES OF GENERAL

APPLICABILITY (Affecting Interstate Commerce or a Federal Interest)

FEDERAL

(Federal prosecution based on federal interest, not based on territorial jurisdiction over location of crime) (e.g., drug offenses, firearms offenses, mail fraud, embezzlement or theft from tribal organization, theft from casino, failure to report child abuse, etc.) (Authority: individual federal statute)

NON-INDIAN OFFENDER:

1. VICTIM CRIMES: AN OFFENSE AGAINST A VICTIM'S PERSON OR PROPERTY

<i>WHO IS THE VICTIM?</i>	<i>WHAT WAS THE CRIME?</i>	<i>JURISDICTION</i>
INDIAN (enrolled or recognized as Indian by a government entity <u>and</u> possessing some degree of Indian blood)	Indian Country Crimes Act Crimes: All federal crimes which apply to the "special maritime and territorial jurisdiction of the United States under the U.S. Code." (Authority: General Crimes Act - 18 U.S.C. § 1152)	FEDERAL
	All remaining crimes contained in state code (where there is no federal statute for the category of offense) under the Assimilative Crimes Act. (Authority: General Crimes Act - 18 U.S.C. §§ 1152 & 13)	FEDERAL
	Domestic Violence, Dating Violence, or Violation of Protection Order offenses [when defendant: 1) resides in Indian country, 2) works in Indian country, or 3) is a spouse or partner of a member of a participating tribe or is an Indian residing in Indian country of a participating tribe] (Authority: tribal code and 25 U.S.C. § 3101)	TRIBAL * **
NON-INDIAN	All crimes contained in state code. (Authority: <i>United States v. McBratney</i> , 104 U.S. 621 (1881))	STATE

* limited to 1 year sentence & \$5,000. fine, unless tribe approved under Tribal Law & Order Act for 3 yr. felonies.

** effective after 3/7/15 if the tribe provides U.S. Constitutional protections in tribal court.

2. VICTIMLESS CRIMES: NO VICTIM'S PERSON OR PROPERTY INVOLVED IN CRIME

STATE ONLY

(e.g., traffic offenses, disorderly conduct, prostitution, etc.)

3. GENERAL FEDERAL CRIMES: OTHER FEDERAL CRIMES OF GENERAL APPLICABILITY (Affecting Interstate Commerce or a Federal Interest)

FEDERAL

(Federal prosecution based on federal interest, not based on territorial jurisdiction over location of crime) (e.g., drug offenses, firearms offenses, mail fraud, embezzlement or theft from tribal organization, theft from casino, failure to report child abuse, etc.) (Authority: individual federal statute)

*created by Arvo Q. Mikkanen, Assistant U.S. Attorney & Tribal Liaison,
 U.S. Attorney's Office, Western District of Oklahoma
 (may be reproduced with attribution to author)*

August 2017 Version

McGirt / Murphy FAQs

1. If my state conviction is vacated because the state had no jurisdiction to prosecute and sentence me and I get prosecuted in federal or tribal court, will the time I served in state prison or detention be credited against any sentence I receive in federal or tribal court?
 - a. I am unaware of a federal statute or case that explicitly requires the Bureau of Prisons (BOP) to grant credit for the time served in state prison in this situation. The BOP controls the time computation for prisoners in federal custody. The U.S. district judge sentencing the defendant could signal his or her intentions regarding credit for time served in these circumstances. The district judge could also adjust the sentence he or she imposes by the amount of time previously served in state custody.
 - b. Each tribe has its own code and cases that may address this issue there.
2. If my state conviction gets vacated because the state had no jurisdiction to prosecute me, will I be immediately released from state confinement?
 - a. In major crimes, I would expect custody arrangements to be made between the two jurisdictions to allow transfer from state to federal custody without release.
3. My crime was committed on one of the other Five Tribes' reservation that was not specifically addressed in *McGirt*, does the Attorney General's statement that *McGirt* applies to the other 4 Tribes have any weight?

- a. General Hunter's statements might be an indication that he will concede the issue as it relates to the other four tribes, but the issue would still ultimately have to be determined by a court.
 - b. To make the argument regarding any other tribe's reservation, follow Justice Gorsuch's template. Concentrate on the treaty language creating that tribe's reservation, looking at any treaties and statutes that are different from the Creek, typically the tribe's removal treaty, the treaty that diminished boundaries following the Civil War, and the tribe's allotment act. Other congressional acts analyzed in *McGirt* and *Murphy* are common to all the Five Tribes and some may be common to other Oklahoma tribes. Stress there is no text where Congress explicitly expressed its intent to disestablish the reservation, although that language was clearly available to them. "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Stress that because there is no ambiguity in Congress's language, there is no need to consult contemporaneous usages, customs, practices and subsequent historical events (steps 2 and 3 under *Solem* and *Parker*). "Extratextual considerations hardly supply the blank check Oklahoma supposes." *McGirt*.
4. What if I have self-identified as Native all my life, but am not an enrolled member of a federally recognized tribe? Will I qualify to vacate my state conviction and sentence that occurred in Indian country? Do you have to have citizenship card at the time of the crime to qualify?
 - a. The "test" of Indian status has been determined by most courts to require 1) some degree of Indian blood, *and* 2) tribal or government recognition as an Indian. There are a

variety of ways to establish Indian status for purposes of the Major Crimes Act (Defendant is "Indian") or General Crimes Act (GCA) (Victim is "Indian"). The first prong, i.e. "some degree of Indian blood" is a matter of whether an ancestor was identified as Indian. The BIA Certificate of Degree of Indian Blood (CDIB) or a tribal enrollment card with blood quantum listed are the most common ways to establish this prong. The second prong, "tribal or federal recognition as an Indian," is most commonly established by tribal enrollment, but that is not the only or exclusive means. *See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977). Other ways to show this recognition will be client specific, i.e. did the defendant or victim received federal or tribal assistance reserved only for Indians, did he enjoy tribal benefits, did he reside on the reservation, was he socially recognized as an Indian, and did he participate in Indian social life. It will take investigation of the family associations over time to make a prong 2 case without a tribal enrollment card.

- b. In *United States v. Zepeda*, 792 F. 3d 1103 (9th Cir. 2015) the court stated that the federal government must prove a defendant was Indian at the time of the crime. I would not be dissuaded by *Zepeda* on the timing issue. First, the 9th Circuit appeared to want to avoid a defendant disassociating himself from his tribe after a crime to be able to make challenge to jurisdiction on appeal. Second, the 9th Circuit's primary concern was whether the "some degree of Indian blood" prong required proof the Indian blood derived from a federally recognized tribe. 792 F. 3d. at 1114. (It does not). *See also United States v. Flores*, 2018 WL 65228475 (W.D. N. C.) (holding federal government was not required to prove that victim was an enrolled member of a tribe at the time of the offense where child victim was enrolled a year after the crimes).
- c. Each tribe sets the rules for membership. Blood quantum may or may not be a requirement to be a citizen. Because

some tribes require a certain % of tribal blood to be a member of the tribe, it is possible for an individual to have 100% “Indian” blood but be unable to enroll in any tribe because he or she does not meet tribal blood requirements. His status as an Indian could be proved by the factors listed in (a) above. None of the Five Tribes have a blood quantum requirement.

5. What if I am a citizen of a tribe but have no Indian blood at all but I am a Freedman citizen or was adopted by tribal parents? Will I be considered an Indian for purposes of MCA and GCA?

a. Each tribe determines who its citizens are and whether a certain degree of Indian blood is required. There would be good arguments in Oklahoma that enrolled Freedman would be “Indian” for purpose of MCA and GCA because of the long history of being tribal citizens of the Five Tribes. I cannot say whether the same could be said for adopted citizens without “Indian” blood. There is likely to be further litigation in these areas.

6. What statute of limitations (SL) will apply to me if my state conviction is vacated and the federal government seeks to prosecute me? Or, if the tribal government seeks to prosecute me?

a. Generally, the statute of limitations for non-capital crimes is five-years in federal court. Crimes “punishable by death” have no statute of limitations in federal court. There are limited reasons a SL may be tolled.

7. Can I receive the death penalty in federal court for a murder committed in Indian country?

a. The only Oklahoma tribe to opt in for the federal death penalty for a murder committed within its reservation boundaries is the Sac and Fox Tribe, however federal

prosecutors have sought authorization for the federal death penalty in Indian country murders by prosecuting it on an independent basis (a basis other than that the murder occurred in Indian country), such as on the theory of carjacking. *See United States v. Mitchell*, 502 F. 3d 931 (9th Cir. 2007) (holding Federal Death Penalty Act applied to murder committed during a car-jacking on the Navajo Reservation despite that the Navajo Nation had not opted in to the federal death penalty).

8. Can I consent to be tried and convicted in state court, even if Oklahoma has been determined to have no jurisdiction?
 - a. Unlikely. The Supreme Court has said that subject matter jurisdiction is not subject to waiver, nor can it be conferred by consent of the parties. *See United States v. Cotton*, 535 U.S. 625, 630 (2002); *Chicago, B & Q. Ry. Co.*, 220 U.S. 413, 421 (1911); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).
9. What happens if I simply do not press my *McGirt/Murphy* case because I think the risk of getting a greater sentence in federal court is too great?
 - a. The decision not to press the issue was expected in *McGirt*, where Justice Gorsuch, speaking for the Court, said, “many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver.” *McGirt*
10. What if I have a prior conviction that was used to enhance a valid state conviction, but the old conviction should have been prosecuted in federal or tribal court?

- a. The client would have to challenge the prior conviction and the case which was enhanced by the prior conviction.
11. Can I be convicted in federal and tribal court for the same crime?
 - a. Yes, separate sovereigns can try and convict for the same acts.
12. How do I find out whether the site of the crime is within a reservation?
 - a. Most tribes will have a realty office and if you have an address or legal description, it can confirm in writing whether the site is within the boundaries of the reservation. In light of *McGirt/Murphy* we can expect tribes to make this information public and assessable for law enforcement purposes.
13. Do I have a deadline for making a jurisdictional challenge to my conviction and sentence?
 - a. **State Court challenges:** The Oklahoma Court of Criminal Appeals (OCCA) has long-standing precedent holding that challenges to jurisdiction (and Indian country jurisdiction particularly) cannot be waived and such arguments can be raised at any time. In *Murphy*, the issue was presented for the first time in a successor state post-conviction action and the OCCA ordered an evidentiary hearing and adjudicated the issue on the merits. However, in light of reference to “well-known state and federal limitations on post conviction review in criminal cases” by Justice Gorsuch and the dissent by Justice Thomas arguing the OCCA imposed a procedural bar on McGirt’s claim by stating such claims should be

raised on direct appeal, the AG may well seek to get the OCCA to overturn its long-standing precedent.

- b. Federal Writs of Habeas Corpus: There is a 1-year SL from the date of the finality of a conviction for a petitioner to file a petition for writ of habeas corpus under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Claims raised there must have been exhausted in state court. Successor petitions must be authorized by the 10th Circuit and have strict limitations. The 10th Circuit has held that *Murphy* claims do not qualify for successor status. *See Dopp v. Martin*, 750 F. App'x 754,757 (10th Cir. 2018); *Boyd v. Martin*, 747 F. App'x 712, 716-17 (10th Cir. 2018).
14. There were four cases where the Supreme Court vacated the OCCA's judgment and remanded for further consideration in light of *McGirt*. What does this mean?
 - a. Those cases (*Davis, Bentley, Terry, and Johnson*) all came up in the same posture as did *McGirt*, from a denial of an Application for Post-Conviction Relief by the OCCA. The OCCA could do several different things on remand. It could grant post-conviction relief and vacate the conviction, order an evidentiary hearing, deny based on some new procedural waiver doctrine.
15. What if a jurisdictional challenge has been made by motion in a pending revocation case, but not as a to the underlying conviction?
 - a. You will want to establish that the conviction and original sentence is invalid, which in effect ends the revocation. But if the judge denies the jurisdictional motion in your revocation case and revokes the sentence and you appeal, you will be unable to challenge the underlying sentence in

the revocation appeal according to OCCA court Rule 1.2 (D)(4) “Scope of review is limited to the validity of the revocation order.”

- b. **Creek cases:** If the underlying facts of your Indian country claim are not disputed, i.e. the defendant or victim is Indian and the site of the crime is within Creek reservation boundaries, then consider some kind of writ, such as mandamus, asking OCCA to issue an order mandating that the trial judge vacate the conviction and sentence, dismiss the case, and order immediate release of the prisoner.
 - c. **Other tribe’s reservations:** To succeed on these claims will require development of the argument specifically related to the tribe whose reservation you claim are was not disestablished. As Justice Gorsuch said, “Each tribe’s treaties must be considered on their own terms.”
16. Would filing state writs of habeas corpus be more efficient in making these jurisdictional challenges?
- a. It is unknown how the OCCA would handle extraordinary writs in this particular circumstance. About a hundred pro se prisoners filed state writs of habeas corpus on *Murphy* claims in the county where they were incarcerated serving their sentences. The district judges dismissed the writs. On appeal the OCCA said that such writs were the wrong procedures and steered them to filing APCR. On appeal from the denial of the APCR, the OCCA, as it did in *McGirt*, denied the APCR, saying *Murphy* was premature.
 - b. Consider possibility of writs to Oklahoma Supreme Court if it appears trial courts (or OCCA) are creating obstacles to quick resolutions n pending cases.

17. Does an attorney have an ethical obligation to inform the trial court or prosecutor that his/her client is Indian?
 - a. Open for discussion. See no. 9 above.

“Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States.”

“Likewise, courts have no proper role in the adjustment of reservation borders Congress sometimes might wish an inconvenient reservation would simply disappear. . . But wishes don’t make for laws. And saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.”

“Still, just as wishes are not laws, future plans aren’t either. Congress may have passed laws to create conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.”

“To determine whether a tribe continues to hold a reservation, there is only one place we may look: the **Acts of Congress.**”

“[Oklahoma] reads *Solem* as requiring us to examine the **laws passed by Congress** at the first step, contemporary events at the second, and even later events and demographics at the third. On the State’s account, we have so far finished only the first step, two more await.

This is mistaken. When interpreting Congress’s work in this arena, no less than any other, our charge is usually to ascertain and follow **the original meaning of the law before us.** That is the only “step” proper for a court of law.”

“**[E]xtratextual considerations** hardly supply the blank check Oklahoma supposes There is no need to consult **extratextual sources** when the meaning of the statute’s terms is clear. Nor may **extratextual sources** overcome those terms.”

“On the far end of the Trail of Tears was a **promise** Today we are asked whether the lands **these treaties promised** remain an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, **we hold the government to its word.**”

“So, it’s no matter how many other **promises** to a tribe the federal government has already broken, **If Congress wishes to break the promise of a reservation, it must say so.**”