

February 4, 2020

SUPREME COURT BULLETIN NO. 01-20

TO: Tribal Clients
FROM: Sonosky, Chambers, Sachse, Endreson & Perry, LLP
SUBJECT: Supreme Court Mid-term Summary – 2019 Term

At the midpoint of the Supreme Court's 2019 term, there has been little activity on Indian law issues. Soon, however, the Court will consider the status of the Muscogee (Creek) Reservation, which is the question presented in *McGirt v. Oklahoma* (18-9526). That same issue was before the Court last term in *Sharp v. Murphy* (17-1107) (formerly *Carpenter v. Murphy*, formerly *Royal v. Murphy*), but was not decided by the eight justices who participated in the case (Justice Gorsuch recused himself). The Court granted certiorari in *McGirt* this term, evidently to allow the full Court to consider the same issue. We discuss *Murphy* and *McGirt* below. Other certiorari grants are also possible this term, and we also discuss below the cases in which petitions for a writ of certiorari remain pending, as well as the cases the Court has declined to hear.

A. Pending Merits Stage Cases

McGirt v. Oklahoma (18-9526), deals with whether Congress disestablished or diminished the Muscogee (Creek) Reservation in Oklahoma in the late 19th and early 20th century. The same issue is presented in *Sharp v. Murphy* (17-1107), which is still pending before the Court. The resolution of *McGirt* will in all likelihood control the result in *Murphy*, which we discuss first.

1. In *Sharp v. Murphy*, a member of the Muscogee (Creek) Nation was convicted of murder and sentenced to death in Oklahoma state court for killing another member of the Muscogee (Creek) Nation. The murder occurred within the boundaries of the land that was patented by the United States to the Creek Nation by treaty. Murphy petitioned for habeas corpus in federal court, arguing that the patent to the Creek Nation

SUPREME COURT BULLETIN NO. 01-20

February 4, 2020

Page 2

established a reservation that was never diminished by Congress, that the crime with which he was charged therefore occurred in “Indian country,” and that as a result the United States, not the state of Oklahoma, had jurisdiction to prosecute the crime under the Major Crimes Act.

The district court denied the petition, but the Tenth Circuit reversed, reasoning that the grant of land to the Creek Nation established a Reservation that Congress never diminished under the three-factor test of *Solem v. Bartlett*, 465 U.S. 463 (1984). Oklahoma sought rehearing en banc which was denied, and then sought Supreme Court review. The Court granted certiorari, but Justice Gorsuch recused himself from the case at the outset. The eight remaining members of the Court held oral argument on November 27, 2018, in which the United States participated in support of Oklahoma and the Muscogee (Creek) Nation participated in support of Murphy. After argument, the Court requested supplemental briefing on whether any statute might grant Oklahoma criminal jurisdiction in the Creek Nation’s 1866 territory, or whether land within the Creek Nation’s 1866 territory might be a reservation that does not constitute “Indian country.”

On June 27, 2019, the Court restored the case to its calendar for reargument during this term. However, the Court never actually scheduled re-argument and has taken no further action on the case, which remains pending.

As noted above, the recusal of Justice Gorsuch left eight Justices available to decide the case. An even, 4-4 split between the Justices would automatically affirm the Tenth Circuit’s decision, but without an opinion. It is highly likely that the Court had difficulty developing a majority opinion and wanted to avoid affirming the decision below without an opinion, so it held the case.

The Court apparently avoided the problem caused by Justice Gorsuch’s recusal by granting certiorari in a case presenting the same legal issue, from which Justice Gorsuch has not recused himself. That case is *McGirt*, which we discuss below.

2. In *McGirt v. Oklahoma*, a member of the Muscogee (Creek) Nation was convicted in Oklahoma state court of sex crimes against a minor and sentenced to life in prison. McGirt sought state post-conviction relief in state court, arguing that his crime occurred on Indian Country within the still-existing Muscogee (Creek) Reservation, and that Oklahoma lacked criminal jurisdiction to prosecute his offenses. The state District Court denied relief. He then appealed to the Oklahoma Court of Criminal Appeals. That

court found that, because *Murphy* was still pending and the Supreme Court had not yet decided whether the Muscogee (Creek) Reservation still exists, the petitioner had not shown that Oklahoma lacked criminal jurisdiction over him.

In April 2019, McGirt petitioned the Supreme Court for certiorari. After the Court requested a response brief, Oklahoma opposed certiorari. Briefing on the certiorari stage proceedings was completed in August 2019. After holding the case until December 2019, the Court granted certiorari. No Justice is recused from the case. Thus, it presents an opportunity for all nine Justices to hear the merits, and avoid an even split, as had likely developed in *Murphy*. McGirt has until today, February 4, 2020 to file his merits brief, and Oklahoma has until March 13 to file its response brief.

We expect the merits stage of *McGirt* to largely be a replay of *Murphy*, fortified by what each side learned in the *Murphy* proceedings. One significant difference is that in *McGirt*, the inmate seeking post-conviction relief is the petitioner and thus goes first, and Oklahoma is the respondent and thus goes second. The legal arguments are likely to be mostly the same. As before, the Muscogee (Creek) Nation will submit an amicus brief in support of McGirt, and the United States will submit an amicus brief in support of Oklahoma. Generally, the same amici who filed briefs supporting the pro-tribal position in *Murphy* will also file briefs in *McGirt*, making the same or similar arguments as they did before. It seems likely this will also be true for amici supporting the anti-tribal position.

The Court's granting of certiorari in *McGirt* makes it much more likely that the Court will actually decide the question of whether the Muscogee (Creek) Reservation was disestablished or otherwise diminished. We will watch developments in this case carefully to determine what impact it will have on Indian reservations inside and outside Oklahoma.

B. Pending Certiorari Stage Cases

The Court has not yet decided whether to hear four cases that present Indian law issues. These cases are as follows:

1. *Buchwald Capital Advisors LLC v. Sault Ste. Marie Tribe of Chippewa Indians* (18-1218). Major issue: whether the federal Bankruptcy Code abrogates tribal sovereign immunity.

SUPREME COURT BULLETIN NO. 01-20

February 4, 2020

Page 4

The case, brought by the litigation trustee of a bankrupt casino located in Detroit, Michigan, seeks review of the Sixth Circuit's decision that an adversary proceeding cannot be brought against a Tribe in bankruptcy court, because tribes have tribal sovereign immunity against bankruptcy court proceedings.

On June 12, 2019 the Tribe informed the Court that it had entered a settlement agreement with the petitioners, and that once the lower court approves the agreement, the parties will seek to dismiss the case. The Tribe has sought an extension of the briefing schedule to allow this to happen. The Court has extended the Tribe's time to respond until February 18, 2020.

2. *Terry v. Oklahoma* (18-8801). Major issue: diminishment of reservations in northeastern Oklahoma.

In this case, an inmate in Oklahoma state prison argues that Oklahoma lacked jurisdiction to prosecute him for drug-related criminal offenses within the Ottawa Tribe of Oklahoma's Reservation, in the northeast corner of the State. He seeks reversal of the Oklahoma Court of Criminal Appeals decision, denying him state post-conviction relief. This case basically presents the same kind of issue as *Murphy* and *McGirt*, posed with respect to the continued existence of the Ottawa Reservation.

The certiorari stage was fully briefed in October 2019. The Court appears to be holding the case until it decides *McGirt*.

3. *McMahon v. Chemehuevi Indian Tribe* (19-820). Major issue: Indian country status of California Mission Indian lands.

In this case, local law enforcement officials in California challenge an evidentiary ruling on the admissibility of historical evidence on whether certain land in California is within the Chemehuevi Indian Reservation. The local officials seek reversal of the Ninth Circuit's decision that a historical report, recommending the Secretary of the Interior establish the Chemehuevi Indian Reservation to include lands that would have otherwise been granted to California as school trust lands, was not inadmissible hearsay. The Ninth Circuit concluded that the evidence could have established a dispute over a material fact, so the district court could not grant summary judgment against the Tribe. The merits of the case relate to whether the Chemehuevi lost rights to the land under the 1851 California Land Act, whether the land was granted to California by the federal government as school

trust lands under the 1853 California Enabling Act, and whether the Secretary had authority to include the lands within an Indian reservation under the 1891 Mission Indians Relief Act.

The case was docketed on December 31, 2019, and the Tribe filed a brief in opposition on January 30, 2020.

4. *Cherokee Nation v. Bernhardt* (19-937). Major issues: Federal authority to take land into trust for another tribe within the Cherokee Nation’s treaty territory; interpretation of the Oklahoma Indian Welfare Act (“OIWA”).

The case, brought by the Cherokee Nation, challenges the Department of the Interior’s decision to take land into trust for the United Keetoowah Band of Cherokee Indians in Oklahoma (“UKB”) Corporation, within the Cherokee Nation’s treaty territory in Oklahoma. The Nation seeks reversal of the Tenth Circuit’s decision upholding the Department’s land-into-trust decision. Although generally federal regulations require the federal government to get one tribe’s consent before taking land into trust for another tribe within the first tribe’s reservation, the Department did not get the Cherokee Nation’s consent to take the land into trust in this case. The Department’s decision rested on its conclusions that Congress created a Cherokee Nation-specific exception to this regulation in an appropriations act in the 1990s, that nothing in the Cherokee Nation’s treaties prevented it from taking the land into trust, and that although UKB was federally-recognized after 1934, Interior can take land into trust for UKB Corporation for the benefit of UKB, under the OIWA. The Nation argues that Interior’s decision on these points is contrary to Supreme Court precedent and misinterprets OIWA. Attorneys from our firm represent the Cherokee Nation in this case.

The case was docketed on January 27, 2020, and the United States’ response is due February 26, 2020.

C. Cases in Which the Court Denied Certiorari This Term.

So far this term the Court has denied certiorari in the following cases raising Indian law issues:

1. *Oglala Sioux Tribe v. Fleming* (18-1245). Major issue: Federal court jurisdiction over challenges to state court removal of Indian children from their parents.

SUPREME COURT BULLETIN NO. 01-20

February 4, 2020

Page 6

2. *Alabama-Coushatta Tribe of Texas v. Texas* (19-403). Major issue: Whether passage of the Indian Gaming Regulatory Act overturns prior existing tribal-specific acts governing gaming on a specific tribe's lands.

3. *Knighon v. Cedarville Rancheria of Northern Paiute Indians* (19-131) Major issue: Tribal adjudicatory authority over tort claims against non-members.

4. *Smith v. United States* (19-5744). Major issue: Federal criminal jurisdiction to prosecute tribal members for state crimes committed on Reservation under Assimilative Crimes Act.

5. *Spurr v. Pope* (19-598). Major issue: Tribal sovereign immunity and jurisdiction over non-members under the Violence Against Women Act.

We would be happy to discuss any of the cases discussed in this memorandum, and their potential impacts on tribal interests, at your convenience. And we will keep you posted on further developments.

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP

By: Frank S. Holleman