IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-3330

LANCE GEORGE OWEN,

Petitioner and Appellant,

-vs-

DOUGLAS L. WEBER, Warden of the South Dakota State Penitentiary,

Respondent and Appellee,

AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

HON. KAREN E. SCHREIER
CHIEF JUDGE

BRIEF OF THE APPELLANT

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SUMMARY OF THE CASE

This appeal arrives from the district court's order denying a petition for writ of habeas corpus under 28 U.S.C. § 2254 filed by Lance George Owen, who is currently serving a life sentence without the possibility of parole in the South Dakota State Penitentiary. The central question is whether the state court that convicted Owen of committing a murder and aggravated assault at a tribal government housing unit – leased and operated by the Sisseton-Wahpeton Oyate Indian Tribe – had proper jurisdiction to do so, or whether only the federal government had jurisdiction to prosecute the crime under the Indian Major Crimes Act, 18 U.S.C. § 1153.

The district court concluded that the state court had proper jurisdiction over Owen. This conclusion was incorrect, and an unreasonable application of federal law to the record below, because the tribal government housing project qualified as a dependent Indian community and therefore fit within the definition of "Indian country" set forth in 18 U.S.C. § 1151. As a result, Owen's habeas petition was incorrectly denied and the district court's order sealing a contrary fate accordingly should be reversed.

Owen requests twenty (20) minutes for oral argument.

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STATEMENT OF THE ISSUES

I. Did the State of South Dakota lack jurisdiction to prosecute Owen because the government housing project leased and operated by the Sisseton-Wahpeton Housing Authority is a dependent Indian community under 18 U.S.C. § 1151?

The district court held that the housing project did not qualify as a dependent Indian community under 18 U.S.C. § 1151 and that the state's jurisdiction accordingly was proper. However, the district court granted a certificate of appealability on this issue.

- *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).
- *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425 (1975).
- *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981).
- *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010).

JURISDICTIONAL STATEMENT

Lance George Owen, an inmate presently confined and serving a life sentence at the South Dakota State Penitentiary, respectfully appeals from the district court's judgment and order denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, entered on July 30, 2010, by the Honorable Karen E. Schreier, Chief Judge, United States District Court for the District of South Dakota. (App. 292, 302). The district court had jurisdiction over Owen's petition pursuant to 28 U.S.C. § 2241(a) and 28 U.S.C. § 2254. The district court granted a certificate of appealability on the issue of the state court's jurisdiction over Owen on October 19, 2010. (App. 317). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 2253(a) and 28 U.S.C. § 1291.

STATEMENT OF THE CASE

State Trial Proceedings

On February 3, 2005, Lance G. Owen, an enrolled member of the Sisseton-Wahpeton Oyate Tribe, was indicted by a grand jury in Roberts County, South Dakota, on alternative counts of murder in the first degree, murder in the second degree, and manslaughter in the first degree, as well as an additional count of aggravated assault. (App. 5).

On September 12, 2005, Owen filed a pre-trial habeas petition and motion for an evidentiary hearing on the issue of whether the state court had proper jurisdiction. (App. 9). On September 29, 2005, a hearing on the petition and motion was held before the Honorable Jon Flemmer, Circuit Judge, in Roberts County of the Fifth Judicial Circuit in South Dakota. (App. 20). Following initial argument and the introduction of evidence, the hearing was continued. (App. 33). On October 13, 2005, the hearing on the jurisdictional issue resumed and testimony was received by the court. (App. 40). The court took the matter under advisement and reserved its ruling at that time. (App. 63).

On October 17, 2005, Owen filed a motion to dismiss his indictment for lack of jurisdiction. (App. 65). A hearing on the motion and jurisdictional issue was held before Judge Flemmer on December 9, 2005. (App. 68). At the close of this hearing, the trial court denied the motion to dismiss the indictment, as well as the prior habeas petition. (App. 74-75). On December 29, 2005, the Roberts County Circuit Court entered its written order denying the motion to dismiss the indictment, denying the habeas petition, and holding that the state court had proper jurisdiction. (App. 77).

A jury trial was held on January 9-23, 2006, in Sisseton, South Dakota, with Judge Flemmer presiding. (App. 79). During the trial, Owen filed a pro se motion

to dismiss the indictment on jurisdictional grounds, which the trial court denied. (App. 85-86). At the close of the state's evidence, Owen moved for judgment of acquittal on the basis of lack of jurisdiction. (App. 87-88). The trial court denied the motion. (App. 88-89).

On January 23, 2006, the jury found Owen guilty of first degree murder and aggravated assault. (App. 91). The trial court's judgment of conviction was entered on both counts on that same day. (App. 6, 91, 188). Also that same day, Owen was sentenced to life imprisonment without the possibility of parole for the murder conviction and a concurrent sentence of fifteen years for the aggravated assault conviction. (App. 6, 91, 99-100, 188-89).

Direct Appeal

On February 21, 2006, Owen filed a notice of appeal from his conviction with the South Dakota Supreme Court. (App. 95). Among other challenges to his conviction, Owen's brief raised the issue of whether the state court had jurisdiction over his alleged crimes. (App. 112). On February 28, 2007, the South Dakota Supreme Court entered its decision holding, inter alia, that the state court had proper jurisdiction and affirming Owen's conviction. *See State v. Owen*, 729 N.W.2d 356 (S.D. 2007) (App. 97, 112-13). The Court's judgment of affirmance was entered on that same day. (App. 116).

State Habeas Proceedings

On May 22, 2007, Owen filed an application for a writ of habeas corpus in Roberts County Circuit Court of the Fifth Judicial Circuit in South Dakota. (App. 117). On June 7, 2007, the state filed its return. (App. 122). The Honorable Scott P. Myren, Circuit Judge, was assigned to the proceedings. (App. 126).

A hearing on Owen's petition was held before Judge Myren on January 4, 2008. (App. 126). A statement of issues, including the jurisdictional issue, was presented as an exhibit at the hearing. (App. 135). Argument was heard on the jurisdictional issue during which several relevant factual stipulations were entered between the defendant and the state. (App. 131-33). On October 21, 2008, the court filed its written decision holding that the state had proper jurisdiction and denying Owen's petition. (App. 136, 137-39).

Owen submitted proposed findings of fact and conclusions of law that were rejected by the court. (App. 144). Owen further filed objections to proposed findings of fact and conclusions of law submitted by the state. (App. 150). On November 4, 2008, the court entered its order denying Owen's application for a writ of habeas corpus. (App. 155). The court entered findings of fact and conclusions of law. (App. 156).

On December 2, 2008, Owen filed an application in circuit court for a

certificate of probable cause pursuant to SDCL § 21-27-18.1 to appeal from the denial of his state habeas petition to the South Dakota Supreme Court. (App. 164). Owen's application raised and preserved the jurisdictional issue. (App. 164). On December 11, 2008, Judge Myren denied the application. (App. 167).

On December 19, 2008, Owen then filed a motion for certificate of probable cause with the South Dakota Supreme Court that also raised the issue of state jurisdiction. (App. 169-70). On March 23, 2009, the South Dakota Supreme Court denied the motion for a certificate of probable cause, thereby exhausting Owen's state post-conviction remedies. (App. 173).

Federal Habeas Proceedings

On May 5, 2009, Owen filed a pro se petition under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody in United States District Court, District of South Dakota, Southern Division. (App. 179). The case was assigned to the Honorable Karen E. Schreier, Chief Judge. Among other issues, Owen's petition contended that the state court did not have jurisdiction to prosecute him for his alleged crimes. (App. 181). On June 12, 2009, the state filed its answer to Owen's petition. (App. 228).

On July 30, 2010, the district court entered its order denying Owen's petition for a writ of habeas corpus. (App. 292). In its order, the district court

held that the land in question was not a dependent Indian community and that the state court's determination that it had proper jurisdiction was neither contrary to clearly established law or based on an unreasonable determination of the facts based on the evidence presented. (App. 299). The district court accordingly entered judgment dismissing Owen's petition with prejudice. (App. 302).

On October 19, 2010, the district court granted Owen a certificate of appealability to this Court "on the issue of whether state court jurisdiction was proper." (App. 317). The district court's order was based upon its determination that "[i]t is possible the Eighth Circuit could reach a different conclusion and determine that the Peever Housing Project qualified as a dependent Indian community." (App. 307).

This appeal followed.

STATEMENT OF THE FACTS

In the early morning hours of January 18, 2005, a party ended in tragedy when an individual named Adrian Keeble was fatally stabbed at a housing unit operated by the Sisseton-Wahpeton Housing Authority in Peever, South Dakota. Lance G. Owen was convicted in South Dakota state court of murder and aggravated assault and sentenced to life in prison without the possibility of parole, as well as a concurrent sentence of fifteen years. (App. 6, 91, 99-100, 188-89). Owen is an enrolled member of the Sisseton-Wahpeton Oyate Tribe. (App. 132).

The land where the stabbing occurred was originally reserved for the Sisseton-Wahpeton Indians by treaty with the United States in 1867, 15 Stat. 505

(1867 Treaty) and there is no dispute that it falls within the original boundaries of the Lake Traverse Indian Reservation. (App. 1, 132-34). The Treaty of 1867 "granted the tribe a permanent reservation in the Lake Traverse area, and provided for tribal self-government under the supervision of federal agents." *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 431 (1975).

Beginning with the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 338 (repealed in part by Pub.L. No. 106-462 § 106, 114 Stat. 1991, 2007 (2000)), and accelerated by the Act of May 8, 1906, ch. 2348, 34 Stat. 182 (Burke Act), Congress authorized reservation lands to be alienated from the various tribes through a process of allotment to individual tribe members and, eventually, the issuance of fee simple patents to white settlers. *See DeCoteau*, 420 U.S. at 432; *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 999-1000 (8th Cir. 2010). As this Court has recognized, "[t]he process of allotment and the liberalized issuance of fee patents under the Burke Act left many Indians landless and reduced once coherent communities to jurisdictional checkerboards…" *See id.* at 1000 (citing *Cohen's Handbook of Federal Indian Law*, § 1.04 at 78 (2005 ed.)).

In 1891, following an agreement signed by a required majority of tribal members, the Lake Traverse Indian Reservation was terminated and disestablished by an Act of Congress. *See DeCoteau*, 420 U.S. at 436-45 (citing Act of March 3,

1891, 26 Stat. 989). The result of this disestablishment was described by the Supreme Court in 1975:

> The 1867 boundaries of the Lake Traverse Reservation enclose approximately 918,000 acres of land. Within the 1867 boundaries, there reside about 3,000 tribal members and 30,000 non-Indians. About 15% of the land is in the form of 'Indian allotments'; these are individual land tracts retained by members of the Sisseton-Wahpeton Tribe when the rest of the reservation lands were sold to the United States in 1891. The trust allotments are scattered in a random pattern throughout the 1867 reservation area. The remainder of the reservation land was purchased from the United States by non-Indian settlers after 1891, and is presently inhabited by non-Indians.

DeCoteau, 420 U.S. at 428.

The tribal government housing unit where the crime occurred is located at 248 Washington Street within the City of Peever, a political subdivision of the State of South Dakota. (App. 12-13). The property description places it in Lawrence Township, Northwest Corner, Section 8, in Roberts County, South Dakota. (App. 12-13). According to the United States Department of Interior, in the early 1900's this property was sold by fee simple patent to the City of Peever and, like all land now within the city limits of Peever, is in Fee status and governed by the city and Lawrence Township. (App. 14-15, 132).

In the early 1980's, the housing unit at 248 Washington Street was leased by the City of Peever to the Sisseton-Wahpeton Housing Authority for 99 years to serve as government housing. (App. 47, 138). There are at least twenty-six such

housing units leased to the tribe in Peever. (App. 48). The particular lease for 248 Washington Street cannot be located by the City, but similar leases were issued for consideration in the amount of one dollar, and the Sisseton-Wahpeton Oyate Tribe does not owe or make any rental payments to the City under its terms. (App. 44-45, 74).

The Sisseton-Wahpeton Housing Authority has complete control over the housing units with regard to the conditions and upkeep of the units, their governing policies, determination regarding who may live there, and the amount of rent to be charged. (App. 48-49, 51). Eviction notices are served by the tribal housing authority. (App. 53). The Sisseton-Wahpeton Oyate Tribe does not pay any state or local property taxes on these units, including the one located at 248 Washington Street. (App. 58). Although the Roberts County Sheriff's Office provides law enforcement services for Peever, including residents of the housing units, tribal police participate in such duties as well. (App. 53-54). In fact, the first law enforcement on the scene at 248 Washington Street on the evening in question was a tribal officer. (App. 53-56).

The population of Peever is approximately forty percent Indian. (App. 46-47). Children in Peever generally either attend school in nearby Sisseton, where there is a school run by a state school district, or Tio Spa Zina, Waubay, and

Enemy Swim schools run by the tribe on Indian lands. (App. 47-48, 54). Generally, children of Indian residents attend the tribal schools. (App. 54). Indian residents obtain health care through Indian Health Services run by the tribe and the Bureau of Indian Affairs. (App. 48-49, 54-55). In general, the Indian residents of Peever have a strong connection to the Sisseton-Wahpeton Oyate Tribe and the governmental services, such as housing, schools, and health care, jointly provided by the tribe and the United States government. (App. 49, 54).

SUMMARY OF ARGUMENT

1. If the state did not have proper jurisdiction over Owen, an enrolled member of the Sisseton-Wahpeton Oyate Tribe, to prosecute him for the crimes with which he was charged, his state court conviction should be vacated.

2. Under the Indian Major Crimes Act, 18 U.S.C. § 1153, all major crimes committed by tribe members in "Indian country" fall under the exclusive jurisdiction of the federal government. The definition of "Indian country" set forth in 18 U.S.C. § 1151 includes "dependent Indian communities."

3. The fatal stabbing of Adrian Keeble, for which Owen was convicted in state court, occurred at a tribal government housing unit leased and operated by the Sisseton-Wahpeton Housing Authority. This housing project qualified as a dependent Indian community under section 1151(b) because it was set aside as

federally subsidized government housing for the use of Indians enrolled in the Sisseton-Wahpeton Oyate Tribe and because the dependence of tribe members living in the project on the federal government demonstrated the requisite level of federal superintendence.

4. As a result, the federal government had exclusive jurisdiction over the crimes for which Owen was convicted and his state court conviction was invalid and should be vacated.

STANDARD OF REVIEW

In this habeas corpus action brought pursuant to 28 U.S.C. § 2254, this Court reviews the district court's conclusions of law de novo and its factual findings for clear error. *See McGehee v. Norris*, 588 F.3d 1185, 1193 (8th Cir. 2009); *Colvin v. Taylor*, 324 F.3d 583, 586 (8th Cir. 2003). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court may not grant relief for claims adjudicated on the merits by the state court unless the adjudication was contrary to, or involved an unreasonable application of, federal law as determined by the Supreme Court, or was an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d).

A state court "unreasonably applies federal law when it "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably

applies it to the facts of the particular state prisoner's case" or "unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). "[A] determination of a factual issue made by a State court shall be presumed to be correct" in a federal habeas proceeding. 28 U.S.C. § 2254(e)(1).

In addition, the cannons of Indian law require that statutes affecting Indians are to be liberally construed with doubtful expression resolved in favor of the Indians. *See Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918). "Statutes are to be liberally construed in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251 (1992).

ARGUMENT

I. OWEN'S CONVICTION SHOULD BE VACATED BECAUSE THE STATE COURT LACKED JURISDICTION OVER HIM FOR THE INCIDENT AT THE TRIBAL GOVERNMENT HOUSING PROJECT IN PEEVER, SOUTH DAKOTA.

A. The absence of state court jurisdiction is a proper basis for federal habeas relief.

"Originally," as the Supreme Court has explained, "criminal defendants whose convictions were final were entitled to federal habeas relief only if the court

that rendered the judgment under which they were in custody lacked jurisdiction to do so." *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). The absence of jurisdiction in the convicting court accordingly is a longstanding and accepted basis for federal habeas relief cognizable under the due process clause. *See Rhode v. Olk-Long*, 84 F.3d 284, 287 (8th Cir. 1996); *Houser v. United States*, 508 F.2d 509, 512 (8th Cir. 1974); *Yellowbear v. Wyoming Attorney General*, 525 F.3d 921, 924 (10th Cir. 2008); *Evans v. Cain*, 577 F.3d 620, 624 (5th Cir. 2009).

B. The federal government has proper jurisdiction over major crimes committed on reservations or "Indian Country" as defined by 18 U.S.C. § 1151.

It is well established that states have criminal jurisdiction over tribe members for crimes not committed in Indian country. *See Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Thus, if the crime at issue in this case was not committed in Indian country, then the state court properly exercised its jurisdiction to prosecute Owen. However, if the crime was committed in Indian country, then the federal government had proper jurisdiction over Owen and the underlying conviction in this case was improperly obtained by the state.

The question of jurisdiction for prosecution of criminal offenses on Indian reservations arose in *Ex parte Crow Dog*, in which the Supreme Court held that

federal courts did not have jurisdiction to prosecute a murder occurring in Indian country. 109 U.S. 556, 572 (1883). In 1885, Congress responded to that decision by passing the Indian Major Crimes Act, 18 U.S.C. § 1153, which granted the United States exclusive jurisdiction to prosecute Indians for major crimes in "Indian country." *United States v. Kagama*, 118 U.S. 375, 383 (1886); *Keeble v. United States*, 412 U.S. 205, 209 (1973).

As this Court recently explained, "[r]eservation land is by definition 'Indian county,' and as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states." *Podhradsky*, 606 F.3d at 1006 (citing *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n.1 (1998)). "Reservation land," however, "is not the only way to qualify as Indian country." *Podhradsky*, 606 F.3d at 1006. The Indian country statute, 18 U.S.C. § 1151, was enacted to establish the scope of federal jurisdiction over major crimes between Indians occurring on Indian lands. It defines the term "Indian country" as meaning:

> (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.[1] If the crime in question occurred in Indian country, as defined by section 1151, then its prosecution properly fell within the ambit of federal jurisdiction and the state court lacked jurisdiction to prosecute Owen. *See Podhradsky*, 606 F.3d at 1006 (citing *Venetie*, 522 U.S. at 527). Since the inception of his prosecution in state court, Owen has consistently maintained that the state lacked jurisdiction to prosecute him because the tribal government housing project at which the alleged crime occurred is properly considered a "dependent Indian community" pursuant to 18 U.S.C. § 1151.

C. The federal government had exclusive jurisdiction over the crime because the tribal government housing project where it occurred was a "dependent Indian community" under 18 U.S.C. § 1151(b).

In *Venetie*, 522 U.S. at 527, the Supreme Court recognized that since 18 U.S.C. § 1151 was enacted in 1948, it had not had occasion to interpret the term "dependent Indian communities." To derive a test for identifying "dependent Indian communities" under section 1151(b), the Court examined three previous

[1] Section 1151 is now used to delineate Indian lands for both civil and criminal purposes. *See Podhradsky*, 606 F.3d at 1006 n. 8 (citing *Venetie*, 522 U.S. at 527); *DeCoteau*, 420 U.S. at 427 n. 2).

cases in which it had recognized "that Indian lands that were not reservations could be Indian Country and that the Federal Government could therefore exercise jurisdiction over them." *Venetie*, 522 U.S. at 528 (citing *United States v. Sandoval*, 231 U.S. 28, 34 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. McGowan*, 302 U.S. 535 (1938)).

The Supreme Court concluded that each of those case had "relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them." *Venetie*, 522 U.S. at 530. In construing the term "dependent Indian communities" for the first time, the Supreme Court thus held that the term "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must be set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Venetie*, 522 U.S. at 527; *see also Podhradsky*, 606 F.3d at 1014.

1. *The housing project was not a reservation or allotment.*

A prerequisite in the test established by the Supreme Court in *Venetie* is expressed in the negative. Dependent Indian communities under section 1151 are lands that "are neither reservations nor allotments[.]" *Venetie*, 522 U.S. at 527;

Podhradsky, 606 F.3d at 1014. This requirement is readily established here. In *Solem v. Bartlett*, 465 U.S. 463 (1984), the Supreme Court held that "[o]nce a block of land is set aside for an Indian reservation … the entire block retains its reservation status until Congress explicitly indicates otherwise." *Podhradsky*, 606 F.3d at 1008 (quoting *Solem*, 465 U.S. at 470). The land on which the tribal government housing unit where the crime occurred is located within the original boundaries of the Lake Traverse Indian Reservation. (App. 1, 132-34).

In 1891, however, Congress explicitly indicated its intent to disestablish that reservation in the Act of March 3, 1891, ch. 543, 26 Stat. 1035, which provided that the tribe had agreed to "cede, sell, relinquish and convey" all interest in unalloted lands on the Lake Traverse Indian Reservation, and that it would receive full compensation in consideration for its loss. *See Solem*, 465 U.S. at 469 n. 10. As the Supreme Court expressly recognized in *DeCoteau*, 420 U.S. at 436-45, the Act of 1891 thus disestablished the Lake Traverse Sioux Reservation. *See Solem*, 465 U.S. at 469 & n. 10; *United States ex rel Cook v. Parkinson*, 525 F.2d 120, 123 (8th Cir. 1975). Thus, the land on which the tribal housing unit sits is no longer part of the reservation, but rather was sold to the City of Peever. (App. 14-15, 132).

It is equally clear that the land in question is not an unextinguished allotment. An allotment is defined as a parcel of land created out of a diminished

Indian reservation and held in trust by the federal government for the benefit of individual Indians. *See Venetie*, 522 U.S. at 529 (citing *Pelican*, 232 U.S. at 449). Here, even if the land was once held in trust for individual tribe members as part of the allotment process, it was long ago sold to non-Indians, thereby extinguishing allotment status. (App. 14-15, 132). Thus, the tribal housing project is neither presently part of an Indian reservation nor is it an allotment held in trust for the benefit of individual Indians. It is therefore eligible for consideration as a dependent Indian community under 18 U.S.C. § 1151(b). *See Venetie*, 522 U.S. at 527; *Podhradsky*, 606 F.3d at 1014.

2. *The housing project met the federal set aside and superintendence requirement.*

Prior to *Venetie*, this Court held that in considering whether certain land qualifies as a dependent Indian community under 18 U.S.C. § 1151(b), the following factors must be considered:

> (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory;" (2) "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area," (3) whether there is "an element of cohesiveness … manifested either by economic pursuits in the area, common interests, or need of the inhabitants as supplied by that locality," and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."

United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981) (citations omitted).

In *South Dakota*, this Court applied these factors to hold that a housing project located in Sisseton, South Dakota, was a dependent Indian community under section 1151(b). 665 F.2d at 843 (citing *Weddell v. Meierhenry*, 636 F.2d 211, 212 (8th Cir. 1980)). This Court further noted that "the fact that the state has asserted jurisdiction over the project does not necessarily defeat a finding of a dependent Indian community." *South Dakota*, 665 F.2d at 842 (citing *United States v. John*, 437 U.S. 634, 653 (1978)).

In *Venetie*, the Supreme Court held that in order to be considered a dependent Indian community under the jurisdiction of the federal government within the meaning of 18 U.S.C. § 1151, lands in question first "must be set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Venetie*, 522 U.S. at 527; *see also Podhradsky*, 606 F.3d at 1014. "The federal set-aside requirement ensures that the land in question is occupied by an 'Indian community'; the federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Venetie*, 522 U.S. at 531.

This Court should hold that both of these requirements have been satisfied

in this case. First, the facts in the underlying record establish that the land has been set aside by the government for the use of Indians as Indian land. The land was leased in the early 1980's by the City of Peever to the Sisseton-Wahpeton Housing Authority for 99 years to serve as federally subsidized government housing for the Tribe. (App. 47, 138). As this Court has previously explained, at the time that the project in question originated in the early 1980's, the Department of Housing and Urban Development (HUD) Office of Indian Programs made an annual contribution payment to the Sisseton-Wahpeton Housing Authority "for debt service and overhead, to make up for the inability of the Housing Authority to collect enough rent to exist on its own." *South Dakota*, 665 F.2d at 840. "These contribution funds are specifically earmarked for Indian housing." *Id.*

By subsidizing the tribal housing authority and its housing projects, the federal government, in effect, set aside those projects for their use as Indian lands. This is further demonstrated by the terms of the lease to the tribal housing authority. As the South Dakota Supreme Court has recognized, a 99-year lease, (far in excess of the useful life of the unit in question) for consideration of one dollar is effectively a transfer of ownership of the land. *See First Nat'l Bank of Madison v. Spear*, 80 N.W. 166, 168 (S.D. 1899). And it is undisputed that the purpose of the lease was to provide government housing to members of the

Sisseton-Wahpeton Oyate Tribe and that the tribal housing authority has complete control over the premises. (App. 47, 48-49, 51, 138).

As the Supreme Court has explained, the purpose of the set-aside requirement is to ensure "that the land in question is occupied by an 'Indian community[.]'" *Venetie*, 522 U.S. at 531. That is evident from the record below. It is thus clear that the land has been set aside, with the assistance of the federal government, for the use of the tribe as Indian lands. *See Venetie*, 522 U.S. at 527; *Podhradsky*, 606 F.3d at 1014.

It is also apparent that the "federal superintendence" requirement of the Supreme Court's test in *Venetie* is met in this case. The purpose of this particular inquiry is to ensure "that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Venetie*, 522 U.S. at 531. Here, just as in *South Dakota*, 665 F.2d at 840-41, the record demonstrates that the Indian residents of Peever have a strong connection to the Sisseton-Wahpeton Oyate Tribe and the governmental services, such as housing, schools, and health care, jointly provided by the tribe and the United States government. (App. 48-49, 54-55).

Although Roberts County law enforcement has jurisdiction in the City of Peever, tribal law enforcement also has an authorized presence – and at the tribal housing units in particular – as evidenced by the fact that a tribal officer was first on the scene on the night in question. (App. 53-56). Finally, the Sisseton-Wahpeton Oyate Tribe does not pay any state or local property taxes on these units, including the one located at 248 Washington Street. (App. 58). Thus, the standard for establishing a dependent Indian community under 18 U.S.C. § 1151(b) was met, and the district court's contrary determination was an unreasonable application of federal law. 28 U.S.C. § 2254(d).

CONCLUSION

WHEREFORE, Lance George Owen respectfully requests that the district court's order and judgment be reversed and vacated with instructions to grant his petition for writ of habeas corpus and release him from state custody.

Dated this 18th day of January, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 18, 2011, two true and correct copies of the foregoing **Brief of Appellant,** as well as an electronic version on a computer disk, was served by U.S. Mail, first class, postage prepaid, upon the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Appellant complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner: The Brief was prepared using Microsoft Word, Version 2003. It is proportionately spaced in 14-point type, and contains 5,144 words.

Pursuant to the Eighth Circuit Rules of Appellate Procedure 28A(d), I certify that the disk provided to the Court and opposing counsel have been scanned for viruses, using Symantec Corporate Edition antivirus soft ware, and the diskettes are virus free.

/s/ Ronald A. Parsons, Jr.
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Addendum