IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

(1) JEFF FIFE; (2) TED TIGER; (3) JESS HARJOCHEE; (4) CECIL HARRY; (5) RODNEY LUELLEN; (6) JEANETTA CARR; (7) JOSEPH DOMEBO; (8) CECILIA WITTMAN; (9) JENNIE GOODELL and (10) DANIEL WIND, Petitioners, vs. (1) PATRICK E. MOORE; (2) RODERICH WIEMER, and; (3)MARCY MOORE, Respondents.	Case No.: 6:11-cv-00133-RAW

RESPONSE OF PETITIONERS IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

COME NOW Petitioners Jeff Fife, Ted Tiger, Jess Harjochee, Cecil Harry, Rodney Luellen, Jeanetta Carr, Joseph Domebo, Cecilia Wittman, Jennie Goodell, and Daniel Wind (collectively, the "Petitioners"), and respectfully submit this response in opposition to Respondents' motion to dismiss [Docket No. 22]. Petitioners request the Court deny Respondents' motion and grant the petition [Docket No. 21] and issue a Writ of Habeas Corpus, in accordance with 25 U.S.C. § 1303. For their response, Petitioners advise the Court as follows.

ARGUMENT AND AUTHORITIES

A. Petitioners Are Under Legal "Detention" Sufficient To Seek Relief By Writ of Habeas Corpus; Cases Cited By Respondents Support Petitioners' Argument That They May Seek Relief

In their motion to dismiss, Respondents allege that Petitioners are not in "detention" sufficient to seek a Writ of Habeas Corpus under 25 U.S.C. § 1303, citing *Dry v. CFR Court of*

Pitchlynn & Williams, PLLC
124 East Main Street
Norman, Oklahoma 73069
(405) 360-9600

Indian Offenses for the Choctaw Nation, 168 F.3d 1207 (10th Cir. 1999). The *Dry* case does not help Respondents' arguments. Indeed, the *Dry* case is one of the cases relied upon by Petitioners in support of their proposition. Under a clear and straight-forward reading of the *Dry* case, the Tenth Circuit has expressly found that, for purposes of habeas review of tribal court actions under the Indian Civil Rights Act, "[a] petitioner need not show actual, physical custody to obtain relief." *Id.* 1208 (*citing Maleng v. Cook*, 490 U.S. 488, 491 (1989). The Tenth Circuit held that a petitioner need only show that he/she is subject to "severe restraints on [his or her] individual liberty." *Id.* (*citing Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973).

In *Dry*, the petitioners were released on their own recognizance pending trial. *Dry*, 168 F.3d at 1208. The Tenth Circuit specifically held "[a]lthough Appellants are ostensibly free to come and go as they please, they remain obligated to appear for trial at the court's discretion [and] [t]his is sufficient to meet the 'in custody' requirement of the habeas statute." *Id.* In their motion to dismiss, Respondents concede Petitioners are free on bond, yet they fail to provide legal authority to show this Court how Petitioners' situation is legally distinct from the facts in *Dry* and the Supreme Court case law cited in Petitioners' petition. *See also, Means v. Navajo Nation*, 432 F.3d 924 (2005) (finding federal habeas jurisdiction under ICRA appropriate when defendant had exhausted tribal remedies as to challenge to tribal court jurisdiction, but remained subject to conditions of release pending trial on the merits).

Respondents' reliance on *Fields v. State of Oklahoma*, 243 Fed. Appx. 395, 2007 WL 2122066 (10th Cir. 2007) is meritless.[1] The court in *Fields* determined that a person sentenced to only a fine or restitution is not "in custody"; however, Petitioners in this case have not even been sentenced. A fine or restitution is not the same thing as having posted a bond and being subject to bond requirements. The cases against Petitioners remain pending and, for the time

[1] The *Fields* case is an unpublished decision and has no precedential value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

Pitchlynn & Williams, PLLC
124 East Main Street
Norman, Oklahoma 73069
(405) 360-9600

being, they are subject to having their bond revoked, arrested, and placed in jail. Respondents suggest that Petitioners have direct control whether or not they appear in court, but, like any other defendant on bail, Petitioners do not have the freedom to forget about appearing in court without any repercussions. The reality that looms over their head is that a failure to appear in court as ordered can result in arrest and jail time. The Supreme Court and the Tenth Circuit recognize that Petitioners' obligation to appear in court as ordered is enough of a restraint on liberty to satisfy the requirements for seeking a Writ of Habeas Corpus.

B. Respondents Fail To Articulate A Plausible Argument That Petitioners Have Failed To Exhaust Tribal Remedies.

Respondents assert that Petitioners have failed to exhaust available Tribal remedies, yet they fail to contradict any of the factual statements made in the Petition regarding Petitioners' efforts in the MCN Tribal courts. Respondents fail to cite to any contravening fact or make any effort to show this Court that Petitioners have failed to follow every step in the appellate process with the MCN Supreme Court.

Petitioners have shown that they asserted challenges to Tribal jurisdiction and on the basis of due process violations in the District Court and, when those challenges were rejected, Petitioners filed an appeal with the MCN Supreme Court. Respondents do not deny this.

As of this date, Petitioners have not received notice of the Supreme Court's docketing of the appeal. Respondents are correct that Petitioners face a jury trial starting April 25, 2011. Along with filing their appeal, Petitioners asked for a stay of the District Court trial. To date, the Supreme Court has refused to rule on the motion. It makes no sense for the Supreme Court to have appellate rules that provide appellants with a basis for seeking appellate relief before a hearing or trial on the merits, then ignore attempts by an appellant to seek that remedy. In such a situation, the tribal remedy is non-existent in fact, or, at best, inadequate. If a petitioner does all that this is possible but an attempted appeal is frustrated by official inaction, there is no more

Pitchlynn & Williams, PLLC
124 East Main Street
Norman, Oklahoma 73069
(405) 360-9600

to be demanded of the petitioner, and the exhaustion requirement is satisfied. *Means v. Wilson*, 522 F.2d 833, 837 (8th Cir. 1975).

C. Respondents Fail To Make A Plausible Showing That Any Of Petitioners' Contentions In Support Of The Writ Of Habeas Corpus Is Meritless.

Respondents cite to absolutely no legal authority in support for their proposition that Indian country defined by 18 U.S.C. § 1151 does not apply to the Creek Nation's exercise of tribal court jurisdiction. Essentially, Respondents are arguing that, per 18 U.S.C. § 1152, because these alleged offenses are property offenses – committed by one Indian against the property of another – that Section 1151 doesn't apply to confine the boundaries of the tribal court's jurisdiction.

It appears that Respondents do not deny that the alleged offenses for which Petitioners have been charged occurred outside the Nation's Indian country. Rather, Respondents attempt to craft an argument, unsubstantiated by law, that the Nation may assert criminal jurisdiction outside Indian country if the alleged offenses are property offenses. Respondents fail to recognize that, since tribal law must yield to any controlling federal law, for criminal adjudicatory jurisdictional purposes, the Nation cannot define its own Indian country beyond the limits established by 18 U.S.C. § 1151.

Indian tribes have exclusive power over their members and their territory subject only to limitations under federal law. *See, e.g., Worcester v. Georgia*, 31 U.S. 515, 555 (1832). An Indian tribe's power to punish members who commit crimes within Indian country is a fundamental attribute of the tribe's sovereignty. *United States v. Wheeler*, 435 U.S. 313, 326-27 (1978); *Talton v. Mayes*, 163 U.S. 376, 379-80 (1896) (emphasis added). The boundaries of a tribal court's civil and criminal jurisdiction are determined according to the boundaries of a tribe's Indian country. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 365 (2001). Respondents fail to cite to any legal authority

Pitchlynn & Williams, PLLC
124 East Main Street
Norman, Oklahoma 73069
(405) 360-9600

that it may exercise criminal jurisdiction over anyone (Indian or non-Indian) outside Indian country, as defined in Section 1151.

Absent evidence demonstrating the crimes alleged occurred on Muscogee (Creek) Nation trust or restricted property, or on fee land within reservation boundaries, jurisdiction over any alleged crime does not lie with the Nation, and the Nation is without authority to hold Petitioners in any form of legal detention or prosecute the crimes alleged. Thus, the Nation's assertion of criminal jurisdiction against Petitioners is outside the jurisdictional limits of the Nation's courts and, under federal law, is unlawful.

Respondents' remaining arguments that they are lawful officials of the Nation are expressly contradicted by the laws of the Muscogee (Creek) Nation, as outlined in the Petition. Further, even if Respondents are lawful officials, Petitioners have articulated arguments in support of the position that the prosecutor and judge should not be involved in the criminal prosecution of Petitioners in light of the blatant violations of due process rights that Petitioners are being subjected to by these Respondents. Respondents have failed to counter these arguments.

CONCLUSION

WHEREFORE Petitioners Jeff Fife, Ted Tiger, Jess Harjochee, Cecil Harry, Rodney Luellen, Jeanetta Carr, Joseph Domebo, Cecilia Wittman, Jennie Goodell, and Daniel Wind, and, respectfully submit this response in opposition to Respondents' motion to dismiss and request the motion be denied and that the Court grant the petition and issue a Writ of Habeas Corpus, in accordance with 25 U.S.C. § 1303.

Dated this 20th day of April 2011.

Pitchlynn & Williams, PLLC
124 East Main Street
Norman, Oklahoma 73069
(405) 360-9600

PITCHLYNN & WILLIAMS, PLLC

/s/ O. Joseph Williams

O Joseph Williams, OBA # 19256
Stephanie Moser Goins, OBA # 22242
P.O. Box 427
124 East Main Street
Norman, Oklahoma 73070
Telephone: (405) 360-9600
Facsimile: (405) 447-4219
Email: jwilliams@pitchlynnlaw.com
smgoins@pitchlynnlaw.com

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of April, 2011, a true and correct copy of the foregoing document was electronically transmitted to the Clerk of this Court using the ECF System for Filing. Based on the records currently on file, the Clerk of this Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Brett E. Gray
Assistant Attorney General
Muscogee (Creek) Nation
Office of the Attorney General
Hwy 75 North and Loop 56
Okmulgee, Oklahoma 74447
Attorney for Respondents

Timothy S. Posey
Graydon Dean Luthey, Jr.
Hall, Estill
320 South Boston Avenue, Suite 200
Tulsa, Oklahoma 74103-3706
Attorneys for Respondents Roderich Wiemer and Marcy Moore

/s/ O. Joseph Williams

O. JOSEPH WILLIAMS