CASE NO. 11-7072
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID B. MAGNAN,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
RANDALL G. WORKMAN, Warden, Oklahoma State Penitentiary, E. SCOTT PRUITT, Attorney General, State of Oklahoma,	)
	)
Respondents - Appellees.	)

On Appeal from the United States District Court
For the Eastern District of Oklahoma
The Honorable Judge Ronald A. White
D.C. No. CIV-09-438-RAW-KEW

APPELLANT'S OPENING BRIEF

STEVEN A. BROUSSARD
MICHAEL J. LISSAU
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
320 S. Boston Ave., Suite 200
Tulsa, Oklahoma 74103
Telephone: (918) 594-0400

CHAD A. READLER
Counsel of Record
Jones Day
325 John H. McConnell Blvd.
Columbus, Ohio 43215
Telephone: (614) 469-3939

GARY PETERSON
211 N. Robinson Ave., Suite 450 South
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3367

Oral Argument Requested

July 17, 2012

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

PRIOR OR RELATED APPEALS

None.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Oklahoma had jurisdiction over this matter pursuant to 28 U.S.C. § 2254. Petitioner David Magnan was convicted in Oklahoma state court of three counts of First Degree Murder and one count of Shooting With Intent to Kill. He was sentenced to death on each of the murder counts and to life imprisonment on the shooting with intent to kill count. Magnan filed a Petition for Writ of Habeas Corpus by a Person in State Custody on August 2, 2010 in the Eastern District of Oklahoma (Docket No. 24). The District Court denied the Petition on August 23, 2011 (Docket No. 36) (Attachment 1). The District Court entered an amended judgment on September 22, 2011 (Docket No. 42). A timely notice of appeal prepared in accordance with Fed. R. App. P. 4(b)(1) was filed on October 24, 2011 (Docket No. 43). This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253 because the District Court issued a certificate of appealability (Docket No. 37).

STATEMENT OF THE ISSUES

Were Magnan's crimes committed in Indian Country, as defined in 18 U.S.C. § 1151, thereby giving federal courts exclusive jurisdiction under 18 U.S.C. § 1153(a), the Indian Major Crimes Act, and rendering Magnan's conviction and sentence in Oklahoma state court void for lack of jurisdiction?

STATEMENT OF THE CASE

David Magnan, an Indian, is incarcerated in Oklahoma state prison under sentences of death for three convictions of first degree murder. *See Magnan v. State* (*Magnan*), 207 P.3d 397, 401 (Okla. Crim. App. 2009) (Attachment 2). He was prosecuted in Oklahoma state court in 2005, where he was convicted and sentenced after pleading guilty. *See id.*

On appeal, Magnan argued that the State lacked jurisdiction to try him because the crimes occurred in Indian Country, giving the federal courts exclusive jurisdiction. *See* 18 U.S.C. § 1153(a) ("Any Indian who commits . . . murder . . . [or] assault with intent to commit murder . . . within the Indian country, shall be subject to the . . . exclusive jurisdiction of the United States."); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) ("[F]ederal jurisdiction over the offenses covered by the Indian Major Crimes Act is 'exclusive' of state jurisdiction."). The Oklahoma Court of Criminal Appeals remanded the case to the trial court for an evidentiary hearing on the matter. The trial court in turn determined that the property was not Indian Country, meaning that the State did have jurisdiction.

In 2009, a divided Oklahoma Court of Criminal Appeals upheld Magnan's convictions and sentences. In addressing the threshold jurisdictional question, the appellate court held, *first*, that a 1970 conveyance of the property to the Seminole Housing Authority "extinguished all Indian lands restrictions that attached to

surface estate of the property," and, *second*, that "the State's interest in exercising criminal jurisdiction over this property must overwhelm any fractional interest any Indian heirs of the original allottee may own in the unseen mineral estate." *Magnan*, 207 P.3d at 404-06. The court reached those conclusions despite the absence of the statutorily required approval of the 1970 conveyance by the Secretary of Interior, the resulting trust for the benefit of the Indian owner that was created by the conveyance, and the fact that the large majority of mineral interests in the property never left Indian hands. In dissent, Judge Chapel concluded, after a detailed review of the record, that "[n]o evidence before this Court suggests the land is anything other than restricted Indian land." *Id.* at 414 (Chapel, J., dissenting). Accordingly, Judge Chapel would have held that the State did not have jurisdiction to prosecute Magnan. *See id.* at 415.

The U.S. Supreme Court denied a writ of certiorari on October 5, 2009. *See Magnan v. Oklahoma*, 130 S. Ct. 276 (2009). Magnan filed this habeas corpus petition in the District Court for the Eastern District of Oklahoma on August 2, 2010, challenging the legality of his convictions on the same jurisdictional grounds. The District Court denied the petition on August 23, 2011. *See Magnan v. Workman*, No. CIV-09-438-RAW-KEW, Opinion and Order, at 14 (E.D. Okla. Aug. 23, 2011). This appeal followed.

STATEMENT OF THE FACTS

This appeal centers on a one-acre, rural tract of land in Seminole County, Oklahoma. (EHR at 113.)[1] The tract was part of a 200-acre property allotted in the early 20th century to Jimpsey Tiger as a member of the Seminole tribe. (EHR at 114.) Much of that 200 acres, including the tract at issue here, continues to be owned by Jimpsey Tiger's descendents. (PH Tr. at 5, 136.)

Magnan's crimes occurred in a small house located on this one-acre tract. Magnan is a member of the Assiniboine and Sioux Tribes of Fort Peck, Montana. (EHR at 110-11.) Three of the four victims were also Native American. (*Id.* at 111-12.)

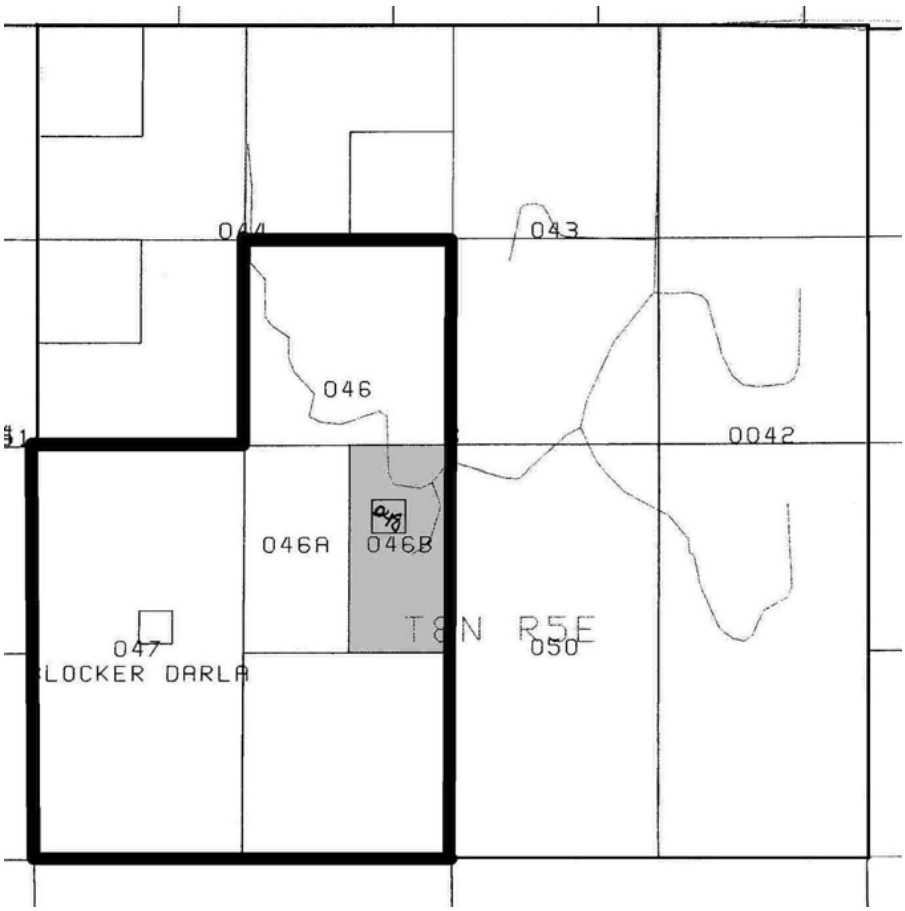
Although somewhat complicated, the title history of the one-acre property at issue is essentially undisputed. During the remand proceedings in the state trial court, G. Dale Elsener, an attorney in Seminole, Oklahoma, provided a title opinion based on his examination of the tract index records and documents in the office of the County Clerk of Seminole County. (EH Def.'s Ex. 12.) His title opinion was admitted into evidence during the evidentiary hearing. The court

[1] The state court record was filed on December 20, 2010 at Docket No. 29. Citations to that record are in the following formats. "EHR" refers to the evidentiary hearing record prepared by the state trial court, including the parties' stipulations and the trial court's findings of fact and conclusions of law. "PH Tr." refers to the transcript of the June 28, 2004 preliminary hearing in state trial court. "EH Def.'s Ex." refers to Defendant's exhibits introduced at the December 17, 2007 state trial court evidentiary hearing. "EH Tr." refers to the transcript of the December 17, 2007 state trial court evidentiary hearing.

determined that it correctly stated the ownership interests in the property, which are outlined below. (EHR at 114.)

A. The Original Indian Allotment Was Made To Jimpsey Tiger.

As noted above, the property at issue was part of a 200-acre piece of land allotted to Jimpsey Tiger in the early twentieth century. (*Id.*) That land is designated by the dark boundary in the following diagram:



Section 3, Township 8 North, Range 5 East
Seminole County

Elsener examined the title history for the shaded tract. That tract includes the one-acre property where the shootings occurred, designated "048" on the diagram.

Over a century ago, Congress commenced a comprehensive statutory scheme governing alienation of allotted lands owned by members of the Five Civilized Tribes, including the Seminole Tribe, whose members populated the Seminole County area. Beginning in 1908, tribal members with at least 3/4 Indian blood could not alienate their allotted property until April 26, 1931, unless the restrictions were removed by the Secretary of Interior. *See* 35 Stat. 312, § 1 (1908) (Attachment 3). In 1928, Congress extended the restrictions for another 25 years, until April 26, 1956. *See* 45 Stat. 495, § 1 (1928) (Attachment 4). Jimpsey Tiger's land was governed by these federal allotment laws.

Jimpsey Tiger died intestate on January 1, 1944, at which time he continued to own the allotted land with the alienability restrictions in place. Following federal court proceedings, his heirs—his wife, Lena Tiger, and four children, Mandy Tiger Wise, George Tiger, Corena Tiger, and Kizzie Tiger—inherited his land in equal 1/5 shares. By federal law, the property remained restricted against alienation when transferred by inheritance from one member of the Five Civilized Tribes to another with at least 1/2 Indian blood. *See id.*; 47 Stat. 777, § 1 (1933). Each of Jimpsey Tiger's heirs met those qualifications. (*See* EHR at 114; EH Def.'s Ex. 12 at 5.)

B. The Title History Of The Surface Rights To The Property.

1. Kizzie Tiger Wolf purchased the property interests.

Kizzie Tiger ultimately acquired all of the surface rights. First, Lena Tiger transferred her 1/5 share in the surface rights of the property to her son, George Tiger, giving him a 2/5 interest in the surface rights. (EH Def.'s Ex. 12 at 5.) Then, in 1950, Kizzie Tiger purchased the surface rights from her three siblings (George Tiger, Mandy Tiger Wise, and Corena Tiger), giving Kizzie Tiger full title to the surface rights in the property—1/5 by way of inheritance, and 4/5 by way of purchase. (*Id.* at 5-6.) The property remained restricted against alienation in her hands. (*Id.*) Congress again extended the restrictions on Indian lands in 1955 for the lives of the Indians owning restricted lands. *See* 69 Stat. 666, § 1 (1955) (Attachment 7). The restrictions on the property at issue thus remained in effect throughout the life of Kizzie Tiger—who ultimately married and became Kizzie Tiger Wolf—unless lawfully removed.

2. Kizzie Tiger Wolf temporarily conveyed the surface rights to the Seminole Housing Authority, a public agency, in 1970.

On February 20, 1970, Kizzie Tiger Wolf purportedly deeded the surface rights to the one-acre tract where Magnan's crimes occurred to the Seminole County Housing Authority, a public entity funded by the federal government for the benefit of Indians. (EH Def.'s Ex. 19.) Six days after signing the deed, Kizzie Tiger Wolf petitioned the Seminole County District Court of Oklahoma for judicial

approval of the transfer. (EH Def.'s Ex. 14 at 5-8.) As set forth in that petition, Kizzie Tiger Wolf entered into a contract with the Seminole Housing Authority for the latter to construct a house on the property for her benefit. (*See id.*)

The home was built in accordance with the federal Department of Housing and Urban Development's "Mutual Help" program. *See Hous. Auth. of the Seminole Nation v. Harjo*, 790 P.2d 1098, 1101-02 (Okla. 1990) (describing the "comprehensive federal regulations [that] . . . govern [Mutual Help] programs") *overruled on other grounds by Lewis v. Sac & Fox Tribe of Okla. Hous. Auth.*, 896 P.2d 503, 509 (Okla. 1994). The Mutual Help program provided for the construction of numerous homes for Indians in Eastern Oklahoma. *See id.*; (*see also* EH Def.'s Ex. 26 at 8-9.) The Warranty Deed between Kizzie Tiger Wolf and the Housing Authority specified that a house would be built on the property and noted that the consideration paid by the Housing Authority for the property was a mere dollar. (EH Def.'s Ex. 19.) The contract required Kizzie Tiger Wolf to make monthly payments to the Housing Authority to pay for the house; if she failed to pay, she could lose any right to the house. (*See* EH Def.'s Ex. 14 at 30.)

A hearing was held on the petition on April 16, 1970. Kizzie Tiger Wolf and M. Dean Storts, a Trial Attorney for the Department of Interior, appeared at the hearing. (*See* EH Def.'s Ex. 14 at 27.) Storts was the official successor to the United States Probate Attorney. (*Id.* at 12.) Kizzie Tiger Wolf was the only

witness. (*See id.* at 27-31.) Storts asked no questions nor made any statements. (*See id.*) The judge approved the deed conveying the property to the Housing Authority, (*Id.* at 31), and issued a written order of approval. (*Id.* at 1-4.) According to the order, Storts "joined with the said Petitioners and requested the Court to approve said deed without submitting the same at public auction and . . . agreed that said conveyance would be in the best interest of said Petitioners." (*Id.* at 4.) In 1981, after the house had been built and paid for, the Housing Authority deeded the one-acre tract back to Kizzie Tiger Wolf, again for the sum of one dollar. (*See* EH Def.'s Ex. 20.)

3. The surface rights remained under Indian ownership.

Upon the death of Kizzie Tiger Wolf in 1991, the surface rights in the property were inherited by her husband and nine children, all of whom were Indians with at least 1/2 Indian blood. The property, which remained restricted in the heirs' hands, *see* 61 Stat. 731, § 1 (1947) (Attachment 6), remained in the possession of the heirs and their successors at the time of Magnan's crimes. *See Magnan*, 207 P.3d at 403.

C. Title History To The Property's Mineral Rights Was Predominantly Owned By Indians.

Although Kizzie Tiger Wolf acquired the surface rights to the property from her siblings in 1950, she did not acquire the mineral rights. Lena Tiger made the only transfer of mineral rights in the property other than by inheritance. (EH

Def.'s Ex. 12 at 7.) Accordingly, the family still owns 4/5 of the mineral rights. That interest remains restricted against alienation.

D. An Earlier Homicide Occurred On The Property.

In 1998, another homicide occurred on the same property. *Magnan*, 207 P.3d at 405. The federal government sought to prosecute the perpetrator, Carl Woods, in federal court, arguing that the property is Indian Country. *Id.* Persuaded by a jurisdictional challenge from the defendant, the federal court dismissed the case. *Id.* Woods was then tried and convicted in Oklahoma state court. (*See* Woods Felony Docket, Docket No. 25, Appendix 14; Offender Lookup - Detail, Docket No. 25, Appendix 15.) He has now completed his sentence. (*See id.*, Appendix 15.)

* * *

The State of Oklahoma has not disputed any of the above facts. To our knowledge, the State only disputes the interpretation and legal implications of these facts.

SUMMARY OF THE ARGUMENTS

A. Introduction.

David Magnan, an Indian, was convicted of murder by an Oklahoma state court, and sentenced to death. Magnan does not challenge his guilt. He pled guilty in state court to three counts of first-degree murder, and stipulated to the charged aggravating circumstances. He does, however, challenge the State of Oklahoma's ability to prosecute him, a determination that means the difference between life and death.

Magnan's crimes occurred in "Indian Country," over which the federal government has exclusive jurisdiction to prosecute "major crimes." Enacted in 1942, the federal Indian Country statute, 18 U.S.C. § 1151 (Attachment 8), defines "Indian country" to include "Indian reservations" and "dependent Indian communities" as well as "Indian allotments," the definition critical to this case. Under § 1151(c), "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same," are deemed Indian Country.

The state appellate court's jurisdictional determination both turned on a clearly erroneous interpretation of the factual record and contravenes established federal law and Supreme Court precedent. "Indian Country" is regulated primarily by the federal government and Indian tribes, not the States. *See, e.g., Okla. Tax*

Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125-26 (1993) (rejecting Oklahoma's assertion of tax jurisdiction over tribal trust lands); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 179-80 (1973) (federal law preempts state taxes on tribe member's income earned on reservation). This is particularly true for "major crimes" committed in the territory. In the Indian Major Crimes Act, 18 U.S.C. § 1153, Congress identified 15 "major crimes," including murder, over which the federal government has exclusive jurisdiction when, as here, the accused is an Indian and the crime occurred in Indian Country. *See, e.g., Negonsott*, 507 U.S. at 102-103 ("As the text of § 1153 . . . and our prior cases make clear, federal jurisdiction over the offenses covered by the Indian Major Crimes Act is 'exclusive' of state jurisdiction.") (citations omitted).

In other words, it is a clearly established principle of federal law that state courts do not have jurisdiction over offenses enumerated in the Indian Major Crimes Act. This precedent is so deeply rooted that even a history of unchallenged state jurisdiction over lands will not defeat the exclusive jurisdiction that arises once a federal court determines the lands are Indian Country. *See United States v. John*, 437 U.S. 634, 652-54 (1978) (assuming "that there have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged" but independently determining that disputed land was Indian Country and therefore that "Mississippi has no power" over the offense).

Both federal law and Supreme Court precedent have long recognized this jurisdictional rule. Yet despite this long-settled precedent, the State of Oklahoma, over Magnan's objection, prosecuted Magnan for his crimes. In violation of federal jurisdictional principles, Oklahoma asserted jurisdiction over the land where the crime occurred, even though the land was an Indian allotment consistently occupied by Indians and predominantly owned by Indians.

Although today's case does not question Magnan's guilt, its outcome has life or death ramifications. After all, while Magnan was eligible for the death penalty in the state proceedings, the same is not true in federal court. The Federal Death Penalty Act, 18 U.S.C. § 3598, commands that Indian tribes have the authority to determine whether crimes committed within their Indian Country jurisdiction shall be subject to the death penalty. *See* 18 U.S.C. § 3598 ("[N]o person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence . . . for any offense the Federal jurisdiction for which is predicated solely on Indian country . . . and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction."). Because the crimes at issue here occurred on land associated with the Seminole Tribe, which has not agreed to application of the death penalty in its territory, when this case is tried in federal court, as it should have been from the start, Magnan would not be

eligible for the death penalty. *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C.L. Rev. 779, 831 (2006) (identifying Sac and Fox as the sole tribe to opt in to the death penalty).

B. Summary of Argument.

For at least three independent reasons, the property at issue was "Indian Country" at the time of the shootings.

First, the 1970 conveyance to the Housing Authority was invalid, and thus "null and void," 35 Stat. 312, § 5, because Kizzie Tiger Wolf never obtained approval of the Secretary of Interior, as federal law required her to do, to remove the alienability restrictions on her purchased Indian allotment. The 1970 court proceeding approving the conveyance was structured to satisfy the separate statutory requirement for *inherited property* only; it made no reference to the statutes governing conveyance of *purchased property*, in particular the Secretarial-approval requirement. Nor did Wolf ever file an application with the Secretary and in turn receive an order approving the transfer, as the law also required. While attorney Dean Storts, the successor to the U.S. Probate Attorney, participated in the 1970 proceeding, he did not (nor could he) provide Secretarial approval, as he had not been given that authority.

Second, even assuming that the requirements of federal law were satisfied, the conveyance from Wolf to the Housing Authority created a classic resulting

trust, with the public Housing Authority holding legal title to the property for the benefit of Wolf. The land was transferred pursuant to a federal program that paid for homes to be built for Indians, and federal law required that the temporary transfer occur while the home was constructed for the Wolf family. The home, moreover, was built in accordance with strict federal oversight. Under Oklahoma law, Kizzie Tiger Wolf was the true and real owner of the parcel in question before, during, and after the 1970 conveyance, due to the creation of a resulting trust over the property, for the benefit of Wolf, with the federal government serving as trustee. Because Wolf was always the intended beneficiary of the land, for this reason too the Indian titles to her allotment were never extinguished.

Third, regardless whether and how the surface rights were transferred, title to 80% of the mineral interests in the property never transferred from Indian ownership, meaning that the shootings occurred on an Indian allotment the "Indian titles to which have not been extinguished." There is no dispute that the original allotment of land to Jimpsey Tiger included both surface and mineral interests, nor is there any dispute that 80% of the mineral interests remain restricted under Indian ownership. Critically, under Oklahoma law, ownership of mineral interests constitutes "title" to the land. In other words, not all "Indian titles" were extinguished regardless of the fate of the surface interests. The state courts' use of a judicially crafted balancing test to hold that state interests overrode federal

interests in this context was unfaithful to Supreme Court precedent, which holds that the unambiguous definition of Indian Country in § 1151(c) is the governing standard.

Despite these three separate grounds for deeming the land "Indian Country," the state courts concluded that the federal government did not have exclusive jurisdiction here. That result was at odds not only with unambiguous federal law, but also the long-established interpretive principle that any ambiguity regarding ownership of Indian Country should be resolved in favor of the Indians. *See Hagen v. Utah*, 510 U.S. 399, 400 (1994) ("In diminishment cases, the rule that 'legal ambiguities are resolved to the benefit of the Indians' also must be given 'the broadest possible scope.'") (citing *DeCoteau v. Dist. Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975)); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the [Indians]."). Simply put, the state court proceedings were invalid, due to lack of state jurisdiction. Habeas relief is necessary to protect federal jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW FOR THIS HABEAS CORPUS PROCEEDING.

A. Because The Case Involves Federal Court Jurisdiction, The Court Owes No Deference To The Findings Of The State Courts.

Although this case arises under the familiar Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, the typical standard of

review set out in AEDPA does not apply. Rather, because this case turns on jurisdictional questions, specifically, whether the controversy is one reserved solely to the federal courts for resolution, the federal courts owe no deference to state court determinations. Rather, the Court must review *de novo* both the facts and legal issues underlying this dispute. Put differently, Congress, via AEDPA, cannot curtail the Court's full review of facts and law relevant to a federal court's jurisdiction.

Congress does not have plenary power over the mechanisms of judicial review. "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (striking down parts of the bankruptcy code that vested too much power in bankruptcy judges); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (construing *Hayburn's Case*, 2 Dall. 409 (1792), as standing for the proposition that "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch"); *Murray's Lessee v. Hoboken Land & imp. Co.*, 59 U.S. 272, 284 (1855) ("[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty . . . .").

Accordingly, Congress cannot remove independent review of facts or legal issues that make up the basis of a court's jurisdiction from Article III courts. *See St. Louis Smelting & Ref. Co. v. Kemp*, 104 U.S. 636, 641 (1881) ("In such cases the objection . . . reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it is competent to act."). This concept is familiar to military courts, legislative courts, and administrative agencies, all of which, for instance, receive deferential review of findings of legal and factual findings, except those forming the basis for their jurisdiction. *See, e.g.*, *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 282-83 (1978) (statute barring court review of lawfulness of agency "emission standard" in criminal case does not bar review of whether regulation is an "emission standard"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (citizenship is a "jurisdictional fact" in deportation proceedings that may not be determined by "a purely executive order"); *United States v. Grimley*, 137 U.S. 147, 150 (1890) ("It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and, if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence."). For example, in *Crowell v. Benson*, 285 U.S. 22, 54, 62-64 (1932), the Supreme Court conditioned the constitutionality of Congress's power to create non-Article III courts on available avenues for an Article III court to review *de*

novo facts which are "fundamental or 'jurisdictional' in the sense that their existence is a condition precedent to the operation of the statutory scheme."

That the Court may review these jurisdictional issues *de novo* is required by the Constitution and also consistent with AEDPA. AEDPA's review standard is premised on Congress's belief in the competence of state courts to decide issues of federal law in the criminal cases arising in those courts. *See Washington v. Schriver*, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring) (discussing legislative history and purposes behind AEDPA). But that belief presupposes that the state courts have jurisdiction to decide such issues in the first place. If a state court lacks jurisdiction, then deference to its rulings would be wholly unwarranted, as the court was not competent to decide anything to begin with. *See Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction, the court cannot proceed at all in any cause"); *Scott v. McNeal*, 154 U.S. 34, 46 (1894) (judgment by state court without jurisdiction violates Due Process Clause).

Thus, while federal courts have generally respected the judgments of state courts, they have never done so when those state courts have acted outside of their subject matter jurisdiction. That was the holding in *Kalb v. Feuerstein*, 308 U.S. 433 (1940), where a state court entered an unappealed final judgment in a controversy that was within the exclusive subject matter jurisdiction of a federal court, by virtue of its bankruptcy jurisdiction. The Supreme Court afforded no

deference whatever to the state court judgment, independently determining that jurisdiction was exclusively federal. *Id.* at 439-40. "States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." *Id.* at 439. In other words, federal courts, rather than state courts, have the final say as to whether a particular case falls within an exclusive grant of federal jurisdiction.

In light of *Kalb*, a contention that a state court lacks subject matter jurisdiction should not be viewed as an independent "claim" for purposes of § 2254(d). Instead, such a challenge merely denies the state court's authority to decide such claims. Likewise, a ruling as to whether subject matter jurisdiction exists is not a ruling "on the merits." *See Park Lake Resources L.L.C. v. Department of Agriculture*, 378 F.3d 1132, 1136 (10th Cir. 2004) (jurisdictional ruling is not "on the merits"). Because the jurisdictional ruling here was neither a "claim" nor "on the merits," the deferential review standards of § 2254(d) do not apply. Instead, review of this ruling is *de novo*. *See Fox v. Ward*, 200 F.3d 1286, 1292 (10th Cir. 2000).

Although the principle of *de novo* review of jurisdictional issues has not yet been extended to collateral attacks of state court criminal convictions, *see Yellowbear v. Atty. Gen. of Wyoming*, 380 F. App'x 740, 743 (10th Cir. 2010) *cert. denied*, 131 S. Ct. 1488 (2011) (noting "doubts" about the proposition but

ultimately determining that whether review is under AEDPA's "deferential standard or *de novo* makes no difference to the outcome" where petitioner did not advance credible argument that state court's determination of jurisdiction was incorrect), the *de novo* review standard seems particularly well suited to the habeas corpus context. Indeed, as one legal commentator has noted, "this sort of inquiry vindicates the core historical function of the habeas writ—to inquire into the jurisdiction of the executive officer in whose custody a person is being held, and to require release if that jurisdiction is lacking." David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 Cardozo L. Rev. 1001, 1004 (2008).

Likewise, applying *de novo* review to habeas corpus petitions addressing federal court jurisdiction would not interfere with comity, the traditional argument for deference. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (noting that the "Court's desire to correct obvious constitutional violations led to a somewhat expansive notion of jurisdiction" when it was limited to issuing relief where the issuing court had no jurisdiction). That is so because the doctrine is limited to facts and legal determinations that are conditions precedent for the exercise of judicial power. *Crowell*, 285 U.S. at 54. Unlike administrative courts or military courts, state courts are ordinarily courts of general jurisdiction. As such, *de novo* review will be appropriate only in areas of law where federal courts have exclusive

jurisdiction, for instance, major crimes committed in Indian Country. This is a limited exception, as "[e]xclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule" in our judicial system. *In re C & M Properties, L.L.C.*, 563 F.3d 1156, 1167 (10th Cir. 2009).

B. Even Under AEDPA's More Limited Review, The Court Must Not Accept Unreasonable Factual Determinations.

Even if traditional AEDPA standards apply to this dispute, the deference owed under AEDPA is not without limits. *See Le v. Mullin*, 311 F.3d 1002, 1010-11 (10th Cir. 2002). With respect to factual determinations, for example, petitioners may rebut state court factual findings with clear and convincing evidence. *Id.* at 1010. AEDPA, moreover, does not apply to state court findings that were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *House v. Hatch*, 527 F.3d 1010, 1019 (10th Cir. 2008).

C. Likewise, Under AEDPA, The Court Must Reject Legal Determinations Contrary To Established Federal Law.

Similarly, under AEDPA, state court legal determinations that are "contrary to, or involved an unreasonable application of, clearly established federal law" also receive *de novo* review. *See Sperry v. McKune*, 445 F.3d 1268, 1271 (10th Cir. 2006) (quoting 28 U.S.C. § 2254(d)(1)). Under AEDPA, a federal court must determine first whether the state court identified the correct legal issue but then

failed to apply the correct legal test. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012). Likewise, the federal court must also ascertain "whether the *result* reached by the state court contravenes or unreasonably applies clearly established law." *Goss v. Nelson*, 439 F.3d 621, 635-36 (10th Cir. 2006) (citing *Aycox v. Lytl*, 196 F.3d 1174, 1177-78 (10th Cir. 1999)). In both cases, federal courts are to apply the pre-AEDPA standards of review. *See Hooks v. Ward*, 184 F.3d 1206, 1223 (10th Cir. 1999) (noting that prior to AEDPA, federal courts reviewed *de novo* pure questions of law and mixed questions of law and fact).

Decisions are contrary to clearly established federal law where the state court applies a rule besides that which has emerged from Supreme Court cases. *See Bell v. Cone*, 535 U.S. 684, 694 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). Likewise, even where the state court "correctly identifies the governing legal principle," the decision itself may be an unreasonable application of clearly established federal law, undeserving of deference from a federal court. *See Williams*, 529 U.S. at 407-08. Put another way, where the state court's application of Supreme Court precedent to the facts of a particular case is "objectively unreasonable," federal review is not circumscribed by AEDPA. *See Brown v. McKune*, No. 06-3046-MLB, 2006 WL 3497760, at *3-4 (D. Kan. Dec. 5, 2006), *aff'd sub nom*, *Sperry v. McKune*, 445 F.3d 1268 (10th Cir. 2006).

A state court unreasonably applies Supreme Court precedent to the facts when it "unreasonably refuses to extend that principle to a new context where it should apply." *Carter v. Ward*, 347 F.3d 860, 864 (10th Cir. 2003) (noting that the court was only concerned with whether it was unreasonable not to extend a rule from the custodial/testimonial context to the pre-arrest context) (citing *Valdez v. Ward*, 219 F.3d 1222, 1229-30 (10th Cir. 2000) (noting that reasonableness is an objective inquiry and so "the fact that one court or even a few courts have applied the precedent in the same manner to close facts does not make the state court decision 'reasonable.'")). For example, in *Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2000), the Supreme Court, despite acknowledging a "lack of clarity" in its "thicket of Eighth Amendment jurisprudence," found that the lower court should have recognized that a principle of "gross disproportionality" had emerged from precedent. In short, AEDPA's heightened deference is not applicable where a state court fails to extend Supreme Court precedent to a new context where it should apply. *See, e.g.*, *Cargle v. Mullin*, 317 F.3d 1196, 1202-3 (10th Cir. 2003) (noting that deference does not apply if the Oklahoma court's evaluation of counsel's performance does not comport with the *Strickland* standard announced by the Supreme Court).

II. THE PROPERTY REMAINED INDIAN COUNTRY BECAUSE THE ATTEMPTED CONVEYANCE OF THE PROPERTY RIGHTS IN 1970 WAS INVALID UNDER FEDERAL LAW.

As the Oklahoma appellate court recognized, "the first potentially dispositive question of whether the crimes in this case occurred in Indian Country turns on whether Kizzie Tiger Wolf's 1970 conveyance of the surface rights in the property to the Housing Authority" was valid. *Magnan*, 207 P.3d at 403. Under federal law governing Indian allotment conveyances, the conveyance was valid only if the Secretary of Interior properly approved it. Because no such approval occurred here, the property remains Indian Country. The state court's contrary conclusion rested both on an unreasonable interpretation of the facts and a failure to adhere to established Supreme Court precedent, which together confirm that a state may not exercise jurisdiction over Indian Country, and that Indian Country remains so restricted when transferred absent approval of the Secretary of the Interior. *See, e.g., Tiger v. Western Investment Co*., 221 U.S. 286, 299-310 (1911) (holding a conveyance of restricted property by a Five Tribes member was invalid without statutorily required approval by the Secretary of Interior).

A. Federal Law Required Approval By The Secretary Of Interior For Conveyances Of Purchased Interests In Restricted Indian Land.

The law governing the alienation of lands allotted to members of the Five Civilized Tribes has a long, somewhat complex history. In 1908, Congress

declared that "any attempted alienation" of an Indian allotment "prior to removal of restrictions therefrom . . . *shall be absolutely null and void*." 35 Stat. 312, § 5 (emphasis added). Going forward then, unless the State could conclusively show that such restrictions had been removed with respect to all interests and "titles" in the property at issue, 18 U.S.C. § 1151, the property would be deemed to be an Indian allotment subject to federal jurisdiction.

The law governing the removal of alienability restrictions depends on the manner in which the property was acquired—by inheritance or by purchase. With respect to Kizzie Tiger Wolf, it is undisputed that she owned 1/5 of the property's surface rights by way of inheritance, and 4/5 by way of purchase.

Her 1/5 ownership interest received by inheritance was governed by the 1947 Act. That Act dictated that "no conveyance . . . *by an Indian heir* . . . shall be valid unless approved in open court . . . ." 61 Stat. 731, § 1 (emphasis added). Magnan agrees that the state court's approval of the 1970 conveyance met the requirements of the 1947 Act and validly authorized the transfer of Kizzie Tiger Wolf's 1/5 *inheritance* interest in the property.

The same is not true, however, for her 4/5 *purchased* interest, which is governed by other laws. *See Magnan*, 207 P.3d at 414 (Chapel, J., dissenting) ("The federal experts have consistently testified that the applicable federal law treats heirship and purchase interests separately for purpose of conveyance.").

While the controlling statute for obtaining removal of alienability restrictions on *purchased* property is less clear than the statutory regime governing inherited property, it is clear that approval by the Secretary of Interior is always required before a transfer of purchased property is valid. The Oklahoma appellate court applied the 1945 Act, which states that "all . . . conveyances made after the . . . enactment of this Act must have the *consent and approval of the Secretary of the Interior*." 59 Stat. 313, § 1 (1945) (emphasis added) (Attachment 5). Two other potentially controlling statutes include similar requirements. The 1928 Act provides that "*the Secretary of the Interior shall have the authority to remove the restrictions*, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." 45 Stat. 495, § 1 (emphasis added). Similarly, the 1955 Act permits an owner of Indian land to "*apply to the Secretary of the Interior for an order removing restrictions*" on alienation. 69 Stat. 666, § 2(a) (emphasis added).

As the most recent law on the books in 1970, the 1955 Act should control. *See United States v. Yuginovich*, 256 U.S. 450, 463 (1921) ("[A] later statute repeals former ones when clearly inconsistent with the earlier enactments."). To have restrictions removed from property under the 1955 Act, which extended the

alienability restrictions put in place by the 1928 Act, a Native American must first "apply to the Secretary of the Interior for an order removing restrictions." 69 Stat. 666, §§ 1, 2(a). If the Secretary disapproved the application or failed to act on it, the applicant could seek a court order removing the restrictions. *Id.* at § 2(c). The Secretary was also authorized to "issue . . . an order removing restrictions" without an application, but such an order only became effective six months after the order was issued. *Id.* at § 2(b).

In the end, no matter which Act controls, because the Secretary of Interior did not approve the 1970 conveyance, the transfer of Kizzie Tiger Wolf's 4/5 purchased interest was invalid. No evidence has been presented that Kizzie Tiger Wolf ever submitted an application with the Secretary of Interior to have the restrictions removed from her property. Nor did the Secretary ever issue an order removing the restrictions. In sum, the transfer was invalid, and thus did not extinguish the Indian title.

B. The 1970 State Court Proceeding Satisfied The 1947 Act And Its Rules Relating to Inherited Rights, But Could Not Have Provided The Secretarial Approval Required For Transferring Purchased Interests.

The Oklahoma courts plainly erred in holding that the 1970 court proceeding satisfied the strict federal standards for removing all alienation restrictions governing Indian land. That proceeding, through which Kizzie Tiger Wolf sought approval of her conveyance to the Housing Authority, plainly was intended to

comply with the 1947 Act, which, as noted, addressed removal of restrictions on *inherited* interests only. Proving as much, the proceeding mirrored the requirements of the 1947 Act in numerous respects.

First, the 1947 Act permits the "county court of the county in Oklahoma in which the land is situated" to approve a conveyance of restricted land. 61 Stat. 731, § 1. The property here is located in Seminole County, and the 1970 proceeding took place in the District Court in Seminole County. (*See* EH Def.'s Ex. 14 at 1.)

Second, the Act requires a "petition for approval" to be "set for hearing not less than ten days from the date of filing." 61 Stat. 731, § 1. Kizzie Tiger Wolf filed a "Petition for Approval of Warranty Deed" on February 26, 1970, more than ten days prior to the original hearing on March 12, 1970 (which was later postponed until April 16, 1970). (*See* EH Def.'s Ex. 14 at 5, 10-11, 24-25.)

Third, the Act requires notice of the hearing to be published in a newspaper of general circulation in the county. 61 Stat. 731, § 1. Notice was published in the Capital-Democrat on March 19, 1970. (*See* EH Def.'s Ex. 14 at 14.)

Fourth, written notice was required to be provided to the district probate attorney at least ten days prior to the hearing. 61 Stat. 731, § 1. Storts, the successor to the United States Probate Attorney, received notice on March 16, 1970. (*See* EH Def.'s Ex. 14 at 12.) Tellingly, Storts's acknowledgement of notice specifically referenced the 1947 Act (but no other statute). (*Id.*)

Fifth, the 1947 Act requires the grantor to be present at the hearing and to be "examined in open court." 61 Stat. 731, § 1. Kizzie Tiger Wolf was questioned at the hearing by both her attorney and the judge, who then proceeded to approve the conveyance. (*See* EH Def.'s Ex. 14 at 29-30.)

Measured against this backdrop, the 1970 court proceeding plainly was designed and implemented to meet the specifications of the 1947 Act, but no other. Indeed, no reference was made to any other law—be it the 1928, 1945, or 1955 Acts—not in the petition, notices, or acknowledgements, nor at the hearing itself. Storts, moreover, had good reason to be present for the hearing under the 1947 Act, as it specifically required him to be given notice (as successor to the United States Probate Attorney) as well as the right to appeal an order approving a conveyance. 61 Stat. 731, § 1.

C. The State Court And District Court Erroneously Interpreted The 1970 Proceeding As Satisfying The Requirements Of The Federal Acts Governing The Transfer Of Purchased Interests.

The state court's determination that this proceeding released more than Kizzie Tiger Wolf's 1/5 inherited interest was contrary to established law in addition to a gross misreading of the factual record. Relying on the superseded 1945 Act, the Oklahoma appellate court concluded that the 1970 state court proceeding "was in effect a combined proceeding that satisfied the requirements of both the 1945 and 1947 Acts," including the former's requirement of Secretarial

approval, due to "the participation of the Department of Interior's attorney in that proceeding, a proceeding in which he requested that the deed be approved." *Magnan*, 207 P.3d at 404. Similarly, the district court below relied on the findings of the district court in *United States v. Woods*, CR-98-26-B (E.D. Okla.), which involved a different homicide on the same property, to conclude that "'the B.I.A. and the Department of Interior joined in this proceeding, consented to it, and there was approval of the deed.'" *Magnan v. Workman*, 8/23/2011 Opinion and Order, at 13 (quoting EH Def.'s Ex. 27 at 10).

For three independent reasons, those courts were wrong to conclude that Storts's appearance at the 1970 proceeding was sufficient to constitute approval by the Secretary of Interior: (1) Storts did not affirmatively approve the conveyance at the hearing; (2) any "approval" at the hearing did not comply with Department of Interior regulations; and (3) Storts did not have authority to approve the conveyance on behalf of the Secretary of Interior.

1. Storts failed to "approve" the conveyance at the 1970 state court proceeding.

In its order approving the conveyance to the Housing Authority, the Oklahoma District Court noted that "M. Dean Storts, United States Trial Attorney, has joined with the said Petitioners and requested the Court to approve said deed without submitting the same at public auction and has agreed that said conveyance would be in the best interest of said Petitioners." (EH Def.'s Ex. 14 at 4.) Simply

put, it was an unreasonable reading of the facts to conclude that Storts "requested the Court to approve" the conveyance, (*id.*), or that Storts's "participation . . . constituted the requisite approval of the Secretary of the Interior" to remove alienability restrictions on Kizzie Tiger Wolf's 4/5 purchased interest in the property. *Magnan*, 207 P.3d at 404. The sum total of Storts's participation in the 1970 proceeding amounted to two words: "No questions." (EH Def.'s Ex. 14 at 30.) He made no motions or other filings. Yet the 1945 Act, to say nothing of the governing 1955 Act, required the express "*consent and approval* of the Secretary of the Interior." 59 Stat. 313, § 1 (emphasis added). Surely more than simply declining to ask questions of a witness is needed to meet this two-fold Congressional requirement.

What is more, contrary to the Oklahoma appellate court's conclusion, Storts did not "request[] that the deed be approved." *Magnan*, 207 P.3d at 404. At most, Storts merely "requested the Court to approve said deed *without submitting the same at public auction* and has agreed that said conveyance *would be in the best interest*" of Kizzie Tiger Wolf. (EH Def.'s Ex. 14 at 4 (emphasis added).) In other words, Storts simply asked the court to forego any requirement of putting the property up for auction. As with every other aspect of the 1970 proceeding, this was done to comply with the 1947 Act for inherited property, which allows for "competitive bidding." 61 Stat. 731, § 1(d).

Similarly, Storts's purported agreement that the conveyance would be in Kizzie Tiger Wolf's best interest comports with another requirement of the 1947 Act, *id.*, § 1(c), namely that "[t]he court in its discretion, when deemed for *the best interest of the Indian*, may approve the conveyance conditionally, or may withhold approval," (emphasis added), as well as a provision of the 1908 Act authorizing "representatives of the Secretary of the Interior . . . to counsel and advise" owners of restricted property. 35 Stat. 312, § 6; *see also* 61 Stat. 731, § 4 (1947 Act specifying that "attorneys provided for under the [1908 Act] are authorized to appear and represent any restricted member of the Five Civilized Tribes in Oklahoma before any of the courts of the State of Oklahoma . . . .").

It bears repeating that *everything* about the way the 1970 proceeding was designed and implemented was done to comply with the 1947 Act's requirements for court approval of inherited property. Storts did not "consent and approv[e]" the conveyance on behalf of the Secretary of Interior for the 4/5 purchased interest. Rather, he did no more than decline to ask questions and, perhaps, through some off-the-record, undocumented statement, request that no public auction be had for the property. The "Acknowledgement of Notice" he signed, evidencing that he was properly notified of the 1970 hearing, expressly cited the 1947 Act and no other statute. (EH Def.'s Ex. 14 at 12.) And "[a]t no time" during the "very brief" 1970 hearing "was any issue of the nature of Tiger Wolf's property interests raised

or decided." *Magnan*, 207 P.3d at 415 n.2 (Chapel, J., dissenting). In other words, even if the Oklahoma appellate court and the court below are correct that Storts "approved" the conveyance of Kizzie Tiger Wolf's purchased interest under the 1945 Act, he did so unwittingly. This is far from sufficient to show a knowing approval in accordance with the 1945 Act, fully and fairly extinguishing the Indian rights over the property.

2. Storts's purported approval at the 1970 state court proceeding failed to comply with the controlling federal statute and Department of Interior regulations.

Even assuming Storts intended to approve the conveyance of Kizzie Tiger Wolf's purchased interest in accordance with the 1945 Act and that his limited participation in the 1970 proceeding was sufficient to constitute approval, that approval (and thus the conveyance) was still invalid because it violated the plain terms of the governing statute and Department of Interior regulations.

In violation of established federal law, neither the state courts nor the district court below made any reference to the controlling statute: the 1955 Act. If they had, they could not have reached the same result. Kizzie Tiger Wolf never "appl[ied] to the Secretary of the Interior" to remove the alienability restrictions and the Secretary never issued an "order" removing the restrictions, as required by law. 69 Stat. 666, § 2(a). This failure to meet the plain text of the statute—clearly established federal law—is by itself enough to invalidate the 1970 conveyance.

See Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984) ("[A]bsent clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.") (second alteration in original).

Likewise, the failure to meet the plain text of Department of Interior regulations equally invalidates the conveyance. Well-settled federal law provides that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, . . . even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 U.S. 363, 372 (1957); *see also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that Attorney General's personal consideration of application for suspension of deportation was invalid because Attorney General had delegated that authority, by federal regulation, to the Board of Immigration Appeals).

Regulations in effect in 1970 mandated that an "[a]pplication for the removal of restrictions and for approval of sales of lands must be made in triplicate on approved form Five Civilized Tribes, 5-484, and submitted to the superintendent for the Five Civilized Tribes or any field clerk." 25 C.F.R. § 121.34 (1970). Upon submission of form 5-484, Department regulations specified the procedures for conditional approval of a conveyance of restricted property. *See* 25 C.F.R. § 121.36 (1970). Conditional approval occurs when the

Secretary of Interior determines that the "restricted lands should be sold with conditions concerning terms of sale." *Id.* Department regulations required the Secretary to "issue an order specifically providing the terms under which the land may be sold." *Id.* The property must then be "advertise[d] for sale at public auction for not less than 30 days" and a representative of the superintendent of the Five Civilized Tribes is required to inspect and appraise the property. 25 C.F.R. § 121.37 (1970). Finally, upon consummation of an approved sale of restricted property, the superintendent or other officer in charge of the Five Civilized Tribes must "make appropriate endorsements upon the order for the removal of restrictions from the land sold and on the deed of conveyance." 25 C.F.R. § 121.43 (1970).

None of these regulations were complied with here. Kizzie Tiger Wolf did not submit an application with the Department of Interior, let alone an approved form 5-484. Because she did not submit an application, she never requested either a conditional or unconditional removal of the restrictions. To be sure, Wolf's state court petition sought judicial approval to convey the property to a specific entity, the Housing Authority. Accordingly, she sought a conditional removal of restrictions. In violation of the express requirements of the Department's own regulations, however, (i) the Secretary of Interior failed to issue an order approving the conveyance, (ii) the property was not inspected, appraised, or advertised for

public auction, and (iii) no endorsements were made on the removal order or deed of conveyance. Accordingly, Storts's purported approval of the conveyance of the purchased interest at the 1970 hearing violated the Department's obligations to follow its own regulations. Under established federal law, therefore, the approval was unlawful, and thus invalid. *See Service*, 354 U.S. at 372.

3. Storts did not have properly delegated authority to approve the 1970 conveyance on behalf of the Secretary of Interior.

Even setting aside the mandatory Department regulations, the 1970 proceeding failed to lawfully approve the conveyance for yet another reason: Storts did not have authority to approve the conveyance on behalf of the Secretary of Interior. Each of the relevant statutes gives authority to the Secretary of Interior—as opposed to courts, the Bureau of Indian Affairs, or the Department of Interior generally—to remove alienability restrictions. Accordingly, approval for the conveyance had to come from the Secretary himself or someone to whom the Secretary delegated specific authority to grant such approval. *See Jay v. Boyd*, 351 U.S. 345, 351 n.8 (1956) (explaining that government administrator, "*under his rulemaking authority*," can delegate powers to subordinates) (emphasis added). Yet throughout this lengthy legal process, no evidence has been offered to show that Storts was delegated approval authority.

He was not. Storts appeared at the hearing as "successor to the United States Probate Attorney." (EH Def.'s Ex. 14 at 12.) "Probate attorney" was the title for

lawyers designated by the Secretary of Interior to "counsel and advise" allottees of the Five Civilized Tribes concerning their restricted lands. 35 Stat. 312, § 6; *see Yarhola v. Duling*, 207 P. 293, 294 (Okla. 1922). Since 1947, the functions of the probate attorney have been assigned to trial attorneys in the Interior Department Field Solicitor's office in Tulsa. *See* Tim Vollmann & M. Sharon Blackwell, *"Fatally Flawed": State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 Tulsa L.J. 1, 17, 23 (1989). These lawyers were not part of the Bureau of Indian Affairs. Rather, they reported to the Interior Department Solicitor. *See* United States Government Organization Manual 1969-70 at 222, 602 (1969) (Docket No. 25, Appendix 13).

As a trial attorney, Storts would not have been delegated administrative authority to approve the removal of alienability restrictions. Storts's responsibilities were as an *advocate*—to "counsel and advise" or "appear and represent" Native American owners of restricted property. 35 Stat. 312, § 6 (1908 Act); 61 Stat. 731, § 4 (1947 Act). To suggest that Storts would appear at the 1970 hearing as *both* an *advocate* for Kizzie Tiger Wolf and a *delegate* of the Secretary of Interior to make an *impartial* determination whether to approve the conveyance is not only an implausible notion, but also one that would mean Storts acted unethically, given his divided loyalties.

Confirming as much, three current and former Interior Department officials testified that no such delegation ever occurred. As noted by the dissent in the state appellate proceedings, "[t]hese witnesses explained in great detail and with documentation why, in their opinion and the opinion of the Bureau of Indian Affairs, the land in question is restricted Indian land." *Magnan*, 207 P.3d at 414 (Chapel, J., dissenting). *First*, Eddie Streater, the Superintendent of the Wewoka Agency within the Department of Indian Affairs, (EH Tr. at 19-20), testified that based upon his review of the state probate records and any records in his office removing restrictions (or lack thereof), his "Agency still considers [the property] to be restricted" in accordance with the 1955 Act relating to Kizzie Tiger Wolf's 4/5 purchased interest. (*Id.* at 31.) That is so because at the time of the 1970 transfer, the Area Director would have had responsibility for approving the removal of restrictions on behalf of the Secretary. (*Id.* at 29.) Storts, as the U.S. Trial Attorney, was not an Area Director, nor had he been delegated authority to remove restrictions. (*Id.* at 31.) Restrictions, moreover, could not be removed without a formal order from the Department. (*Id.*)

Second, Allen Woodcock, the current Field Solicitor in the Department's Tulsa office, the same office where Storts likely worked, (*see id.* at 34), explained that Solicitors in his office "appear in State court approval proceedings pursuant to" the 1947 Act for inherited property interests. (*Id.* at 35.) He confirmed further that

the 1955 Act, not the 1947 Act, would control the removal of restrictions on purchased land. (*See id.* at 36.) Accordingly, Storts's appearance at the 1970 hearing "was pursuant to Section 1 of the 47 Act which deals only with inherited restricted interest." (*Id.* at 39.) Concurring with Streater, Woodcock too stated that the Regional Director of the Bureau of Indian Affairs would have had delegated authority from the Secretary to remove restrictions on purchased land. (*Id.*) And he was "not aware that there was ever any delegation of authority to approve conveyances on Restricted Form Deed to the Solicitors Office." (*Id.* at 40.)

Third, Sharon Blackwell, the former Deputy Commissioner of Indian Affairs with the Department of Interior, as well as a former Field Solicitor from the Tulsa office, (*id.* at 80-81), explained that Tulsa Field Solicitors "appear in State Court only on behalf of the restricted Indians or matters involving restricted estates," (*id.* at 81), just as Storts did, "pursuant to that very specific authority that is granted in Section 1 of the 1947 Act." (*Id.* at 88.) Storts, Blackwell confirmed, appeared at the 1970 proceeding "for the very limited purpose of representing" Kizzie Tiger Wolf; he did not have authority to remove restrictions from her purchased interest in the property. (*Id.* at 90).

The unrebutted testimony from these officials confirms that Storts "was not delegated to act on the Secretary of Interior's behalf and approve any conveyance conducted under the statute governing conveyance of the 4/5 restricted purchase

interest." *Magnan*, 207 P.3d at 414 (Chapel, J., dissenting). And "nothing in the record indicates that Tiger Wolf's purchase interest conveyance was approved by either the [Bureau of Indian Affairs] Area Director or the Secretary of the Interior. In fact, the record indicates that it was not." *Id.* Accordingly, the conveyance was never properly approved under the 1955 Act (or any other applicable law), rendering it invalid. The decisions below resisting this conclusion plainly contravene established federal law and precedent governing "Indian Country" and related federal regulations.

D. The State Courts' Decisions Failed To Resolve Legal Ambiguities In Favor Of Finding An Indian Allotment.

The state court decisions are even more difficult to accept in light of long-standing canons of statutory construction in the Indian Country setting. Those canons dictate that any ambiguity regarding whether a piece of land constitutes such an Indian allotment be resolved in favor of finding that the land is an Indian allotment. *See Hagen*, 510 U.S. at 423 ("In diminishment cases, the rule that 'legal ambiguities are resolved to the benefit of the Indians' also must be given the 'broadest possible scope.'") (citing *DeCoteau*, 420 U.S. at 447; *Carpenter*, 280 U.S. at 367 ("Doubtful expressions are to be resolved in favor of the [Indians]."));

see also Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply

rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (citations omitted).

Application of this fundamental principle is evidenced by *United States v. Soldana*, 246 U.S. 530 (1918), where the lower court's jurisdiction depended upon whether the railroad station platform upon which the criminal offense was committed was within the bounds of Indian Country. *Id.* at 531. Two alternatives were presented to the Supreme Court: did Congress except the land from a reservation or merely convey a "right of way or other limited interest in the land on which to construct and operate a railroad." *Id.* Rather than picking between the two, the Supreme Court, in holding that the land was still Indian Country, resolved any ambiguity in favor of the Indian interests, concluding that "it was not the purpose of Congress to extinguish the title of the Indians." *Id.* at 532-33.

Similarly, in *United States v. Ramsey*, 271 U.S. 467 (1926), the Supreme Court reversed a lower court decision denying federal jurisdiction under the Indian Major Crimes Act. *Id.* at 469. Previously, the Supreme Court had held that allotments held in trust retained "a distinctively Indian character, being devoted to Indian occupancy" during the trust period. *United States v. Pelican*, 232 U.S. 442, 449 (1914). Reversing the lower court decision drawing a distinction between allotments held in trust and those merely restricted from alienation, *see Ramsey*,

271 U.S. at 470, the Supreme Court held that, in light of canons of construction applicable to Indian interests, "it would be quite unreasonable" to attribute to Congress an intention to treat distinctly allotments held in trust from those restricted from alienation. *See id.* at 471-72. Instead, the Court construed the statutory definition of Indian Country to include both forms of trust. *See id.* The decisions here violated this established federal law, as applied by the Supreme Court. On this ground too, the writ should issue.

E. The *Woods* Court Wrongly Determined That The Property No Longer Constituted Indian Country.

The Oklahoma appellate court also justified its ruling by relying on a prior criminal case involving a 1998 homicide on the same property. *See Magnan*, 207 P.3d at 406 (citing *United States v. Woods*, CR-98-26-B (E.D. Okla.)). In that case, the federal government attempted to prosecute the defendant Woods in federal court, arguing (correctly) that the property was Indian Country. *See id.* at 405. The defendant, however, successfully challenged federal jurisdiction based on the 1970 proceeding. *See id.* That jurisdictional ruling was announced from the bench, was never the subject of a written opinion, and was not appealed by the United States.

In its defense, the federal court in *Woods* did not have the benefit of much of the jurisdictional evidence in the record here, *see id.* at 406, which must be reviewed *de novo*. In particular, no testimony of present and former Interior

Department officials was offered to demonstrate that the Secretary of Interior had not delegated authority to Storts. (*See* EH Def.'s Ex. 26.) For this reason and others, *Woods* was wrongly decided, contrary to the correct position taken there by the federal government.

It is of no moment, contrary to the concern expressed by the Oklahoma appellate court, that reversing course from *Woods* and finding the property to be Indian Country here would purportedly "creat[e] a jurisdictional void." *Magnan*, 207 P.3d at 406. There will be no such void if the federal government reassumes the jurisdiction that it correctly tried to exercise in *Woods*. As for Woods himself, he was convicted more than ten years ago, and has now completed his prison term, meaning that he could not now challenge his conviction. (*See* Docket No. 25, Appendix 15.) Equally true, if this Court properly determines the property to be Indian Country, as commanded by federal law and Supreme Court precedent, Magnan would be subject to federal jurisdiction, and would be estopped from arguing otherwise. And given that Indian Country is a matter of federal law, a ruling from this Court will conclusively resolve the issue as to this property for any future cases.

The alternative is unattractive. After all, perpetuating an incorrect holding (regarding federal jurisdiction, no less) for the sake of perpetuation has little to

recommend it, particularly when it would result in the execution of a defendant who would otherwise be ineligible for that ultimate punishment.

The Oklahoma court's erroneous reliance on *Woods*, moreover, is contrary to Supreme Court precedent and the overriding significance of the federal Indian Country and Indian Major Crimes Act statutes. The Supreme Court has already made clear that past treatment of property cannot override the proper application of the Indian Country statute. That was the holding in *John*, 437 U.S. 634, where a Choctaw Indian was prosecuted in Mississippi state court for a crime committed on a Choctaw reservation. Challenging the application of the Indian Major Crimes Act, Mississippi argued that its past exercise of jurisdiction over the tribe overrode any assertion of federal jurisdiction. *Id.* at 647-53. Rejecting the State's asserted reliance interests and historical assertions, the Supreme Court held that present application of the Indian Country statute overrode the State's assertion of jurisdiction. *Id.* at 649-54.

Applying that precedent here, any "justifiable expectations" Oklahoma may assert with respect to the property at issue here cannot trump the clearly established Supreme Court precedent requiring full application and enforcement of the Indian Country Act. *See Indian Country, U.S.A. Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 974 (10th Cir. 1987) ("the past failure to challenge Oklahoma's jurisdiction over Creek Nation lands … does not divest the federal

government of its exclusive authority over relations with the Creek Nation or negate Congress' intent to protect Creek tribal lands"). Rather, the Court must "ask only whether the land is Indian Country." *Sac & Fox Nation*, 508 U.S. at 125 (rejecting Oklahoma's assertion of tax jurisdiction over tribal trust lands). Here, the answer plainly is "yes." Accordingly, the writ should issue.

III. THE 1970 CONVEYANCE CREATED A RESULTING TRUST FOR THE BENEFIT OF KIZZIE TIGER WOLF, WHICH DID NOT EXTINGUISH HER INDIAN TITLE.

Even if the 1970 proceeding was legally sufficient to authorize transfer of all of Kizzie Tiger Wolf's surface interest in the property to the Housing Authority, that does not mean that Indian title was extinguished. In effect, the Housing Authority merely held the property in trust for Wolf, so that a house could be built on the property for her benefit. Because the transfer created a resulting trust for the benefit of Kizzie Tiger Wolf, the 1970 conveyance failed to extinguish all Indian titles to the allotment, in particular, her equitable interest in the property. Both law and equity deem her to be the real owner, despite the conditional transfer of legal title.

A. Oklahoma Law Recognizes A Resulting Trust Over Land Transferred For The Benefit Of Someone Other Than The Transfer Recipient.

Under Oklahoma law, a resulting trust is created "where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is

inferred from the terms of the disposition, or from accompanying facts and circumstances, that the beneficial interest is not to go to or be enjoyed with the legal title." *Bryant v. Mahan*, 264 P. 811, 813 (Okla. 1927). "In such a case, a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner." *Cacy v. Cacy,* 619 P.2d 200, 202 (Okla. 1980).

Intention, which can be actual or implied, is the key consideration in the formation of a resulting trust. *Id.* at 202-03. "'In all species of resulting trusts, intention is an essential element, although that intention is never expressed by any words of direct creation. There must be a transfer, and equity infers the intention that the transferee was not to receive and hold the legal title as the beneficial owner, but that a trust [would] arise in favor of the party whom equity would regard as the beneficial owner under the circumstances.'" *Flesner v. Cooper*, 134 P. 379, 381 (Okla. 1913) (quoting Pomeroy's Equity Jurisprudence § 1031). Where "the legal estate in property is disposed of, conveyed, or transferred; but the intent appears or is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title," a trust "results in favor of the person for whom equitable interest is assumed to have been intended, and whom equity deems to be the real owner." *Id.*

The transfer of real property for the benefit of another is a classic example of the formation of a resulting trust. *See, e.g.*, *Trimble v. Boles*, 36 P.2d 861 (Okla. 1934). In *Trimble*, the plaintiff, who was ill and advised that she would not recover, transferred a piece of property to the defendant to avoid expenses that may incur in administering her estate. *See id.* at 862. Both parties agreed that if the plaintiff recovered, the defendant would reconvey the property to her. Throughout her illness, the plaintiff remained on the property, continued to collect rents, pay taxes, and make repairs. When the plaintiff eventually recovered, she sought reconveyance of the property. The defendant objected. Overruling that objection, the Oklahoma Supreme Court held that in these circumstances, the defendant held the title in trust for the plaintiff, meaning the plaintiff was entitled to the property. *See id.* at 864.

B. The Record Reflects That The Parties To The 1970 Conveyance Intended The Property To Transfer To The Housing Authority For The Benefit Of Kizzie Tiger Wolf.

Even if legal title was properly transferred to the Housing Authority in 1970, Kizzie Tiger Wolf retained equitable title to the land by virtue of a resulting trust. That was the plain intent of the parties to the conveyance.

At the outset, it bears noting that the transfer was not to a private party for that party's benefit or use. Rather, the transfer was to an Indian-affiliated Housing Authority, a public entity. *See Harjo*, 790 P.2d at 1102 (noting that "[t]he

Seminole Tribe appoints the commissioners of the Housing Authority"). And the sole reason for the transfer was so that Kizzie Tiger Wolf could receive the benefit of having a house built for her by the Housing Authority with federal funds. As reflected in Wolf's Petition for Approval of Warranty Deed, she contracted with the Housing Authority to require it to "cause a dwelling unit to be constructed for the[] Petitioner[] pursuant to the terms of the Annual Contributions Contract entered into between the [Housing Authority] and the United States of America, Secretary of the Department of Housing and Urban Development, such Annual Contributions Contract being designated 'Oklahoma:93-2.'" (EH Def.'s Ex. 14 at 6.)

That the transfer was made for the benefit of Kizzie Tiger Wolf—specifically, for a home to be built for her use and possession—was confirmed by the explicit language in the Warranty Deed. The Warranty Deed states that "in consideration of the sum of One Dollar and other good and valid consideration in hand paid … that a dwelling unit will be completed upon the hereinafter described property within two years from the date hereof" under the terms of the Annual Contributions Contract between the Housing Authority and the HUD Secretary. (EH Def.'s Ex. 19.) Likewise, the Order Approving Deed And Authorizing [Its] Delivery similarly states that Kizzie Tiger Wolf "convey[ed] all of [her] right, title and interest" in the land to the Housing Authority "for and in consideration of the

benefits to be derived by the Petitioners under the terms of a certain contract entered into between the [Housing Authority] and the Petitioner[], which said terms provide among other things that the [Housing Authority] will cause a dwelling unit to be constructed for said Petitioner[]" pursuant to an agreement with the Housing Authority and HUD. (EH Def.'s Ex. 14 at 1.) Plainly, the parties intended that Kizzie Tiger Wolf would be the ultimate beneficiary of the transfer.

While the Housing Authority held the legal title to the parcel in question, Kizzie Tiger Wolf retained all benefits to the property while the house was constructed and paid for, and the Housing Authority deeded the property back to her upon full payment. Legal title may have passed from Kizzie Tiger Wolf to the Housing Authority in the 1970 conveyance, but the beneficial interest, and thus the true ownership of the parcel, remained with Kizzie Tiger Wolf before, during, and after this transaction. Critically, it was the intent of both parties that the property would revert back to her once the house was constructed and Kizzie Tiger Wolf satisfied payments owed for the cost of building the house, which it did. *See Magnan*, 207 P.3d at 415 n.2 (Chapel, J., dissenting) ("The 1970 hearing . . . revolved around Tiger Wolf's desire to convey her land to the Housing Authority, which promised to build her a house and return the property."). The land in question, therefore, remained "Indian Country" due to Kizzie Tiger Wolf's continued interest in the property. *See, e.g., Trimble*, 36 P.2d at 862-65.

C. The Temporary Transfer To The Housing Authority Was Required By Federal Law, Further Evidence That The Housing Authority Held The Land In Trust.

Further evidence of this resulting trust is the fact that HUD rules required that the Housing Authority have legal title to the land before federal funds could be used to construct the house for Kizzie Tiger Wolf's benefit. She received the constructed home pursuant to HUD's "Mutual Help" program. (*See* EH Def.'s Ex. 25 at 188, Letter from the Housing Authority to Mr. Redmond Wolf, Jan 7, 1981 ("We will receive a check in the amount of $40,807.77 to re-build your burned out Mutual Help home. We have figured your payoff on the home at $6,299.03 which must be confirmed by the HUD area office and approved by the Board of Commissioners."); *id.* at 186, Letter from the Housing Authority to Mr. Hugh C. Johnson, Director, Indian Team, Department of Housing and Urban Development, Jan. 15, 1981 ("Mr. Redmond Wolf, a participant in Project 93-2 would like to pay off his Mutual Help home.").) That program, which led to the construction of many Indian homes in eastern Oklahoma, required funding from HUD to the Housing Authority, as well as extensive superintendence of how the Housing Authority administered the program on HUD's behalf. (*See* EH Def.'s Ex. 26 at 8-9.)

The details underlying the Mutual Help program were addressed at length in *Harjo*, 790 P.2d at 1101-02. There, the Oklahoma Supreme Court held that a

Mutual Help home funded by the federal government and built in Seminole County was part of "Indian Country" as defined in 18 U.S.C. § 1151. *See id.* In reaching that conclusion, the court emphasized that "comprehensive federal regulations . . . govern [Mutual Help] programs"; in particular, "procedures for participation in the housing program administered by the Seminole Housing Authority are determined by HUD." *Id.* at 1101. Notably, the "Housing Authority can only participate in this program after first being approved by both HUD and the Department of the Interior":

> They provide for how each Indian Housing Authority . . . must select applicants based on federal preferences for low income Indian families on Indian reservations 'and other Indian areas.' They provide that in the event of the death, mental incapacity, or abandonment of the home by the Indian homebuyer, such home-buyer may be succeeded only by a member of the homebuyer's family who is an authorized occupant of the home in accordance with the [Mutual Help] [a]greement. The regulations also specifically require compliance with federal laws involving environmental protections, wage controls and health and safety precautions.

Id. (internal citations omitted). In the Mutual Help program, the federal government maintains authority over the property even when it is in the hands of the Housing Authority: "The U.S. Government through the HUD regulations controls virtually every foreseeable legal consideration touching the property until the [Mutual Help] [a]greement runs its course or sooner terminates." *Id.* at 1101-02.

Indeed, "[t]he Seminole Housing Authority receives all of its funding from HUD," including through the Mutual Help program. *Id.* at 1102. The Housing Authority in turn uses that federal money to build homes for low-income Indians, adhering to federal requirements and HUD oversight:

> the program . . . was designed to provide housing to Indian people with low incomes. All participants in this program are Indian. A policy of the program is to keep the houses within the Indian family, especially if the land was donated. . . . The procedures and requirements for participation in the program are established in great detail by HUD. Under the supervision of HUD, the Housing Authority is required to conduct yearly inspections of the premises to determine whether federal regulations are met and followed.

Id. (internal citations omitted).

All told, the Housing Authority was in essence merely a placeholder, one that held the land while the federal government built a home for the benefit of Kizzie Tiger Wolf.

In very similar circumstances, the Oklahoma Supreme Court has held that land transferred to a housing authority retained its Indian Country status, where the land was improved by the housing authority for subsequent use by Indians. In *Ahboah v Housing Authority of Kiowa Tribe*, 660 P.2d 625, 626 (Okla. 1983), Indians entered into a lease-back agreement with a housing authority – leasing an allotment to the housing authority, which in turn leased the property back to the Indians after certain improvements were made to the allotment. After allegedly failing to pay rent, the housing authority brought a forcible entry and detainer

action in state court; the Indians moved to dismiss the case for lack of state court jurisdiction, asserting that the land was "Indian Country." *Id.* The Oklahoma Supreme Court agreed, stating that "[e]xtensive federal regulation of the leasing of allotments, even to non-Indians lessees, shows Congressional intent that the leased allotments remain Indian Country." *Id.* at 629 (footnote omitted).

D. The United States Effectively Was The Trustee Over The Resulting Trust, Further Evidence That The Land At Issue Remained Indian Country.

The United States government effectively controlled the transaction at issue. As previously noted, both the warranty deed (*see* EH Def.'s Ex. 19) and the Order Approving Deed And Authorizing [Its] Delivery (*see* Def.'s Ex. 14) reference the contract between the Housing Authority and HUD that originated and controlled the 1970 transaction. Further, HUD was the Housing Authority's sole funder. *See Harjo*, 790 P.2d at 1102. It follows that under HUD's arrangement with the Housing Authority, the federal government, in essence, held the property in trust itself, making it the trustee over the property—further proof that the 1970 transaction did not extinguish the Indian titles to the property.

The notion of the government holding Indian land in trust for the benefit of an Indian or an Indian community is a long-understood concept. *See, e.g., Pelican*, 232 U.S. 442 (identifying an instance where government carved out trust allotment for Indians). In 1887, Congress passed the Dawes Act, authorizing the President to

allot reservations to be held in trust by the federal government for the benefit of the allottee. 25 U.S.C. §§ 331, 348. Given the federal government's historical relationship with our nation's Indian community, it was common for the government to either hold the land in trust for an Indian with an agreement to convey at the end of the trust period ("trust allotment"), *e.g., Pelican*, 232 U.S. 442, or grant a specific tract of land in fee to an Indian subject to restrictions against alienation ("restricted allotment"), *see, e.g., Ramsey*, 271 U.S. 467. In either case, the land is considered "Indian Country" and under the control of the United States government, *Pelican*, 232 U.S. at 449, and subject to federal criminal jurisdiction. *Ramsey*, 271 U.S. at 471-72; *see also State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 78 (Okla. 1985) (holding that Indian trust lands were Indian Country under 18 U.S.C. § 1151).

This historical trustee role was in effect for this Indian allotment as well, where Kizzie Tiger Wolf received a restrictive allotment, placed the allotment in trust to the United States government to receive the benefit of a newly constructed home, and then received the allotment back from the government once the house was constructed and paid off. Confirming as much is *United States v. Jewett*, 438 F.2d 495 (8th Cir. 1971), where the defendant, an Indian, argued that the crime at issue there did not occur in "Indian Country" because the land was held in trust by the federal government. The land in *Jewett* was a trust allotment with numerous

"transfers to Indians through inheritance. The last entry is a deed from the Indian owners to the United States in trust for the Cheyenne River Sioux Tribe, approved by the Secretary of Interior . . . ." *Id.* at 497. Despite a series of transfers via inheritance and placing the land back in trust with the United States government, the appeals court concluded that the parcel remained "Indian Country" and that the defendant was subject to federal jurisdiction. *Id.* at 497-98; *see also Ramsey*, 271 U.S. at 471 (holding that land held in trust remains restricted because "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") (*citing United States v. Bowling*, 256 U.S. 484, 487 (1921)).

If an individual Indian who receives a "trust allotment" can place such allotment back with the United States for the benefit of a tribe (and not himself) without the land losing its "Indian Country" status, it follows that Kizzie Tiger Wolf can also receive a "restricted allotment" and place such allotment in trust with the United States, for her benefit, without the land losing its "Indian Country" status. In both instances, the United States government exercises control over the property, which indicates that restrictions would not be removed and titles would not be extinguished. All told, the land at issue here remained Indian Country even after the 1970 transfer, affording the federal government exclusive criminal

jurisdiction over the property. The state courts' failure to recognize this land as Indian Country plainly violates numerous aspects of established federal law.

IV. BECAUSE THE INDIAN MINERAL INTERESTS IN THE PROPERTY WERE NEVER EXTINGUISHED, THE PROPERTY WAS INDIAN COUNTRY AT THE TIME OF MAGNAN'S CRIME.

Oklahoma's assertion of jurisdiction over Magnan's crimes was invalid for an additional, independent reason: Kizzie Tiger Wolf's 4/5 interest in the *mineral* rights to the property at issue never transferred from Indian ownership. (*See* EH Def.'s Ex. 12 at 4; EHR at 114.) Under Oklahoma law, ownership of mineral interests constitutes title to real property. Because ownership of 4/5 of the mineral rights to the land always remained under Indian ownership, the "Indian titles" to the land "have not been extinguished." 18 U.S.C. § 1151(c). In other words, regardless of the facts and legal consequences of the 1970 transfer proceeding with respect to the surface rights to the property, the uncontested fact that Indian ownership of the mineral rights continued unabated means that the allotment at issue was Indian Country subject to exclusive federal jurisdiction. The state courts ignored this established legal rule, as recognized by the Supreme Court, that any restriction associated with an allotment means the allotment retains its Indian Country characteristic, and, moreover, that this strict federal test cannot be displaced by a judicially-created balancing test. *See, e.g., Ramsey*, 271 U.S. at 471;

Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 525 (1998) (rejecting judicial balancing test for determining Indian Country status).

A. Under Oklahoma Law, Title To An Indian Allotment Includes Both Surface And Mineral Rights.

Because the shootings occurred on allotment land subject to an 80% restricted mineral interest, under the plain terms of § 1151(c), the "Indian titles" to that allotment were never "extinguished." *Id*. If the "statutory text is plain and unambiguous, . . . [the courts] must apply the statute according to its terms." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-64 (2009). Here, the terms have a clear, plain meaning. "Allotment is a term of art in Indian law . . . [that] means a selection of specific *land* awarded to an individual allottee from a common holding." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972) (internal citation omitted) (emphasis added); *United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997) ("allotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian . . . or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials") (internal citation and internal quotation omitted). The term "extinguish" is equally unambiguous. It means "to bring to an end . . . to cause to be void, nullify." Webster's Ninth New Collegiate Dictionary at 440 (1990). Accordingly, all Indian titles to the land at issue must have come "to an end" before the land would no longer be deemed Indian Country.

With respect to "title" determinations, generally the law of the state where the land at issue is situated, here Oklahoma, governs the determination of what constitutes "title" to the allotment under § 1151(c). *See United States v. Okla. Gas & Electric Co.*, 318 U.S. 206, 2009-10 (1943) ("a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies"). Under Oklahoma law, an allotment of "specific land" includes both surface and subsurface interests. "*[L]and* includes not only the face of the earth, but everything of a permanent nature under or over it. In this sense, it embraces both the surface of the earth and minerals, oil and gas found below the earth's surface." *Lewis*, 896 P.2d at 515 (emphasis in original); *see also Sinclair Crude Oil Co. v. Okla. Tax Comm'n*, 326 P.2d 1051, 1056 (Okla. 1958) ("Oil and gas unsevered from the soil is part of the realty . . . ."). In other words, "the owner of land in fee has the right to the surface and to everything permanently situated beneath or over it." *Lewis*, 896 P.2d at 515-16. Accordingly, an "Indian allotment" of land includes both the surface and subsurface mineral interests in the specific land that was allotted.

Just as "land" includes both surface and subsurface interests, Oklahoma law defines "title" to property as including both surface and subsurface interests. The

Oklahoma legislature defines "title" as "the judicial or nonjudicial conclusion regarding legal or equitable ownership of real property or an estate in real property located in the State of Oklahoma." 12 Okla. Stat. § 1141.2(22) (2001). "Real property" in turn is defined as "land and fixtures and includes the surface estate and the minerals underlying lands in the State of Oklahoma." *Id*. § 1141.2(16). Likewise, "estate" is defined as "a quantity or duration of ownership in real property . . . and includes both the surface estate and mineral estate." *Id*. § 1141.2(7). Thus, "title" to land in Oklahoma encompasses both ownership of the surface estate and the mineral estate.

Congress understood that land in Indian Country has associated with it both surface and mineral interest rights. Indeed, in other statutes, Congress excepted one of those interests from Indian land considerations. *See* 16 U.S.C. § 470bb (for purposes of the archeological resource protection on public lands, "Indian Lands" means Indian allotments "except for any subsurface interest in lands not owned or controlled by an Indian tribe or an Indian individual"). That Congress made this exception elsewhere is further proof that the Indian Country Act was meant to cover all ownership interests in the land. So too is the fact that Congress used the plural "titles" in addressing the extinguishment requirement. Simply put, Congress knew how to limit the scope of § 1151(c) to reach only the surface interest, and it declined to do so. Under any reasonable interpretation, Congress's use of the word

"extinguished" demonstrates allotment property remains Indian Country until *all* restrictions on the property have been completely removed.

B. Indian Title To The Allotment At Issue Was Never Extinguished Given The Indian Retention Of Mineral Rights.

All agree that the original allotment to Jimpsey Tiger included both the surface and mineral estates in the property, meaning that Jimpsey Tiger held "Indian title" to both the surface estate and the mineral estate. Nor is there any dispute that 80% of the mineral interest in the subject property remained restricted. In the state trial court remand proceedings, Mr. Elsener's uncontroverted title opinion concluded that 80% of the mineral interests in the property remained subject to restrictions on alienation. (EH Def.'s Ex. 12 at 4.) The trial court in turn found that Mr. Elsener's determination was correct and assumed, without deciding, that mineral interests in the property were restricted. (EHR at 114, 127.) On appeal, the state appellate court deferred "to the district court's finding that the title opinion correctly describes the allocation of ownership in the property," and thus also assumed (without deciding) that "the 4/5ths mineral interest remained restricted as Indian allotment property." *Magnan*, 207 P.3d at 405.

Accordingly, there is no factual dispute that 80% of the mineral interests were owned by the heirs of Jimpsey Tiger at the time of Magnan's crime. Under state law, ownership of mineral interests in real property constitutes ownership of "title" to real property, meaning that the property at issue, regardless of the

determination of the 1970 surface rights transfer, "remained restricted as Indian allotment property" at the time of the shootings. *Id*.; *see also Sinclair*, 326 P.2d at 1056 (noting that the "granting of the [surface] easement" did "not affect the title to the minerals" held by Cherokee allottees). Because "Indian titles" to the subject property had not been extinguished, the shootings occurred in "Indian Country" and the state court had no jurisdiction to prosecute Magnan.

Federal law—which must be interpreted in favor of finding that land constitutes Indian Country, *see Cnty. of Yakima*, 502 U.S. at 269—supports this conclusion. Section 1151(c) does not distinguish between title to surface and subsurface interests in property. Instead, it references "Indian titles," contemplating multiple ownership interests in the same property. Accordingly, split ownership of surface and subsurface interests between Indians and non-Indians means that the property remains restricted. *See HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1254 (10th Cir. 2000) ("The split nature of the surface and mineral estates does not alter the jurisdictional status of these lands . . . ."). That was the conclusion in *Pittsburg & Midway Coal Mining Co. v. Watchman*, where a coal company sought an injunction prohibiting the Navajo Nation from imposing a business tax on revenues gained from a mine located on land in which 47% of the surface area was held in trust by the United States "for individual Navajo allottees." 52 F.3d 1531, 1534-35 (10th Cir. 1995), *partially overruled on other grounds by*

Hydro Res., Inc. v. U.S. E.P.A., 608 F.3d 1131 (10th Cir. 2010) (per curium). The coal company argued the mine did "not fall within 18 U.S.C. § 1151(c) because" there was no Indian "title to any of the subsurface coal estate." *Id*. at 1542. The court rejected the company's conception of jurisdiction under § 1151(c) as "untenable," holding that the "48 trust allotments comprising 47% of the surface area of the [mine] are Indian country by definition under 18 U.S.C. § 1151(c)." *Id.*

Here, on the other hand, the state courts failed to give the 80% ownership of mineral interests any significance. That analysis is not only at odds with the plain terms of the Indian Country Act and supporting Supreme Court precedent, but it also fails to recognize the significance of the mineral estate. After all, the mineral estate is not only a recognized interest, but it is also often the dominant ownership interest, so much so that the owner of the minerals can be considered under state law to have a controlling interest in the use and occupancy of the *surface* estate as well. *See, e.g., Wellsville Oil Co. v. Carver*, 242 P.2d 151 (Okla. 1952) (holder of a prior oil lease owns the dominant estate and possesses exclusive right to use so much of the leased premises as is reasonably necessary to oil operations). For example, in *Bell v. Phillips Petroleum Co.*, 641 P.2d 1115, 1118, 1120 (Okla. 1982), the Supreme Court of Oklahoma held that "implicit" in certain federal regulations related to the Osage Tribe's "valuable mineral" interests was "an imposition of the right of ingress and egress upon the unleased surface lands [of

non-Indians] as a necessary incident to the Osage Tribe's exercise of its ownership in the mineral estate."

C. The Oklahoma Court Ignored The Plain Language Of § 1151(c) And Violated Clearly Established Federal Law When It Applied A Balancing Test To Determine That It Had Jurisdiction.

In weighing various interests and placing certain rights over others as part of a judicially-crafted balancing test for determining what constitutes Indian Country, the state court contravened federal law. Federal law requires that *all* Indian interests be extinguished before an allotment is no longer deemed Indian Country, and that any ambiguity favor the Indian interests. Just as this Court held in *Pittsburgh & Midway Coal* that the lack of Indian title to the subsurface interests of Indian allotments did not eliminate the properties' "Indian Country" status, any lack of Indian title to the surface interest of a property does not change the fact that the land is "Indian Country" under § 1151(c).

Rejecting this straightforward analysis, the state courts, even after accepting that 80% of the mineral interests "remained restricted as Indian allotment property," nevertheless concluded that all Indian "titles" had been "extinguished." 18 U.S.C. § 1151(c). In so doing, the state courts did not even purport to apply the plain terms of § 1151(c), nor did they adhere to Supreme Court precedent holding that allotments for which title is held by an Indian are not subject to state jurisdiction. Rather, the state courts applied an inapplicable, judicially crafted balancing test.

Specifically, the Oklahoma appellate court applied a "contacts and interests analysis analogous to the familiar 'minimum contacts' test set forth in *International Shoe Co. v. State of Washington*." *Magnan*, 207 P.3d at 405. Drawing from that civil personal jurisdiction standard, the appellate court framed the relevant issue as "whether a fractional interest in the mineral estate that is subject to restrictions on alienation as Indian allotment property may burden the unrestricted surface estate in such a way to cause the surface estate to be categorized as Indian Country." *Magnan*, 207 P.3d at 405. Citing no Supreme Court precedent addressing either the Indian Country or Indian Major Crimes Acts, the state court applied its hand-crafted "contacts and interests" balancing test, holding that the subject property cannot "be categorized as Indian Country" because "even a 4/5ths fractional interest in the mineral estate," which is "subject to restrictions on alienation as Indian allotment property," is "insufficient to deprive the State of criminal jurisdiction over the surface of the property at issue here." *Magnan*, 207 P.2d at 405.

That decision is plainly at odds with § 1151, to say nothing of established Supreme Court precedent. Indeed, the Supreme Court has previously rejected the use of judicially crafted balancing tests when interpreting § 1151, which also defines as Indian Country all "dependent Indian communities within the borders of the United States . . . ." In *Venetie*, 522 U.S. at 525, the Supreme Court interpreted

the term "dependent Indian communities" to determine whether certain lands owned by the Native Village of Venetie Tribal Government constituted "Indian Country" under § 1151(b). Below, the Ninth Circuit "held that a six-factor balancing test should be used to interpret the term 'dependent Indian community,'" which included such considerations as "the degree of cohesiveness of the inhabitants" and "the nature of the area." *Id*. at 525-26. Balancing the six factors, the Ninth Circuit held that the land in question was Indian Country. *Id*.

On appeal, the Supreme Court rejected the use of a balancing test to determine the boundaries of Indian Country. Examining its own precedent from which Congress derived the term "dependent Indian communities," the Supreme Court held that the term "refers to a limited category of Indian lands . . . that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id*. at 527. Applying that understanding of the statute's plain meaning, the Supreme Court held that the land in question was not Indian Country. *Id.* at 532.

In each case in which it had found federal jurisdiction over non-reservation and non-Indian-allotment land prior to the enactment of § 1151, the Supreme Court had "relied upon a finding of both a federal set-aside and federal superintendence." *Id*. at 530. Because "[t]he entire text of § 1151(b)" was taken verbatim from the

Court's prior holdings, and because the legislative history indicated that "§ 1151's definition of Indian country is based" on those holdings, the Court held that "in enacting § 1151(b), Congress indicated that a federal set-aside *and* a federal superintendence requirement must be satisfied for a finding of a 'dependent Indian community.'" *Id*. Accordingly, the Supreme Court rejected the Ninth Circuit's balancing test. "By balancing these 'factors' against one another," the Supreme Court explained, "the Court of Appeals reduced the federal set-aside and superintendence requirements to mere considerations." *Id*. at 531 n.7.

Here, a civil jurisdictional due process analysis is not only inapplicable, but it also cannot override the exclusive federal jurisdiction embodied in the Indian Country and Indian Major Crimes Acts. By the clear language of § 1151(c), Congress precluded the use of an interest-balancing approach by making all allotments Indian Country and requiring that they continue to be Indian County so long as any aspect of the "titles" remain in Indian hands. *See, e.g., Hallowell v. United States*, 221 U.S. 317, at 319-20, 322-24 (1911) (Notwithstanding the substantial participation of the Omaha Indian defendant in public life in the state of Nebraska, and the substantial assimilation of the allotted Omaha reservation into the state, the federal government retained criminal jurisdiction over the defendant's allotment property. No balancing of interest test was undertaken, even though the

state clearly had significant interests and the federal government's ongoing supervision over and interest in the reservation was arguably minimal.).

After *Venetie*, "Congress – not the courts, not the states, not the Indian tribes – gets to say what land is Indian country subject to federal jurisdiction." *Hydro Res.*, 608 F.3d at 1148, 1151 (holding that this Court's prior use of a balancing test for determining "dependent Indian community" status did not comport with § 1151(b) and did not survive *Venetie*). That is especially true here, as the language used in § 1151(c) is clearer and more self-explanatory than the term "dependent Indian community" used in § 1151(b). Accordingly, the Oklahoma state court's use of a non-textual balancing test to determine whether an Indian allotment is "Indian Country" violated both the plain meaning of § 1151(c), as well as established Supreme Court precedent.

D. The Oklahoma Court Improperly Put State Interests Ahead of Federal Law In Failing To Apply § 1151(c).

The Oklahoma appellate court's analysis, one that favored a judicially-created balancing test over strict adherence to the federal statutory terms, was flawed in numerous respects.

First, the court improperly put state interests over those of the federal government, when federal law is the primary consideration with respect to Indian Country determinations. Rather than attempting to apply § 1151(c), the state court instead held that because of the supposed potential for a jurisdictional void due the

Woods court's prior determination that the property was not Indian Country, "the State's interest in exercising criminal jurisdiction over this property must overwhelm any fractional interest any Indian heirs of the original allottee may own in the unseen mineral estate." *Magnan*, 207 P.2d at 406. But "Congress–not the courts, not the states, not the Indian tribes–gets to say what land is Indian country subject to federal jurisdiction." *Hydro Res.*, 608 F.3d at 1151.

To be sure, the state court relied in large part on *Murphy v. State*, 124 P.3d 1198, 1206 (Okla. Crim. App. 2005), which also applied a balancing test to hold that Indian ownership of a 1/12 "unobservable mineral interest [was] insufficient contact with the situs in question to deprive the State of Oklahoma of criminal jurisdiction." That decision was wrongly upheld by the Eastern District of Oklahoma in *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007). Setting aside the fact that the 80% Indian mineral interests in the property here create a stronger Indian connection to the land than the 8% mineral interests at issue in *Murphy*, the fact remains that both *Murphy* and the courts here failed to adhere to federal law, the singular consideration in Indian Country determinations. In this rare but flawed instance, past should not be prologue.

Second, by failing to apply the clear language of § 1151(c), the state court also violated the well-established Supreme Court interpretative canon that when a federal statute's terms are unambiguous, "judicial inquiry is complete except in

rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). Here, determining whether property constitutes "Indian Country" under § 1151(c) requires nothing more than applying the key terms of the statute—"Indian allotments," "titles" and "extinguished"—none of which are vague or relative words. And any ambiguity in that language, it bears repeating, must be resolved in favor of finding Indian Country. *See Cnty. of Yakima*, 502 U.S. at 269.

Third, the state court's rule also violates the Supreme Court's express warning "against the 'judicial expansion of narrow and precise statutory language' in the criminal context because 'a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion' of statutes." *Hydro Res.*, 608 F.3d at 1160 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)). The state court's balancing test improperly makes Indian Country jurisdiction dependent upon a case-by-case judicial balancing of state and federal interests, one that would only spawn uncertainty and confusion. For instance, would the state courts have reached a different result here if the crime had impacted the subsurface, *e.g.*, an explosion that killed residents and damaged mineral aspects of the property?

This concern is heightened in the jurisdictional context, "an area where there is a compelling need for uniformity," meaning that "there must be a single bright line." *Ute Indian Tribe of the Unitah & Ouray Reservation v. Utah*, 114 F.3d 1513,

1527 (10th Cir. 1997); *see also Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (jurisdictional rules should be simple and easily administered). Unlike the state court's balancing test, the express language of § 1151(c) provides such a bright line: whether the crime occurred on an Indian allotment for which the Indian titles have not been extinguished. As demonstrated above, because 80% of the mineral interests remained restricted against alienation, the shootings occurred on an Indian allotment the "Indian titles to which have not been extinguished"—what both § 1151(c) and Supreme Court cases applying the statute deem to be "Indian Country."

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the complicated nature of the legal and factual issues presented and certain novel questions of law, counsel submits that oral argument would be helpful in addressing these issues.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's denial of Magnan's § 2254 petition and hold that Oklahoma lacked jurisdiction to prosecute him for his crimes, allowing the federal government properly to assert jurisdiction.

Dated: July 17, 2012

Respectfully submitted,

s/ Chad A. Readler
Chad A. Readler
Counsel of Record
careadler@jonesday.com
JONES DAY
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Gary Peterson
211 N. Robinson Ave., Suite 450 South
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3367

Steven A. Broussard
Michael J. Lissau
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 S. Boston Ave., Suite 200
Tulsa, Oklahoma 74103
Telephone: (918) 594-0400

ATTORNEYS FOR PETITIONER

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 17,184 words. I relied on my word processor to obtain the word count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

s/ Chad A. Readler

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing APPELLANT'S OPENING BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the McAfee program version 4.5.0.1852, with updated virus definitions, and, according to the program, the document is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ Chad A. Readler

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANT'S OPENING BRIEF was furnished through (ECF) electronic service to the following on this the 17th day of July, 2012:

Jennifer L. Crabb, Esq.
Assistant Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Attorney for Respondent

s/ Chad A. Readler
One of the Attorneys for Petitioner

ATTACHMENT 1

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

DAVID BRIAN MAGNAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-09-438-RAW-KEW**
	)	
RANDALL WORKMAN, Warden, Oklahoma State Penitentiary,	)	
	)	
Respondents.	)	

OPINION AND ORDER

On May 10, 2005, Petitioner, after being found competent to do so, pled guilty in the District Court of Seminole County, State of Oklahoma, to three counts of First Degree Murder in violation of 21 O.S. 2001, § 701.7 and one count of Shooting With Intent to Kill in violation of 21 O.S. 2001, § 652 and stipulated to the aggravating circumstances pled by the State. *See*, Transcript of Plea Hearing held on May 10, 2005. Thereafter, on July 6, 2005, Petitioner again stipulated to the Bill of Particulars and admitted the aggravating circumstances pled by the State; stated he had nothing to present in mitigation; waived any direct appeal; and asked to be sentenced to death for the murders. Thereafter, the district court judge sentenced Petitioner to death on each of the murder counts and to life imprisonment on the shooting with intent to kill count. *See*, Transcript of Proceedings held on the 6th day of July, 2005.

Although Petitioner waived direct review of his conviction and sentence, on appeal his attorneys contended that the crime scene was Indian Country and, therefore, the state did

not have jurisdiction to try him. Because the jurisdictional issue had not been raised in the state district court, the Oklahoma Court of Criminal Appeals ("OCCA") remanded the matter to the Seminole County District Court for an evidentiary hearing. On remand, the state district court concluded the property was not "Indian country" and that the State of Oklahoma had properly exercised jurisdiction. *State v. Magnan*, District Court Case No. CF-04-59, slip op. (Seminole County, Oklahoma January 2, 2008). On April 22, 2009, the OCCA affirmed Petitioner's sentence. *Magnan v. State*, 207 P.3d 397 (Okla. Crim. App. 2009), *cert. denied*, — U.S. —, 130 S.Ct. 276 (2009). Petitioner did not seek any post-conviction relief in the Oklahoma Courts. Petitioner now seeks relief from his death sentence pursuant to 28 U.S.C. § 2254.

I. RECORDS REVIEWED

This Court has reviewed: (1) the Petition for Writ of Habeas Corpus filed on August 2, 2010; (2) the Response to the Petition filed by the Oklahoma Attorney General on behalf of the Respondent on October 4, 2010; (3) the Reply to the Response filed by Petitioner on November 19, 2010; (4) the transcript of the Initial Appearance held on March 12, 2004; (5) the transcript of May 17, 2004;[1] (6) the transcript of a hearing held on June 28, 2004, including the exhibits introduced at said hearing;[2] (7) transcript of Exhibits from June 28, 2004; (8) transcript of proceedings held on July 22, 2004; (9) transcript of a hearing held on

[1]The cover page of this transcript states it is the "Transcript of Preliminary Hearing." This is not, however, a transcript of a preliminary hearing.

[2]This is the preliminary hearing transcript.

February 28, 2005;[3] (10) transcript of plea hearing held on May 10, 2005; (11) transcript of Victim Impact Testimony held on May 25, 2005;[4] (12) transcript of proceedings held on July 6, 2005; and (13) transcript of hearing held on December 13, 2007. Additionally, this Court has reviewed the original record from the District Court of Seminole County Case No. CF-04-59 and the pleadings filed in OCCA Case No. D-2005-683 which were transmitted to this Court. Although not listed specifically, this court has thoroughly reviewed all other items filed in this case. See Inventory of State Court Record, Docket No. 31, filed on April 29, 2009 and Amended Inventory of State Court Record, Docket No. 34, filed August 9, 2011.

As a result, this court finds that the records, pleadings and transcripts of the state proceedings provide all the factual and legal authority necessary to resolve the matters in the petition and, therefore, an evidentiary hearing is unnecessary. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)(*Sumner I*); *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982)(*Sumner II*).

II. STATEMENT OF THE FACTS

Historical facts found by the state court are presumed correct, unless the petitioner rebuts the same by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Since Petitioner

[3]The cover page for this transcript indicates it is a "Transcript of Plea Hearing." However, no plea took place during these proceedings.

[4]This transcript is a sentencing hearing held in the case *State of Oklahoma v. Aaron Paul Wolf*. Mr. Wolf was a co-defendant of Petitioner Magnan.

has failed to rebut the facts, as set forth by the OCCA, this Court hereby adopts the factual findings made by the Oklahoma appellate court.

> On the evening of March 2, 2004, a group of family and friends, James Howard, Lucilla McGirt, Karen Wolf, Amy Harrison, and Eric Coley, gathered at Mr. Howard's rural Seminole County home to celebrate Mr. Coley's birthday. Ms. Harrison was Ms. Wolf's daughter and Mr. Howard's niece. At some point, Mr. Howard answered a telephone call from Aaron Wolf, a co-defendant in this case. As the two men argued, Ms. Harrison took the telephone in time to hear Aaron Wolf say "I am going to kill that m——f——."
>
> Later that evening, at approximately 1:00 a.m. on the morning of March 3rd, Magnan, Aaron Wolf, and Redmond Wolf, Jr., arrived at Mr. Howard's home in Magnan's car. Mr. Coley and Ms. Harrison went out of the house to meet them. As Harrison approached, Aaron Wolf told her to get out of there and gestured toward the woods behind the house. She fled. Coley tried to stop Magnan from going inside the house. During the resulting scuffle, Coley pushed Magnan to the ground. We learn what happened next from Coley's viewpoint. He saw what appeared to be a shiny gun barrel in Magnan's hand. A flash of flame erupted from the object and Coley realized he had been shot in his left side. In spite of his injury, he ran to the house and banged on windows trying to warn Howard, McGirt, and Wolf.
>
> After a short while, Harrison left the hiding place she had found in the woods and gingerly moved toward the house. As she approached, she heard gunshots from inside. She heard men get into the car and drive away. Harrison found Coley outside, preparing to enter the house. Inside, Coley saw Howard bloody and lying on a bed near the kitchen. In the bedroom he found McGirt and Wolf. Both women had been shot. After returning to the kitchen and warning Harrison against going in the bedroom where her mother was, he collapsed from his injuries.
>
> Despite Coley's admonition, Harrison went to check on her mother and McGirt. She found her mother and McGirt on the bed. Harrison knew her mother was dead, but saw that McGirt was still alive. She went back to the kitchen to check on Howard and found him covered in blood and apparently dead.
>
> During his plea colloquy, Magnan told the district court judge that he shot Eric Coley with the intent to kill him. He said he then walked into the house where he saw James Howard lying in a bed near the kitchen. When the old man looked up at him, Magnan said "goodbye" and shot him, intending to

> kill him. Magnan told the court he went into the bedroom intending only to say "good-bye" to Karen Wolf, but when she "got smart" with him, he shot her, intending to kill her. Magnan admitted he next shot McGirt, who was in the bed next to Wolf, and intended to kill her as well.
>
> James Howard and Karen Wolf died at the scene. Lucilla McGirt was hospitalized for approximately two weeks before she died of complications from her gunshot wounds. Eric Coley survived his gunshot injury.

Magnan v. State, 207 P.3d 397, 401-402 (2009). Additional factual findings regarding the situs of the crime scene will be discussed later in this opinion.

III. PETITIONER'S CLAIMS FOR RELIEF

In his Petition (Doc. 24) filed on August 2, 2010, Petitioner raises only one ground for relief, *i.e.*, the State of Oklahoma did not have jurisdiction because Petitioner is an Indian and the crime occurred within Indian country. As a result, Petitioner asserts he is in custody in violation of the laws and Constitution of the United States. Respondent argues that the OCCA finding that the State had jurisdiction over the crimes committed by Petitioner is not contrary to or an unreasonable application of clearly established federal law and, therefore, the federal habeas corpus relief requested is not warranted. In his Reply, Petitioner asserts that the jurisdictional issue involved herein turns on a question of fact.

IV. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") delineates the circumstances under which a federal court may grant habeas relief. Title 28, section 2254 (d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to

> any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court recognizes that "[t]his is a 'difficult to meet' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Cullen v. Pinholster*, — U.S. —, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) (quoting *Harrington v. Richter*, 562 U.S. —, —, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011) and *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002)). Review under § 2254(d)(1) is limited to the record that was before the state court which adjudicated the claims on the merits. *Id*. Furthermore, determinations of factual issues made by state courts are presumed correct and a habeas petitioner must rebut the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In *Williams v. Taylor*, 592 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the United States Supreme Court interpreted the above-quoted statute holding, in order for a petitioner to obtain federal habeas relief, the petitioner must first demonstrate that his case satisfies the conditions set by § 2254(d)(1). A decision can be "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth" in

Supreme Court case law or "if the state confronts a set of facts that are materially indistinguishable from" a decision of the Supreme Court, but nonetheless arrives at a different result. *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 365, 154 L.Ed.2d 263 (2002), citing *Williams v. Taylor*, 529 U.S. at 405-406. Whereas, the "unreasonable application" provision is implicated when "the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "unreasonably extends a legal principle from [Supreme Court] 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. at 407. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct.1933, 167 L.Ed.2d 836 (2007). Finally, the Supreme Court has made it clear that a state court is not required to cite Supreme Court caselaw, or even be aware of it, "so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]." *Early*, 537 U.S. at 8.

V. JURISDICTIONAL DISPUTE

Petitioner claims the State of Oklahoma lacked jurisdiction to try him for his crimes because both he and his victims are Indians and his crime occurred in "Indian country." Petitioner, therefore, asserts jurisdiction over his crimes rested exclusively in the federal government and his conviction and sentences of death violate the federal Indian Major

Crimes Act, 18 U.S.C. § 1153(a). Respondent, relying on 28 U.S.C. § 2254(d)(1), asserts that the OCCA finding that the state had jurisdiction over the crimes was not an unreasonable application of clearly established federal law. Petitioner counters that the jurisdictional issue here turns on a question of fact, not of law and therefore, review herein is governed by 28 U.S.C. § 2254(d)(2).

> 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.' *Duro v. Reina*, 495 U.S. 676, 680, n. 1, 110 S.Ct. 2053, 2057, n. 1, 109 L.Ed.2d 693 (1990). The Indian Country Crimes Act, 18 U.S.C. § 1152, extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country, except for those 'offenses committed by one Indian against the person or property of another Indian.' See F. Cohen, Handbook of Federal Indian Law 288 (1982 ed.). These latter offense typically are subject to the jurisdiction of the concerned Indian tribe, unless they are among those enumerated in the Indian Major Crimes Act. Originally enacted in 1885, the Indian Major Crimes Act establishes federal jurisdiction over 13 enumerated felonies committed by '[a]ny Indian . . . against the person or property of another Indian or other person . . . within the Indian country.' § 1153(a).

Negonscott v. Samuels, 507 U.S. 99, 102, 113 S.Ct. 1119, 1121, 122 L.Ed.2d 457 (1993) (footnote omitted). Murder is one of the thirteen enumerated offenses contained within the Major Crimes Act. *See*, 18 U.S.C. § 1153(a). Where applicable, federal jurisdiction under § 1153 preempts state jurisdiction. *Negonscott*, 507 U.S. at 103, 113 S.Ct. at 1122. Thus, the sole issue is whether, on March 2, 2004, the subject tract of land was "Indian country."

In denying Petitioner's challenge to jurisdiction, the OCCA made the following findings of fact regarding the situs of the crimes and the status of the persons involved therein:

> The record shows that the murders in this case occurred in a house located on property that was part of the original restricted allotment of Jimpsey Tiger, a full-blooded Seminole. On Jimpsey Tiger's death in 1944, the property passed in 1/5th fractional interests to his second wife Lena Tiger, 13/16th Creek-Seminole, and four sons and daughters including daughter Kizzie Tiger, a 3/4th blood Seminole. Lena Tiger sold her 1/5th interest in the surface rights to the property to her son George William Tiger, a 3/4th blood Seminole, but expressly retained the mineral rights. In 1950, George William Tiger and his two other siblings sold their interest in the surface rights to their sister Kizzie Tiger. Thus, as of 1950, Kizzie Tiger owned all of the surface rights (1/5th acquired by inheritance and 4/5th by conveyance from her siblings) and 1/5th of the mineral rights (acquired by inheritance). In 1970, Kizzie Tiger, now Kizzie Tiger Wolf, executed a deed purporting to convey the surface rights to the property to the Seminole Nation Housing Authority but expressly reserving the mineral interests. In 1981, the Seminole Nation Housing authority conveyed the property back to Kizzie Tiger Wolf. Kizzie Tiger Wolf died in 1991. Her full interest in the surface rights and her 1/5th interest in the mineral rights were divided among her husband and their nine children. At the time of the murders, these interests remained in the possession of these heirs and their successors.

Magnan, 207 P.3d at 402-403.

Thereafter, the OCCA considered two legal questions. First, the OCCA considered "whether Kizzie Tiger's 1970 conveyance of the surface rights in the property to the Housing Authority of the Seminole Nation extinguished all restrictions on alienation on the surface rights to the property." *Id*. After considering the Act of Congress of July 2, 1945, 59 Stat. 313 (1945) and the Act of Congress of 1947, 61 Stat. 731 (194), the OCCA found the requirements of both Acts were met during a "1970 Seminole County District Court proceeding in which Kizzie Tiger Wolf sought approval of the conveyance of surface rights from her and her husband to the Seminole County (sic) Housing Authority." *Id*., at 404. As

a result, the OCCA found, as a matter of law, that the "1970 conveyance extinguished all Indian lands (sic) restrictions that attached to surface estate of the property." *Id.*

Next, the OCCA considered "whether a fractional interest in the mineral estate that is subject to restrictions on alienation as Indian allotment property may burden the unrestricted surface estate in such a way to cause the surface estate to be categorized as Indian Country." *Id*., at 405. In considering this question, the OCCA recognized its earlier decision in *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. 2005), which held "a fractional interest in an unobservable mineral interest is a contact with the surface estate that is insufficient to deprive the State of Oklahoma of criminal jurisdiction." *Id*., at 1206.[5] Additionally, the OCCA recognized that this Court had previously determined "that the property was not Indian Country" and key to that determination was "its finding that Indian land restrictions on the property had been extinguished by Kizzie Tiger Wolf's 1970 conveyance of the surface rights to a non-Indian (i.e., the Seminole Nation Housing Authority)." *Magnan*, *supra* at 405. Thereafter, the OCCA found because the prior ruling of this court held that the property was not Indian country,

> . . . the United States ceded criminal jurisdiction over the property. Because the United States District Court for the Eastern District of Oklahoma found this same property not to be Indian Country for federal criminal jurisdictional purposes, unless we likewise find the property to be non-Indian Country, no sovereign entity will exercise criminal jurisdiction over the property, thereby creating a jurisdictional void.

[5]In *Murphy v. Sirmons*, United States District Court for the Eastern District of Oklahoma Court Case No. CIV-03-443-RAW-KEW, this Court held restricted subsurface mineral interests were insufficient to subject the surface interests of the land to exclusive federal criminal jurisdiction pursuant to 18 U.S.C. § 1151(c).

> If Oklahoma has a sufficient interest to exert criminal jurisdiction over the surface of a property restricted by an unobserved fractional mineral interest in order to avoid creation of a checkerboard jurisdiction, it must have an even more compelling interest in avoiding the creation of a jurisdictional void within its contiguous territory. Therefore, as in *Murphy*, but to an even greater degree here, the State's interest in exercising criminal jurisdiction over this property must overwhelm any fractional interest any Indian heirs of the original allottee may own in the unseen mineral estate. We agree, therefore, with the district court's conclusion that the crimes committed in this case did not occur in Indian Country and we likewise conclude that criminal jurisdiction was proper.

Id., at 406. As previously indicated, Petitioner claims this legal decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.[6]

Despite Petitioner's insistence that the legal decision by the Oklahoma Court of Criminal Appeals was based upon an unreasonable determination of the facts in light of the evidence presented, it is clear that the actual factual findings by the OCCA, regarding the situs of these crimes and the status of the persons involved, as set forth above are not contested by Petitioner. Rather, the only disputed issue in state court was the legal effect of the 1970 conveyance by Kizzie Tiger Wolf and Redmond Wolf to the Housing Authority of the Seminole Nation of Oklahoma. Thus, the question this court must decide is whether the decision of the OCCA resulted in a decision that was contrary to, or an unreasonable

[6]Petitioner asserts in his reply that the absence of any official record in the Bureau of Indian Affairs showing "Departmental approval of the 1970 transfer" establishes that the trial attorney appearing in the 1970 state court proceeding was not authorized to act on behalf of the Secretary of the Interior and, therefore, despite the state court approval of the deed, the subject tract of land continues to be restricted against alienation. The ruling of Judge Burrage, which is discussed in more detail herein, establishes the fallacy of this assertion.

application of, clearly established Federal law, as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1).

While Petitioner claims there was no dispute in the state court proceedings that the state court lacked authority to approve transfer of the 80% surface interest that Kizzie Tiger had purchased from her siblings,[7] Pet. Brief at p. 14, the Oklahoma courts actually considered evidence which established that the Indian land restrictions on the property had been extinguished by the 1970 conveyance of the surface rights to a non-Indian. *See*, Def. Exhs. 25, 26, and 27. Specifically, the state trial court reviewed evidence showing in 1998, Carl King Woods, also an Indian, committed a murder at the exact same residence as the crimes in this case. Mr. Woods was prosecuted in this federal court by the United States Attorney for the Eastern District of Oklahoma. *See*, Def. Exh. 25. After hearing the evidence, Judge Burrage made the following findings regarding the 1970 conveyance:

> Well, the record reflects in the proceedings in the transfer to the Seminole Nation Housing Authority, which is the conveyance that is under attack in this situation, was that on April 16th there was filed in the district court within and for Seminole County, State of Oklahoma an acknowledgement by M. Dean Swartz, the United States trial attorney for the United States Department of Interior, acknowledging written notice of it. There was also an acknowledgement by Virgil N. Herrington, the area director of the Bureau of Indian Affairs, successor to the superintendent of the Five Civilized Tribes, and they both received notice. There is a transcript of the testimony that occurred in this proceeding and I will note for the record that it reflects that the petition to approve the deed was for all interest and not

[7] In the state proceedings, the state did not present live witnesses to counter the testimony of a title attorney, G. Dale Elsener, and others who testified, in their opinion, 80% of the surface interest or the portion of the property purchased with restricted Indian funds was still restricted against alienation. Several stipulations were, however, entered into by the parties, including stipulations regarding the Seminole County land records dealing with the subject tract of property and the court records from *United States v. Woods*, United States District Court for the Eastern District of Oklahoma Case No. CR-98-26-B.

> simply a one-fifth interest. The transcript of the testimony reveals that M. Dean Swartz appeared as the U.S. trial attorney for the Bureau of Indian Affairs and the Department of Interior at the hearing. It was made clear at the hearing that the entire interest was being conveyed or approval was sought for the entire interest to be conveyed to the Housing Authority of the Seminole Nation for construction of a home. The warranty deed was presented at the time of the hearing and the - - and there was an acknowledgement of the signature and then it was asked if Mr. Swartz, who was representing the B.I.A. and the Department of Interior, had any questions and there were no questions. The approval of the entire interest in the land, not a one-fifth interest. Thereafter, the order was entered and the order approving the deed and authorizing its delivery in the first paragraph provides that the Court approves the deed executed February 20th, 1970, conveying all of their right, title and interest to the property. The record further reflects that the appearance of M. Dean Swartz, United States trial attorney appearing on behalf of petitioners and the United States Department of Interior. The Court found that there was proper written notice to the United States trial attorney, to the area director of the Five Civilized Tribes, and so forth.
>
> Then the order that approves it states on the last page, quote, "The court, therefore, finds that M. Dean Swartz, United States trial attorney, has joined with the said petitioners and requested the Court to approve the deed without submitting same at public auction and has agreed that said conveyance would be in the best interest of the petitioners." The Court then goes on to approve the deed conveying, quote, ". . . all of their right, title and interest in and to the above described property to the Housing Authority of the Seminole Nation of Oklahoma," and confirms it.
>
> There is no question in this Court's mind that the B.I.A. and the Department of Interior joined in this proceeding, consented to it, and there was approval of the deed. Even under the government's theory that the Act only applies to inherited lands - - and I don't know that that is entirely correct, but even giving the government that position, the BIA and Department of Interior still consented in, joined in and approved, and I think this was done in good faith. I can find nothing which puts this conveyance in the posture that only a fifth interest was conveyed, ...

Def.Ex. 27, at pp. 8-11. Thereafter, the Assistant United States Attorney stated, "It is very difficult for another branch of the government to appear at this time, Your Honor, and argue that the conveyance was invalid. I think that given all of that, ***we would have to admit this***

Court doesn't have jurisdiction. . . . . ." (emphasis added) *Id*, at p. 11. Thus, Judge Burrage, found this court did not have jurisdiction over the same tract of property on which Petitioner's crimes occurred and Mr. Woods Motion to Dismiss for Lack of Jurisdiction was sustained. *Id.*, at p. 12. *See also*, Def.Ex. 25. It was also undisputed, in the state court, that the government did not appeal this ruling. *See*, Stipulations filed on January 2, 2008, at p. 7.

While Judge Burrage's decision does not compel this Court to hold that the tract in question is not "Indian country,"[8] nothing contained within Petitioner's briefs convince this Court that Judge Burrage's decision was incorrect. Furthermore, Petitioner has not cited, and this Court has not found, any Supreme Court authority which the OCCA's decision was contrary to nor has Petitioner shown that the OCCA's decision was an unreasonable application of Supreme Court law.[9] Accordingly, this Court finds Petitioner has failed to establish that his crimes occurred in "Indian country." Therefore, the State of Oklahoma did not violate federal law by exercising criminal jurisdiction over the crimes involved herein.

VI. CONCLUSION

For the reasons stated herein, Petitioner's Petition for Writ of Habeas Corpus (Doc. # 24) is hereby denied.

---

[8] *See*, e.g., *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n. 13 (9th Cir. 1977).

[9] Unlike the property which was deemed "Indian country" in *United States v. Jewett*, 438 F.2d 495 (8th Cir. 1978), the exhibits admitted in state court establish that this tract of land has been on the state tax rolls since, at least, August 23, 2000 or for more than three years prior to the crime involved herein. Def. Ex. 5.

Dated this 23rd day of August, 2011.

Dated this 23rd day of August, 2011.

Ronald A. White
United States District Judge
Eastern District of Oklahoma

ATTACHMENT 2

enced by passion, prejudice, or any other arbitrary factor.

¶ 30 The jury was instructed on and found the existence of three aggravating circumstances: (1) Rojem was previously convicted of a felony involving the use or threat of violence to the person; (2) the murder was especially heinous atrocious or cruel, and (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest of prosecution. Rojem presented evidence that he had a troubled, chaotic, violent and abusive childhood; that he experienced physical injury and disabilities as a young child; that he lived in poverty and had poor parenting and role models; that he and his family had problems involving alcohol abuse; that he had difficulty in school; that he was nonetheless a loving and helpful family member; that his family loved and valued him; that he had made efforts to rehabilitate himself and help others since going to prison; and that he had a good record while incarcerated. The jury was specifically instructed on eight specific mitigating factors, and invited to consider other mitigating evidence they might find.[41] Upon our review of the record, we find that the sentence of death is factually substantiated and appropriate.

C. JOHNSON, P.J., A. JOHNSON, V.P.J., and LEWIS, J.: concur.

LUMPKIN, J.: concur in results.

LUMPKIN, Judge: concur in result.

¶ 1 I concur with the Court's decision to affirm the sentence in this case. However, I differ with the Court in some aspects of its analysis.

¶ 2 I continue in my belief that the issue of peremptory challenges is not a structural error issue and the Court erred in its analysis of the issue in *Golden v. State*, 2006 OK CR 2, ¶ 18, 127 P.3d 1150, 1154–55 (Lumpkin, V.P.J., Dissenting, 127 P.3d at 1155–1158). Regardless, there was no error in this case.

¶ 3 In addressing the issue of the use of the power point as a demonstrative aid in the testimony of Dr. Cunningham, it must be emphasized that both parties agreed this was only a demonstrative aid to the testimony and would not be admitted as evidence. As a result, the jury was not denied the benefit of any admissible evidence because Dr. Cunningham was able to fully testify as to his opinion and the basis for it. If the power point had more information than was contained in the testimony of Dr. Cunningham, then that additional information was not evidence to be considered by the jury. While the visual aid would have assisted in the presentation of the defense evidence, I agree with the Court that any error was harmless. The decision by the jury that the continuing threat aggravator was not supported by the evidence confirms the harmless error. When Dr. Cunningham's testimony is viewed with the remaining mitigating witnesses' testimony, it is clear the jurors were presented with a clear picture of all relevant mitigating evidence.

2009 OK CR 16

David Brian MAGNAN, Appellant

v.

STATE of Oklahoma, Appellee.

No. D–2005–683.

Court of Criminal Appeals of Oklahoma.

April 22, 2009.

Background: Defendant pled guilty in the District Court, Seminole County, George

41. Jurors were instructed: Rojem showed a potential for rehabilitation and for contributing affirmatively to the lives of his family, friends, and fellow inmates, and can make a contribution to society even in prison; while incarcerated, Rojem attempted to make it possible for death row inmates to become organ donors; Rojem has helped others by knitting afghans that are then sold to help finance projects aiding other people; as a result of his organ donation efforts Rojem has touched the life of others in a positive way; Rojem has attempted to better himself by taking classes while in prison; the male DNA found under the fingernails of Layla Dawn Cummings is not that of Rojem; Rojem received a 1000 year sentence for his rape conviction and a 1000 year sentence for his kidnapping conviction in this case; Rojem has grown spiritually while in prison by becoming a lay disciple of the Buddhist religion.

Butner, J., to three counts of first degree murder and one count of shooting with intent to kill. Defendant was sentenced to death on each of the murder counts and to a term of life imprisonment on the remaining count.

Holdings: Upon mandatory sentence review, the Court of Criminal Appeals, A. Johnson, V.P.J., held that:

(1) Indian landowner's 1970 conveyance of the surface rights in property to the Housing Authority of the Seminole Nation extinguished all Indian lands restrictions that attached to surface estate of the property;

(2) assuming that 4/5ths of Indian landowner's mineral interests in property remained restricted, this factional interest in the mineral estate was insufficient to deprive the State of criminal jurisdiction over the surface of the property; and

(3) evidence was sufficient to support trial court's "aggravating circumstance" findings.

Affirmed.

Chapel, J., filed a dissenting opinion.

1. Criminal Law ⚿1026.10(4)

Normally, an issue not raised in the trial court, and not related to appellate court's mandatory death-penalty sentence review, is waived when a capital defendant pleads guilty, waives appeal, and appellate court proceeds solely under statutorily required sentence review. 21 Okl.St.Ann. § 701.13.

2. Criminal Law ⚿273.4(1)

A guilty plea waives only nonjurisdictional defects; it does not waive a claim that a court lacks the power to adjudicate a charge against the defendant.

3. Indians ⚿162, 175

"Allotment" is a term of art in Indian law describing land owned by individual Indians that is either held in trust by the United States or is subject to statutory restrictions on alienation. 18 U.S.C.A. § 1151.

See publication Words and Phrases for other judicial constructions and definitions.

4. Indians ⚿263

Allotted Indian property that is burdened by restrictions against alienation constitutes Indian Country. 18 U.S.C.A. § 1151.

5. Indians ⚿175, 263

Indian landowner's 1970 conveyance of the surface rights in property to the Housing Authority of the Seminole Nation extinguished all Indian lands restrictions that attached to surface estate of the property, for purposes of determining whether the property on which murders were committed was Indian allotment land and therefore subject only to federal jurisdiction as having occurred in Indian Country; regardless of whether the 1970 proceeding in Seminole County District Court was intended to do so or not, it was in effect a combined proceeding that satisfied the requirements of both the 1945 and 1947 Acts of Congress, i.e., the 1945 Act requiring secretarial approval for conveyance of property acquired by deed, and the 1947 Act requiring Oklahoma State court approval for property acquired by inheritance. 18 U.S.C.A. § 1151.

6. Indians ⚿263, 274(2)

Assuming that 4/5ths of Indian landowner's mineral interests in property remained restricted following her 1970 conveyance of the surface rights in the property to the Housing Authority of the Seminole Nation, this factional interest in the mineral estate was insufficient to deprive the State of criminal jurisdiction over the surface of the property in murder case. 18 U.S.C.A. § 1151.

7. Sentencing and Punishment ⚿1788(5)

Except for jurisdictional issues, appellate court's sentence review in a capital case is limited in scope to just two inquiries: (1) whether the evidence supports the aggravating circumstances found by the trial court judge; and (2) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. 21 Okl.St.Ann. § 701.13(C).

8. Sentencing and Punishment ⚿1788(5)

To determine whether the evidence in a capital case supports the aggravating circumstances found by the district court or whether the sentence of death was imposed under some improper arbitrary influence, appellate court reviews the record to include in-court testimony of witnesses, the court-ordered presentence investigation, and any other evidence presented at the defendant's sentencing hearing.

9. Criminal Law ⚿1134.23

Appellate court is normally prohibited from considering the contents of a presentence investigation report. 22 Okl.St.Ann. § 982(D).

10. Sentencing and Punishment ⚿1788(5)

In a death penalty case, appellate court may consider the contents of a presentence investigation report in its analysis. 22 Okl. St.Ann. § 982(A, D).

11. Criminal Law ⚿1026.10(4)

Capital defendant's claim that the district court abused its discretion by accepting his guilty pleas because there was an insufficient factual basis for the pleas was waived, since claim was neither jurisdictional nor related to appellate court's mandatory sentence review.

12. Criminal Law ⚿1134.23, 1134.75

In accordance with appellate court's sentence review mandate, the court reviews all the aggravating circumstances found by the district court in a capital case, challenged or unchallenged, to determine if each was sufficiently supported by the evidence. 21 Okl. St.Ann. § 701.13.

13. Sentencing and Punishment ⚿1789(8)

Appellate court reviews the sufficiency of the evidence for an aggravating circumstance in a capital case in the light most favorable to the State to determine whether any rational trier of fact could have found the circumstance beyond a reasonable doubt. 21 Okl.St.Ann. § 701.13.

14. Sentencing and Punishment ⚿1772

Evidence was sufficient to support trial court's "aggravating circumstance" finding that capital defendant had been convicted previously of a violent felony; defendant admitted to the district court in his plea colloquy and stipulated in his sentencing hearing that he had been convicted in federal court for the crime of arson with intent to injure, and the uncontested judgment and sentence document from that proceeding was before the court in the record of the preliminary hearing.

15. Sentencing and Punishment ⚿1720

Evidence in capital case was sufficient to support the aggravating circumstance of continuing threat to society; defendant had a prior conviction for burning down a house with a former girlfriend in it, as well as a conviction for simple assault, and the presentence investigation report disclosed a history of misdemeanor arrests for domestic abuse, disorderly conduct, and driving under the influence of alcohol.

16. Sentencing and Punishment ⚿1720

An "aggravating circumstance" finding of continuing threat to society requires evidence showing capital defendant's conduct demonstrates both a threat to society and a probability the threat would continue to exist into the future; support for this aggravating circumstance may consist of evidence of prior unadjudicated crimes, prior convictions, the circumstances of the crime for which a defendant is being sentenced, and the defendant's calloused nature.

17. Sentencing and Punishment ⚿1720

An "aggravating circumstance" finding that a capital defendant may commit criminal acts of violence constituting a continuing threat to society is appropriate when the evidence establishes the defendant participated in other unrelated criminal acts and the nature of the crime exhibited the calloused nature of the defendant.

18. Sentencing and Punishment ⚿1760, 1762

To prove the aggravating circumstance of continuing threat to society in a capital case, the State may present any relevant evidence, in compliance with the rules of evidence, including evidence from the crime itself, evidence of other crimes, admissions

by the defendant of unadjudicated offenses, or any other relevant evidence.

19. Sentencing and Punishment ⚿1679

Evidence in capital case was sufficient to support the aggravating circumstance of great risk of death to more than one person; in his plea colloquy with the district court judge, defendant stated he did not form the intent to shoot and kill each of his three victims until he confronted each victim individually face-to-face, and thus, when he shot and killed first victim in kitchen area, defendant placed his as-yet unintended victims in the bedroom at great risk of death by recklessly discharging a firearm inside a small house in close proximity to the bedroom.

20. Sentencing and Punishment ⚿1684

Evidence in capital case was sufficient to support the aggravating circumstance that murder was especially heinous, atrocious or cruel; medical examiner's report indicated that victim's gunshot injuries included a bone-perforated lung and a severed spinal cord, the report noted further that victim died in the hospital approximately two weeks after being shot, and victim's sister and daughter both testified that they visited victim in the hospital and she was conscious and obviously suffering.

21. Sentencing and Punishment ⚿1684

To prove the heinous, atrocious or cruel aggravating circumstance in a capital case, the evidence must show that the victim's death was preceded by torture or serious physical abuse; serious physical abuse is proved by showing that the victim endured conscious physical suffering before dying.

22. Sentencing and Punishment ⚿1772

Evidence in capital case was sufficient to support the aggravating circumstance that defendant committed the murders while serving a sentence of imprisonment on a conviction of a felony; defendant stipulated to the existence of this fact and admitted it during his plea colloquy, and this statement was corroborated by a copy of the judgment and sentence document from the United States District Court for the District of Montana that was introduced at defendant's preliminary hearing.

23. Sentencing and Punishment ⚿1757

Neither the Eighth Amendment nor the mandatory sentence review statute requires that mitigating evidence be presented on a defendant's behalf in sentencing in a death penalty case; all that is required is that a defendant be given the opportunity to present such evidence. U.S.C.A. Const.Amend. 8; 21 Okl.St.Ann. § 701.13.

24. Sentencing and Punishment ⚿1658

A death sentence may be imposed upon the finding of a statutory aggravating circumstance but, if mitigating evidence has been presented, the death penalty may be imposed only upon the additional finding that the aggravating circumstance outweighs the mitigating circumstances. 21 Okl.St.Ann. § 701.11.

25. Sentencing and Punishment ⚿67

If the circumstances surrounding a crime show that the defendant was a leader or organizer of the criminal activity, then the defendant's leader-organizer role is a relevant indicator of culpability and should be considered in tailoring a sentence to fit the circumstances of the offender and the offense.

An Appeal from the District Court of Seminole County; the Honorable George Butner, District Judge.

Silas R. Lyman II, Diane Box, Norman, OK, attorneys for defendant at plea hearing and sentencing.

Paul Smith, Assistant District Attorney, Seminole County, Wewoka, OK, attorney for State at plea hearing and sentencing.

Sandra Mulhair Cinnamon, Jamie D. Pybas, Norman, OK, John Echols, Sapulpa, OK, attorneys for appellant on appeal.

W.A. Drew Edmondson, Oklahoma Attorney General, Preston Saul Draper, Assistant Attorney General, Oklahoma City, OK, attorneys for appellee on appeal.

OPINION

A. JOHNSON, Vice Presiding Judge.

¶ 1 David Brian Magnan pled guilty to three counts of First Degree Murder in violation of 21 O.S.2001, § 701.7 and one count of Shooting With Intent to Kill in violation of 21 O.S.2001, § 652 in the District Court of Seminole County, Case No. CF–04–59. Before accepting the pleas, the Honorable George Butner received the results of a psychological competency evaluation and conducted an in-court competency inquiry in which he found Magnan competent to enter the pleas. At his sentencing hearing, Magnan stipulated to the aggravating circumstances pled in the State's bill of particulars, stated he had nothing to present in mitigation, waived any direct appeal, and asked to be sentenced to death for the murders. The district court judge sentenced Magnan to death on each of the murder counts and sentenced him to a term of life imprisonment on the shooting-with-intent-to-kill count.

¶ 2 Because Magnan waived his right to a direct appeal, our review here is limited to two non-waivable issues. We consider whether this crime occurred in Indian Country and so is beyond the jurisdiction of the State of Oklahoma and we conduct our statutorily required sentence review under 21 O.S. 2001, § 701.13 and Rule 9.4, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22 Ch.18, App. (2009). The sentence review is mandatory for all death-penalty cases and is not subject to waiver. *Fluke v. State,* 2000 OK CR 19, ¶ 4, 14 P.3d 565, 567.

FACTS

¶ 3 On the evening of March 2, 2004, a group of family and friends, James Howard, Lucilla McGirt, Karen Wolf, Amy Harrison, and Eric Coley, gathered at Mr. Howard's rural Seminole County home to celebrate Mr. Coley's birthday. Ms. Harrison was Ms. Wolf's daughter and Mr. Howard's niece. At some point, Mr. Howard answered a telephone call from Aaron Wolf, a co-defendant in this case. As the two men argued, Ms. Harrison took the telephone in time to hear Aaron Wolf say "I am going to kill that m—— f——."

¶ 4 Later that evening, at approximately 1:00 a.m. on the morning of March 3rd, Magnan, Aaron Wolf, and Redmond Wolf, Jr., arrived at Mr. Howard's home in Magnan's car. Mr. Coley and Ms. Harrison went out of the house to meet them. As Harrison approached, Aaron Wolf told her to get out of there and gestured toward the woods behind the house. She fled. Coley tried to stop Magnan from going inside the house. During the resulting scuffle, Coley pushed Magnan to the ground. We learn what happened next from Coley's viewpoint. He saw what appeared to be a shiny gun barrel in Magnan's hand. A flash of flame erupted from the object and Coley realized he had been shot in his left side. In spite of his injury, he ran to the house and banged on windows trying to warn Howard, McGirt, and Wolf.

¶ 5 After a short while, Harrison left the hiding place she had found in the woods and gingerly moved toward the house. As she approached, she heard gunshots from inside. She heard men get into the car and drive away. Harrison found Coley outside, preparing to enter the house. Inside, Coley saw Howard bloody and lying on a bed near the kitchen. In the bedroom he found McGirt and Wolf. Both women had been shot. After returning to the kitchen and warning Harrison against going in the bedroom where her mother was, he collapsed from his injuries.

¶ 6 Despite Coley's admonition, Harrison went to check on her mother and McGirt. She found her mother and McGirt on the bed. Harrison knew her mother was dead, but saw that McGirt was still alive. She went back to the kitchen to check on Howard and found him covered in blood and apparently dead.

¶ 7 During his plea colloquy, Magnan told the district court judge that he shot Eric Coley with the intent to kill him. He said he then walked into the house where he saw James Howard lying in a bed near the kitchen. When the old man looked up at him, Magnan said "goodbye" and shot him, intending to kill him. Magnan told the court he went into the bedroom intending only to say "good-bye" to Karen Wolf, but when she "got smart" with him, he shot her, intending

to kill her. Magnan admitted he next shot McGirt, who was in the bed next to Wolf, and intended to kill her as well.

¶ 8 James Howard and Karen Wolf died at the scene. Lucilla McGirt was hospitalized for approximately two weeks before she died of complications from her gunshot wounds. Eric Coley survived his gunshot injury.

DISCUSSION

I. Jurisdictional Issue

[1, 2] ¶ 9 Magnan's attorneys contend that the crime scene is in Indian Country and therefore beyond the State's jurisdiction. This issue was not raised in the district court. Normally, an issue not raised in the trial court, and not related to our mandatory death-penalty sentence review, is waived when a defendant pleads guilty, waives appeal, and we proceed solely under 21 O.S. 2001, § 701.13. *Duty v. State,* 2004 OK CR 20, ¶ 20, 89 P.3d 1158, 1162. A guilty plea, however, waives only nonjurisdictional defects. *Frederick v. State,* 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603. It does not waive a claim that a court lacks the power to adjudicate a charge against the defendant. *See e.g., Forester v. State,* 1927 OK CR 33, 252 P. 861, 864 (recognizing that party can never waive or consent to subject matter jurisdiction where there is no basis for court to exercise jurisdiction); *Armstrong v. State,* 1926 OK CR 259, 248 P. 877, 878 (holding that jurisdiction of the subject matter cannot be conferred by consent, nor can it be waived, and it may be raised at any time before or after trial, and even for the first time on appeal).

¶ 10 Recognizing that Magnan's attorneys were raising a jurisdictional issue, inadequately supported by the record below, we granted Magnan's attorneys' request for a remand to the district court for an evidentiary hearing.

¶ 11 The district court heard evidence on Magnan's Indian status, the Indian status of the victims, the precise location of the property on which the murders occurred, and the title status of that property. The district court concluded on remand that the property was not Indian Country and the State properly exercised jurisdiction over the crimes charged. The record on appeal has now been supplemented with the full record of that proceeding as well as the district court's findings of fact and conclusions of law. The parties have filed post-hearing supplemental briefs. The record is now complete and the issues fully briefed and argued.

[3, 4] ¶ 12 Magnan's attorneys contend that the property on which the murders were committed is Indian allotment land and therefore subject only to federal jurisdiction as having occurred in Indian Country. *See e.g., Cravatt v. State,* 1992 OK CR 6, ¶ 7, 825 P.2d 277, 280 (holding that jurisdiction over major crimes in Indian Country is exclusively federal). Under federal law, "Indian Country" is defined as:

> (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, 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 (emphasis added). "Allotment" is a term of art in Indian law describing land owned by individual Indians that is either held in trust by the United States or is subject to statutory restrictions on alienation. *Ahboah v. Housing Authority of the Kiowa Tribe of Indians,* 1983 OK 20, ¶ 10, 660 P.2d 625, 627; *United States v. Stands,* 105 F.3d 1565, 1571–72 (8th Cir.1997)(citing Felix S. Cohen's *Handbook of Federal Indian Law* 615–16 (Rennard Strickland et al. eds.1982)). Allotted Indian property that is burdened by restrictions against alienation constitutes Indian Country. *United States v. Ramsey,* 271 U.S. 467, 470–72, 46 S.Ct. 559, 560, 70 L.Ed. 1039 (1926); *Ahboah,* 1983 OK 20, ¶ 10, 660 P.2d at 627; *United States v. Sands,* 968 F.2d 1058, 1062 (10th Cir.1992).

¶ 13 The record shows that the murders in this case occurred in a house located on

property that was part of the original restricted allotment of Jimpsey Tiger, a full-blooded Seminole. On Jimpsey Tiger's death in 1944, the property passed in 1/5th fractional interests to his second wife Lena Tiger, 13/16th Creek–Seminole, and four sons and daughters including daughter Kizzie Tiger, a 3/4th blood Seminole. Lena Tiger sold her 1/5th interest in the surface rights to the property to her son George William Tiger, a 3/4th blood Seminole, but expressly retained the mineral rights. In 1950, George William Tiger and his two other siblings sold their interests in the surface rights to their sister Kizzie Tiger. Thus, as of 1950, Kizzie Tiger owned all of the surface rights (1/5th acquired by inheritance and 4/5th by conveyance from her siblings) and 1/5th of the mineral rights (acquired by inheritance). In 1970, Kizzie Tiger, now Kizzie Tiger Wolf, executed a deed purporting to convey the surface rights to the property to the Seminole Nation Housing Authority but expressly reserving the mineral interests. In 1981, the Seminole Nation Housing authority conveyed the property back to Kizzie Tiger Wolf. Kizzie Tiger Wolf died in 1991. Her full interest in the surface rights and her 1/5th interest in the mineral rights were divided among her husband and their nine children. At the time of the murders, these interests remained in the possession of these heirs and their successors.

[5] ¶ 14 Magnan contends that the crime scene property is Indian Country because 4/5ths of the surface interests in the property remain restricted against alienation as Indian land. According to Magnan, Kizzie Tiger Wolf's 1970 conveyance of the surface rights to the property did not have the consent of the Secretary of the Interior and therefore the 4/5ths interest she acquired by purchase from her siblings and then conveyed to the Seminole Nation Housing Authority remained as restricted allotted Indian land. The State contends on the other hand that all Indian right and title to the property were extinguished in a 1970 proceeding in Seminole County District Court, a proceeding in which the court approved the conveyance of the surface rights to the property. According to the State, the county district court's approval of the conveyance satisfied federal law sufficiently to lift the Indian lands restrictions on the property. Thus, the first potentially dispositive question of whether the crimes in this case occurred in Indian Country turns on whether Kizzie Tiger's 1970 conveyance of the surface rights in the property to the Housing Authority of the Seminole Nation extinguished all restrictions on alienation on the surface rights to the property.

¶ 15 Two acts of Congress are key to resolving this question. The first is the Act of Congress of July 2, 1945, 59 Stat. 313, 313–314 (1945), which states in relevant part that:

> No conveyance made by an Indian of the Five Civilized tribes ... for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior: *Provided*, That all such conveyances made after the date of the enactment of this Act must have the approval of the Secretary of the Interior.

(emphasis in original). The second is the Act of Congress of 1947, 61 Stat. 731 (1947), providing that:

> no conveyance ... of any interest in land acquired ... by an Indian heir or devisee of one-half or more Indian blood, when such interest was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated.

¶ 16 When read together, these two Acts appear to require that for the 1970 deed to have removed restrictions on the property, two conditions must have been met. First, the 1945 Act seems to require that the Secretary of the Interior have consented to the conveyance of that portion of the surface property Kizzie Tiger Wolf had acquired by inheritance (1/5th interest) from her father. Second, the 1947 Act seems to require that

the conveyance must have been approved in open court by the Oklahoma state court of the county in which the property was located for that portion of the property Kizzie Tiger had acquired by conveyance from her siblings. It might be argued that the 1947 Act superseded the 1945 Act by replacing the Secretary of the Interior approval requirement with a requirement for Oklahoma county court approval of conveyance of a restricted property, but under the circumstances of this case, it is not necessary to reach this question. The record of the 1970 Seminole County District Court proceeding in which Kizzie Tiger Wolf sought approval of the conveyance of the surface rights from her and her husband to the Seminole County Housing Authority shows that the requirements of both Acts were met during the course of the proceeding.

¶ 17 The record shows that in 1970, Kizzie Tiger Wolf and her husband petitioned the Seminole County District Court for removal of restrictions and approval of the deed purporting to convey their entire interest in the surface rights in the property to the Seminole Nation Housing Authority. Notice of that proceeding was served on the Area Director of the Bureau of Indian Affairs and the United States Department of the Interior. Dean Storts, "Trial Attorney, United States Department of the Interior" acknowledged receipt on behalf of the Department of the Interior. Kizzie Tiger Wolf appeared at the hearing with her attorney, James Groves, and offered testimony. Mr. Storts appeared at the hearing for the Department of the Interior and entered no objection to the conveyance.

¶ 18 The 1970 order approving the conveyance recited that the District Court of Seminole County found that Kizzie Tiger Wolf and her husband were offered adequate compensation for the conveyance and were not subject to any fraud, overreaching, or other illegality in making it. Additionally, the district court found that "M. Dean Storts, United States Trial Attorney, has joined with said Petitioners and requested the Court to approve said deed without submitting the same at public auction and has agreed that said conveyance would be in the best interest of the petitioner."

¶ 19 In the evidentiary hearing held on our remand in this case, the district court concluded that the 1970 conveyance removed all restrictions on the surface estate. It did so by reasoning that the 1970 deed purported to convey ***all*** of Kizzie Tiger Wolf's surface rights to the Seminole Nation Housing Authority (including her 4/5ths interest requiring Secretary of the Interior approval under the 1945 Act), and that the participation of the Department of the Interior's attorney in that proceeding, a proceeding in which he requested that the deed be approved by the Seminole County District Court, constituted the requisite approval of the Secretary of the Interior necessary for the lifting of restrictions on the 4/5ths surface interests Kizzie Tiger Wolf obtained by purchase from her siblings. With regard to Kizzie Tiger Wolf's 1/5th inherited interest, the district court seemed to conclude that no Secretarial approval was required under the 1945 Act, but that state court approval was required under the 1947 Act, and that approval was granted, as permitted by the Act, with entry of the Seminole County District Court's Order approving the conveyance.

¶ 20 It is clear from this record, that regardless of whether the 1970 proceeding in Seminole County District Court was intended to do so or not, it was in effect a combined proceeding that satisfied the requirements of both the 1945 and 1947 Acts (i.e., the 1945 Act requiring secretarial approval for conveyance of property acquired by deed, and the 1947 Act requiring Oklahoma State court approval for property acquired by inheritance). We agree with the district court's conclusion, therefore, that the 1970 conveyance extinguished all Indian lands restrictions that attached to surface estate of the property.

[6] ¶ 21 Anticipating this result, Magnan argues that even if Indian land restrictions to the surface were removed in their entirety by the 1970 conveyance, 4/5ths of the mineral interests remain restricted and by virtue of that remaining restricted fractional interest, the entire property (surface and mineral) retained its character as Indian allotment

land. The 4/5ths figure Magnan relies on appears to be based on a title opinion contained in the supplemented record, an opinion which the district court found to be "a correct statement of the ownership interests of the title to this property." While we defer to the district court's finding that the title opinion correctly describes the allocation of ownership interests in the property, we assume only for the sake of argument the legal conclusion that the 4/5ths mineral interest remained restricted as Indian allotment property.[1] Assuming, therefore, that 4/5ths of the mineral interests in the property remained restricted, we are confronted with the second potentially dispositive jurisdictional question in this case: i.e., whether a fractional interest in the mineral estate that is subject to restrictions on alienation as Indian allotment property may burden the unrestricted surface estate in such a way to cause the surface estate to be categorized as Indian Country.

¶ 22 This Court considered a similar question in *Murphy v. State,* 2005 OK CR 25, 124 P.3d 1198. In *Murphy,* a murder occurred on a state road that at one time had been Indian allotted land. Over time, the surface estate on which the road was located, and 11/12ths of the mineral estate, had been conveyed to non-Indians. Applying a contacts and interests analysis analogous to the familiar "minimum contacts" test set out in *International Shoe Co. v. State of Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), the *Murphy* court concluded that the Oklahoma's contacts and interests in the surface property overwhelmed any fractional interest the Indian heir of the original allottee owned in the unseen mineral estate. According to *Murphy,* that conclusion was necessary because allowing an unobservable fractional interest to control the enforcement of laws on the surface of a property would lead to a checkerboard of alternating jurisdictions that would seriously burden the administration of state and local governments. *Murphy,* ¶¶ 42–43, 1206. *Murphy* held, therefore, that a fractional interest in an unobservable mineral interest is a contact with the surface estate that is insufficient to deprive the State of Oklahoma of criminal jurisdiction. *Id.* ¶ 42, 1206.

¶ 23 In this instance, although the restricted fractional interest is larger (4/5ths vs. 1/12th), under *Murphy's* contacts and interests rationale even a 4/5ths fractional interest in the mineral estate is insufficient to deprive the State of criminal jurisdiction over the surface of the property at issue here. This result stems in large part from the unique circumstances of this particular property. Specifically, evidence introduced at the evidentiary hearing shows that another homicide had previously occurred on the property in 1998. In that case, *United States v. Woods,* No. CR–98–26–B (E.D.Okla.), federal authorities prosecuted the case as having occurred in Indian Country.[2] Unlike Magnan, however, the defendant in *Woods* argued in federal district court that the property was ***not*** Indian Country. The federal district court agreed and dismissed the case for lack of jurisdiction. Key to the federal court's determination that the property was not Indian Country was its finding that Indian land restrictions on the property had been extinguished by Kizzie Tiger Wolf's 1970 conveyance of the surface rights to a non-Indian (i.e., the Seminole Nation Housing Authority).

¶ 24 In the *Woods* case, the federal district court found that the Secretary of the Interior

1. On the record before us, it is not clear how the title expert arrived at this figure and we are not necessarily convinced that it is correct based on the chain of title evidence contained in the record. In any event, Magnan's attorneys appear to concede that Kizzie Tiger Wolf's 1/5th inherited interest in the mineral estate was exempt from Indian land restrictions, and as stated in the main text, we need not resolve this issue, because the quantum of the fractional interest is not dispositive in this case.

2. At the evidentiary hearing held on our remand, the district court admitted as evidence the record of certain portions of the proceedings of the United States District Court of the Eastern District of Oklahoma in the case of *United States v. Woods,* No. CR–98–26–B. The transcript of the federal court's jurisdictional hearings and its minute order dismissing the case for lack of jurisdiction are therefore before us as part of the record on appeal. We rely on those documents for our understanding of the federal district court's jurisdictional finding with regard to this property.

approved the lifting of restrictions on the property through the participation of the Department of the Interior's attorney in the 1970 Seminole County District Court proceeding where the Department's attorney not only failed to lodge any objection to the conveyance, but urged the court to approve it. Thus, with the ruling of the federal district court in *Woods* that the property at issue here was not Indian Country, the United States ceded criminal jurisdiction over the property. Because the United States District Court for the Eastern District of Oklahoma found this same property not to be Indian Country for federal criminal jurisdictional purposes, unless we likewise find the property to be non-Indian Country, no sovereign entity will exercise criminal jurisdiction over the property, thereby creating a jurisdictional void.

¶ 25 If Oklahoma has a sufficient interest to exert criminal jurisdiction over the surface of a property restricted by an unobserved fractional mineral interest in order to avoid creation of a checkerboard jurisdiction, it must have an even more compelling interest in avoiding the creation of a jurisdictional void within its contiguous territory. Therefore, as in *Murphy,* but to an even greater degree here, the State's interest in exercising criminal jurisdiction over this property must overwhelm any fractional interest any Indian heirs of the original allottee may own in the unseen mineral estate. We agree, therefore, with the district court's conclusion that the crimes committed in this case did not occur in Indian Country and we likewise conclude that criminal jurisdiction was proper. Having resolved this threshold jurisdictional issue, we now turn to our statutorily mandated review of Magnan's sentence.

II. Sentence Review

[7–10] ¶ 26 Except for jurisdictional issues, our sentence review is limited in scope to just two inquiries: (1) whether the evidence supports the aggravating circumstances found by the trial court judge; and (2) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. *Fluke,* 2000 OK CR 19, ¶ 4, 14 P.3d at 567; 21 O.S.2001, § 701.13(C). To determine whether the evidence supports the aggravating circumstances found by the district court or whether the sentence of death was imposed under some improper arbitrary influence, we review the record to include in-court testimony of witnesses, the court-ordered presentence investigation,[3] and any other evidence presented at the defendant's sentencing hearing.

A. Factual Basis for Pleas

[11] ¶ 27 Magnan's attorneys contend initially that the district court abused its discretion by accepting Magnan's guilty pleas because, according to counsel, there was an insufficient factual basis for the pleas. Since this claim is neither jurisdictional nor related to our mandatory sentence review, it is waived. *Duty,* 2004 OK CR 20, ¶ 20, 89 P.3d at 1162.

B. Aggravating Circumstances

¶ 28 At his sentencing hearing, against advice of counsel, and after being further cautioned by the judge, Magnan waived his right to present evidence of mitigating circumstances and expressly stipulated to each of the alleged aggravating circumstances just as he had done at his plea hearing. The district court then imposed the sentence of death by finding the existence of the following aggravating circumstances in connection with the murders of Karen Wolf and James Howard: (1) Magnan was previously convicted of a felony involving the use or threat of violence; (2) the existence of a probability that Mag-

3. This Court is normally prohibited from considering the contents of a presentence investigation report by 22 O.S.Supp.2002, § 982(D), which explicitly directs that "[t]he presentence investigation reports specified in this section shall not be referred to, or be considered in any appeal proceedings." Section 982(A), however, specifies that a presentence investigation report must be completed for all violent felonies, but expressly excludes offenses in which the death penalty is available as a possible punishment. Because the offenses at issue here are death penalty crimes, and because § 982 does not specify that a report must be prepared for these types of crimes, § 982's prohibition against considering "reports specified in this section" does not apply and we may consider the presentence investigation report in our analysis.

nan would commit criminal acts of violence and thereby constitute a continuing threat to society; (3) Magnan knowingly created a great risk of death to more than one person; and (4) the murders were committed while Magnan was serving a sentence of imprisonment for a felony conviction. *See* 21 O.S. 2001, § 701.12(1), (2), (6), and (7). Although the State alleged that the murders of Wolf and Howard were especially heinous, atrocious or cruel, the district court struck the aggravator with regard to Wolf and Howard. *See* 21 O.S.2001, § 701.12(4). With regard to Lucilla McGirt, however, the district court found the existence of all five aggravating circumstances, including the heinous, atrocious or cruel aggravator.

[12, 13] ¶ 29 In accordance with our sentence review mandate we review all the aggravating circumstances found by the district court, challenged or unchallenged, to determine if each was sufficiently supported by the evidence. We review the sufficiency of the evidence for an aggravating circumstance in the light most favorable to the State to determine whether any rational trier of fact could have found the circumstance beyond a reasonable doubt. *DeRosa v. State,* 2004 OK CR 19, ¶ 85, 89 P.3d 1124, 1153.

1. *Prior Violent Felony Conviction*

[14] ¶ 30 Magnan admitted to the district court in his plea colloquy and stipulated in his sentencing hearing that he had been convicted in 2000 in federal court in Montana for the crime of arson with intent to injure. Additionally, the uncontested judgment and sentence document from that proceeding was before the court in the record of the preliminary hearing. This evidence is sufficient to support the trial court's finding that Magnan had been convicted previously of a violent felony.

2. *Continuing Threat*

[15–18] ¶ 31 Magnan's attorneys assert that the evidence was insufficient to support the aggravating circumstance of continuing threat to society. A finding of continuing threat requires evidence showing the defendant's conduct demonstrates both a threat to society and a probability the threat would continue to exist into the future. *Duty,* 2004 OK CR 20, ¶ 11, 89 P.3d at 1161(citing *Turrentine v. State,* 1998 OK CR 33, ¶ 77, 965 P.2d 955, 977). Support for this aggravating circumstance may consist of evidence of prior unadjudicated crimes, prior convictions, the circumstances of the crime for which a defendant is being sentenced, and the defendant's calloused nature. *Warner v. State,* 2006 OK CR 40, ¶ 126, 144 P.3d 838, 879; *Paxton v. State,* 1993 OK CR 59, ¶¶ 34–41, 867 P.2d 1309, 1322–23. A finding that a defendant may commit criminal acts of violence constituting a continuing threat to society is appropriate when the evidence establishes the defendant participated in other unrelated criminal acts and the nature of the crime exhibited the calloused nature of the defendant. *Warner,* 2006 OK CR 40, ¶ 126, 144 P.3d at 879. To prove this aggravating circumstance, the State may present any relevant evidence, in compliance with the rules of evidence, including evidence from the crime itself, evidence of other crimes, admissions by the defendant of unadjudicated offenses, or any other relevant evidence. *Id.*

¶ 32 Magnan's criminal history, which included a prior conviction for burning down a house with a former girlfriend in it, as well as a conviction for simple assault, were in evidence before the trial court. Additionally, the presentence investigation report, which the judge also considered, disclosed a history of misdemeanor arrests for domestic abuse, disorderly conduct, and driving under the influence of alcohol. Furthermore, evidence of the circumstances of the instant murders and Magnan's own admissions concerning those circumstances were also before the court.

¶ 33 Magnan's admissions and the circumstances of the murders are especially relevant to this aggravator because they show that Magnan committed the murders in a callous manner. This Court has upheld the existence of this aggravating circumstance numerous times based solely upon the evidence of the calloused nature of the crime itself. *See e.g., Pennington v. State,* 1995 OK CR 79, ¶ 70, 913 P.2d 1356, 1371 (listing cases).

¶ 34 In the present case, Magnan told the judge that he killed the elderly James Howard as he was lying in his bed, but did so only after he "looked up at him." Magnan admitted that he killed Karen Wolf with the words "[p]iss on you" and did so only because she "got smart" with him. Magnan stated that he decided to shoot Lucilla McGirt, who was lying in the same bed next to Karen Wolf, only after she spoke to him and he said "good-bye." Magnan's description of the cavalier manner in which he formulated the intent to kill his victims and the trivial reasons he proffered for killing them are clear evidence that he had little appreciation of the gravity of taking their lives. This evidence in itself is sufficient to support an inference of continuing threat aggravator. *See e.g., Snow v. State,* 1994 OK CR 39, ¶ 30, 876 P.2d 291, 298 ("[t]he defendant's attitude is critical to the determination of whether this defendant poses a continuing threat to society [because a] defendant who does not appreciate the gravity of taking another's life is more likely to do so again").

¶ 35 Nevertheless, Magnan's colloquy with the judge at his plea hearing provided further evidence that he posed a continuing threat to society, even within a prison environment, when he engaged the trial court judge in the following exchange:

> Q. What if this Court gives you three consecutive life sentences?
>
> A. I'll appeal it for not getting the right sentence or something.
>
> Q. It's my understanding—
>
> A. In other words, if I have anything to do with that to[o] much longer I am going to start hurting. There is no more talking about it. I have held my temper long enough at this time and that is it. I don't talk around corners or anything. I say things straight up.

(Plea Hrg. Tr. 14–15).

On cross-examination, the prosecutor sought clarification on this point as follows:

> MR. SMITH: You [Magnan] indicated earlier in your plea of guilty regarding what you might do in the future. That gets you away if you were not able to get away from people you were going to start hurting people. Would you agree that attitude kind of supports what we alleged in the Bill of Particulars there exist a probability that you would commit criminal acts of violence that would constitute a continuing threat to society?
>
> A. That is true.
>
> MR. SMITH: You are certain of that, is that correct?
>
> A. Yes.

(Plea Hrg. Tr. 40).

¶ 36 Magnan's prior violent history coupled with his in-court statements about the circumstances of the instant crimes as well as his potential for future violence if incarcerated all provided the district court judge with sufficient evidence to conclude beyond a reasonable doubt that Magnan presented a continuing threat to society.

¶ 37 In addition to challenging this aggravator for insufficient evidence, Magnan's attorneys also argue that the continuing threat aggravating circumstance is unconstitutional. We have consistently rejected this claim and find nothing in the circumstances of this case or counsel's argument to cause us to reconsider those previous decisions here. *See e.g., Wood v. State,* 2007 OK CR 17, ¶ 19, 158 P.3d 467, 475; *Myers v. State,* 2006 OK CR 12, ¶ 87, 133 P.3d 312, 333–34; *Garrison v. State,* 2004 OK CR 35, ¶¶ 106–07, 103 P.3d 590, 609; *Lockett v. State,* 2002 OK CR 30, ¶ 41, 53 P.3d 418, 430–31 (collecting pre–2002 cases).

3. *Great Risk of Death to More Than One Person*

[19] ¶ 38 Magnan's attorneys contend the evidence was insufficient for the trial court to find beyond a reasonable doubt that Magnan knowingly created a great risk of death to more than one person because, according to Magnan's attorneys, the only evidence before the court of risk of death to more than one person was the undisputed fact that three persons died. In *Valdez v. State,* 1995 OK CR 18, ¶ 69, 900 P.2d 363, 383, this Court held that "[i]t is not the death of more than one person which supports [the aggravator], but the defendant's acts that create the risk of death to another which are in close proximity, in terms of time, location and intent to

the act of killing itself." Here, it was not the mere fact that three deaths resulted from Magnan's acts that supported the risk-of-death aggravator. Rather, it was the fact of Magnan's sequential killing of his victims and the sequentially formed intent to kill, that placed each successive victim at risk as Magnan discharged the handgun in or near the small house.

¶ 39 In his plea colloquy with the district court judge, Magnan was very specific. He insisted he did not form the intent to shoot and kill each of his three victims until he confronted each victim individually face-to-face. Therefore, when he shot and killed James Howard in the kitchen area, he placed Karen Wolf and Lucilla McGirt, his as-yet unintended victims in the bedroom, at great risk of death by recklessly discharging a firearm inside the small house in close proximity to the bedroom. Likewise, when he fired two shots into Karen Wolf with Lucilla McGirt lying next to her in the bed, he recklessly placed his as-yet unintended victim Lucilla McGirt at great risk of death. Moreover, the shooting of Eric Coley near the front entrance to the house, a shooting committed in the midst of an altercation with Coley in an effort to obtain access to the house where the murders were ultimately committed, certainly placed Coley's life at risk as well as placing the lives of bystanders Amy Harrison, Aaron Wolf, and Redmond Wolf, Jr. at risk. In total, this evidence was more than sufficient for the trial court to find beyond a reasonable doubt that Magnan knowingly created a great risk of death to more than one person during the commission of each of the three separate murders.

4. *Heinous, Atrocious, Cruel*

[20, 21] ¶ 40 Magnan's attorneys argue that the evidence was insufficient to show beyond a reasonable doubt that Lucilla McGirt's murder was especially heinous, atrocious or cruel. To prove that a murder is especially heinous, atrocious or cruel, the evidence must show that the victim's death was preceded by torture or serious physical abuse. *Hogan v. State,* 2006 OK CR 19, ¶ 66, 139 P.3d 907, 931. Serious physical abuse is proved by showing that the victim endured conscious physical suffering before dying. *Id.*

¶ 41 Here, Magnan told the district court that Karen Wolf and Lucilla McGirt were in the same bed, that he shot Wolf when she "got smart" with him, and that he shot McGirt when she got up from the bed and spoke to him. At the preliminary hearing, the emergency medical technician who treated McGirt at the scene said McGirt was conscious and talking but had suffered gunshot wounds. The medical examiner's report noted a gunshot wound to the back of McGirt's head and a gunshot wound to her right shoulder. The medical examiner determined the cause of death as "complications of gunshot wounds, most likely that of pulmonary failure with pneumonia." The medical examiner's report listed some of McGirt's injuries as "[m]assive subpleural hematoma of the right lung with embedded bony tissue" and "massive tissue necrosis with nearly complete transection" of the thoracic spinal cord. In other words, the medical examiner's report indicated that McGirt's gunshot injuries included a bone-perforated lung and a severed spinal cord. The medical examiner's report noted further that McGirt died in the hospital approximately two weeks after being shot. McGirt's sister and daughter both testified that they visited McGirt in the hospital and she was conscious and obviously suffering. This evidence is more than sufficient to support an inference that McGirt witnessed her friend's death in the bed next to her and that she endured conscious physical suffering from her own gunshot injuries. It is therefore sufficient to support the district court's finding that Lucilla McGirt's murder was heinous, atrocious or cruel. *See e.g., Hancock v. State,* 2007 OK CR 9, ¶ 119–121, 155 P.3d 796, 824 (finding that combination of witnessing friend's shooting followed by being shot oneself and lingering before dying is evidence of heinous, atrocious or cruel aggravating circumstance); *Browning v. State,* 2006 OK CR 8, ¶ 50, 134 P.3d 816, 842–43 (holding that conscious physical suffering may be shown by proving victim lingered in hospital for weeks suffering in pain from wounds inflicted by defendant).

5. *Murder Committed While Serving Sentence for Felony Conviction*

[22] ¶ 42 The district court also found that Magnan committed the murders while serving a sentence of imprisonment on a conviction of a felony. Magnan stipulated to the existence of this fact and admitted it during his plea colloquy when he told the district court judge that he was serving a term of supervised release for a federal felony conviction (arson) when he committed the murders. This statement was corroborated by a copy of the judgment and sentence document from the United States District Court for the District of Montana that was introduced at Magnan's preliminary hearing. The evidence is sufficient to establish beyond a reasonable doubt that Magnan committed the killings while serving a sentence of imprisonment on conviction of a felony.

¶ 43 Nevertheless, Magnan's attorneys contend that the trial court's finding of the sentence-of-imprisonment aggravator was improper because it was based on the same conviction as the prior-violent-felony aggravator. According to Magnan's attorneys, this is impermissible double counting of the same evidence. We have expressly rejected this argument in prior cases and are not persuaded that a different result should apply here. *See e.g., Green v. State,* 1985 OK CR 126, ¶¶ 24–26, 713 P.2d 1032, 1039–1041, *overruled on other grounds, Brewer v. State,* 1986 OK CR 55, 718 P.2d 354.

C. Mitigating Evidence

[23] ¶ 44 Magnan's attorneys assert that the Eighth and Fourteenth Amendments to the United States Constitution require that mitigating evidence be presented on behalf of a capital defendant, even against his wishes, to ensure that a death sentence is imposed in a reliable manner. Magnan's attorneys argue, therefore, that despite Magnan's explicit and personal in-court waiver of the right to present mitigating evidence, and despite his refusal to cooperate with trial counsel in developing mitigating evidence, the district court should have ordered trial counsel to independently investigate and present mitigating evidence on his behalf. This claim is foreclosed by our decision in *Wallace v. State,* 1995 OK CR 19, ¶ 18, 893 P.2d 504, 512, where we held that neither the Eighth Amendment nor the mandatory sentence review statute requires that mitigating evidence be presented on a defendant's behalf in sentencing in a death penalty case; all that is required is that a defendant be given the opportunity to present such evidence. We find nothing in counsel's argument nor in the facts of this case that persuades us that *Wallace* was wrongly decided. We therefore decline counsel's invitation to revisit our decision in that case.

¶ 45 The record reflects that Magnan was given the required opportunity to present mitigating evidence and he freely chose not to do so. Specifically, the transcript of the plea hearing shows that the district court judge carefully explained to Magnan that he (the judge) would have to weigh aggravating and mitigating circumstances in arriving at a sentence and that Magnan was entitled to present evidence of mitigating circumstances that "in fairness, sympathy, and mercy may extenuate or reduce the degree of moral culpability or blame." Further, the district court judge engaged in an extended colloquy with Magnan on the subject of mitigation in which the judge explained the importance of evidence of mitigating circumstances and how that evidence would be weighed against the evidence of aggravating circumstances in order to arrive at a sentence that might or might not include the death penalty. Again, at sentencing, the district court judge advised Magnan of the importance of mitigation and offered him the chance to reconsider his waiver and objection to presentation of mitigating evidence. Again, Magnan declined. From this, it is clear that Magnan was afforded the opportunity to present mitigating evidence and he expressly waived that opportunity. Nothing more was required.[4]

4. Despite Magnan's waiver of mitigation, the district court nevertheless ordered a presentence investigation report and specifically directed that trial counsel provide input to that report with any mitigating evidence that might be developed without Magnan's assistance. While appellate counsel attack the contents of that report as inadequate, inaccurate, and "worthless as mitigation" (Aplt's Brief at 89), the fact remains that by ordering a presentence investigation report

¶ 46 Nevertheless, despite Magnan's waiver, Magnan's attorneys also contend that 21 O.S.2001, § 701.11 requires a sentencer to weigh mitigating evidence against aggravating circumstances and this makes presentation of mitigating evidence mandatory, even over a defendant's objection or waiver. Counsel argues that § 701.11 must be construed in this manner in order to maintain the constitutionality of Oklahoma's death penalty statute.

[24] ¶ 47 Contrary to counsel's assertions, § 701.11 permits imposition of the death penalty only upon the finding of a single statutory aggravating circumstance "*or*" upon a finding that the statutory aggravating circumstance is not outweighed by mitigating evidence. Under a plain reading of this statute and its use of the disjunctive "*or,*" a death sentence may be imposed upon the finding of a statutory aggravating circumstance but, if mitigating evidence has been presented, the death penalty may be imposed only upon the additional finding that the aggravating circumstance outweighs the mitigating circumstances. As counsel note in their brief, the United States Supreme Court has consistently struck down statutes and judicial decisions that prevent a sentencer in a death penalty case from considering and giving effect to mitigating circumstances (See Aplt's Brief at 82, citing *Hitchcock v. Dugger,* 481 U.S. 393, 398–99, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); *Sumner v. Shuman,* 483 U.S. 66, 77–78, 107 S.Ct. 2716, 2723, 97 L.Ed.2d 56 (1987); *California v. Brown,* 479 U.S. 538, 541, 107 S.Ct. 837, 839, 93 L.Ed.2d 934 (1987)). Because there is nothing in this construction of the statute that prevents a defendant from presenting mitigating evidence, and because there is nothing in our construction of it that prevents the sentencer (judge or jury) from considering and giving effect to mitigating circumstances, *if* evidence of such circumstances has been presented, we are not persuaded that § 701.11 must be read to require presentation of evidence of mitigating circumstances even where a defendant expressly waives or objects to presentation of that evidence.

and directing that mitigation be included in it, the district court did attempt to acquire mitigating evidence over Magnan's waiver and objection.

D. Other Factors

¶ 48 Magnan's attorneys claim that trial counsel and the prosecutor failed to object to the inadequacy of the factual basis for Magnan's guilty pleas and, according to counsel, this failure produced an arbitrary imposition of the death penalty. This claim is a variation on the argument previously discussed in which Magnan's attorneys directly challenged the factual basis for the guilty pleas. As noted above, this claim is neither jurisdictional nor related to our mandatory sentence review. The claim is therefore waived. *Duty,* 2004 OK CR 20, ¶ 20, 89 P.3d at 1162. Nevertheless, to the extent that it might be argued that an inadequate factual basis for a guilty plea to a capital offense is a factor leading to the arbitrary imposition of a death sentence, we note that we have reviewed the record of this case and find that either Magnan's in-court admissions given during his plea colloquy, or the extensive evidence presented at his preliminary hearing, provided more than sufficient evidence to establish a factual basis for each element of each of the charged crimes.

¶ 49 Magnan's attorneys argue that the death sentence was arbitrarily imposed in his case because trial counsel failed to alert the district court to "significant" problems with the State's case in aggravation. Specifically, Magnan's attorneys complain that trial counsel failed to point out to the judge a discrepancy between the prosecutor's argument that continuing threat was proved when Lucilla McGirt stood up and talked to Magnan, and he shot her, and the prosecutor's allegation that the heinous, atrocious or cruel aggravator was proved by the suffering experienced by McGirt while she was shot lying in bed. We see no arbitrary factor here.

¶ 50 As framed by Magnan's attorneys, the thrust of this complaint is that "defense counsel failed to point out to the trial court judge that the State's case was not supported by hard evidence but was [instead] based on the prosecutor's own statements and interpretations" (Aplt's Brief 95). It is not at all clear what counsel considers as hard evi-

dence of aggravating circumstances, but as discussed above, the record is replete with Magnan's own in-court admissions and stipulations supporting findings of the various aggravators as well as abundant testimonial and documentary evidence introduced by the State at Magnan's preliminary hearing. This is nothing more than an additional complaint about the sufficiency of the evidence, a claim we have already addressed.

¶ 51 As a corollary to this claim, Magnan's attorneys assert that trial counsel should have instructed the judge that statements of counsel are not evidence. This is a frivolous argument. Unlike jurors, a judge is presumed to know the law, and presumably in this instance, the judge as the trier of fact was aware that statements and argument of counsel are not evidence. *See e.g., Long v. State,* 2003 OK CR 14, ¶ 4, 74 P.3d 105, 107 ("[w]e presume, when a trial court operates as the trier of fact, that only competent and admissible evidence is considered in reaching a decision"); *Martin v. State,* 1976 OK CR 65, ¶ 13, 547 P.2d 396, 399 ("[i]n a case where a jury is waived and the cause tried to the court, the presumption is that the court in arriving at [its] decision and rendering judgment considered only that evidence which is competent and admissible and which has a material bearing on the issues of the case and disregarded incompetent evidence which was admitted" (quoting *Capshaw v. State,* 1940 OK CR 78, 104 P.2d 282 (syllabus), 69 Okla.Crim. 440, 104 P.2d 282 (syllabus))).[5] We see nothing in the record even remotely suggesting that the trial court judge based his findings of continuing threat or heinous, atrocious or cruel aggravators on a mistaken idea that the prosecutor's statement constituted evidence.

¶ 52 In connection with this proposition, Magnan's attorneys also assert generally that "[d]efense counsel failed to comment on the State's argument the court should consider a number of incidences that were not relevant to any aggravators" (Aplt's Brief 95). Counsel do not point to any specific instance in the record where the State urged the trial court judge to consider irrelevant evidence, and our review of the record fails to disclose any such improper exhortations. We find no merit to this claim.

¶ 53 Magnan's attorneys contend next that the district court judge arbitrarily imposed the death penalty as a result of having been influenced by improper argument by the prosecutor. Counsel complain specifically about an argument by the prosecutor in which the judge was asked to consider the litigation costs to society that would be incurred if he did not impose the death penalty. The record shows that this argument was a direct response to Magnan's own exhortation to the court that he (Magnan) would appeal any sentence other than death. The argument was a fair response to a litigation threat issued by Magnan himself in open court.

¶ 54 Magnan's attorneys also contend that it was improper for the prosecutor to argue that the judge should consider Magnan's actions in enlisting others to assist him in the events leading up to the murders and that the court should consider evidence that Magnan secured the assistance of his accomplices through intimidation. Magnan's attorneys further assert that it was improper for the prosecutor to ask the judge to consider the negative impact that the coerced participation of accomplices had on the accomplices and their families.

[25] ¶ 55 Counsel offer no explanation or authority as to why this line of argument was improper; nor do counsel explain how this argument influenced the judge to arbitrarily impose the death penalty. If the circumstances surrounding a crime show that the defendant was a leader or organizer of the criminal activity, then the defendant's leader-organizer role is a relevant indicator of culpability and should be considered in tailoring a sentence to fit the circumstances of the offender and the offense. *See e.g., Bryson v. State,* 1994 OK CR 32, ¶ 84, 876 P.2d 240, 266 (explaining that where defendant enlists accomplices to assist in carrying out murder plan, defendant's leadership role warrants

5. This point of law is well ensconced in our law as one of the standard uniform jury instructions that district court judges issue every day in every criminal jury trial in this State. *See* OUJI–CR2d 1–8 (Opening Instruction)("No statement or argument of the attorneys is evidence").

consideration in imposing death penalty); *Brogie v. State,* 1985 OK CR 2, ¶¶ 42–45, 695 P.2d 538, 548 (citing defendant's leadership role in organizing murder as relevant to justifying imposition of death penalty). The argument was neither improper nor unfairly prejudicial.

¶ 56 Magnan's attorneys complain that the trial court judge improperly agreed to the joint request of the prosecutor and Magnan's trial attorney that the court incorporate into Magnan's sentencing proceeding, the victim impact testimony given at the sentencing of his co-defendant Aaron Wolf. The victim impact witnesses in that proceeding were shooting survivor Eric Coley, Lucilla McGirt's sister, and Lucilla McGirt's daughter. Coley said a fifteen year sentence for Wolf would be appropriate in his view, but said nothing with respect to Magnan. McGirt's sister testified that she observed McGirt in pain in the hospital in the days after the shooting. She offered her opinion that the death penalty would be appropriate for Aaron Wolf. She expressed no opinion with regard to Magnan. McGirt's daughter also testified that she observed McGirt in the hospital in the days after the shooting and that her mother was suffering. She offered the opinion that a life sentence would be appropriate for Aaron Wolf, but expressed no view about Magnan. Magnan's attorneys contend the testimony of these three witnesses caused the district court to arbitrarily impose the death penalty.

¶ 57 We have reviewed the transcript of the victim impact testimony. That testimony was brief, concise, relatively unemotional, and limited to establishing the pain and suffering of Lucilla McGirt, the financial costs of medical treatment for Eric Coley, the emotional impact of McGirt's death on her family, and the victims' opinions as to appropriate punishment. These are all permissible bases for victim impact testimony when that testimony is presented in a brief, concise, and relatively unemotional manner, as was done here. 22 O.S.2001, § 984(A); *Lay v. State,* 2008 OK CR 7, ¶ 26, 179 P.3d 615, 623; *DeRosa,* 2004 OK CR 19, ¶ 77, 89 P.3d at 1151. We find nothing in this record showing that the district court judge was influenced by this testimony to arbitrarily impose the death penalty.

¶ 58 In connection with this claim, Magnan's attorneys also assert that while it might arguably have been appropriate for the judge to admit a transcript of the victim impact testimony from co-defendant Wolf's sentencing hearing, it was error for the judge to take notice of the testimony by relying on his memory of the proceeding. This claim is patently frivolous. We decline to hold that it is error for a judge to rely on his memory to take notice of testimony he heard firsthand in a proceeding in his courtroom.

DECISION

¶ 59 Under the mandate of 21 O.S.2001, § 701.13(C)(1) we have reviewed the record of this case and find that the sentence imposed was based upon aggravating circumstances supported by the evidence and not under the influence of passion, prejudice, or any other arbitrary factor. We further find that the record supports a conclusion that Magnan's waiver of his right to a jury trial, presentation of mitigating evidence, and his right to a direct appeal of his Judgment were all made knowingly, intelligently, and voluntarily. The Judgments and Sentences are **AFFIRMED.**

¶ 60 Magnan has ninety days from the issuance of mandate in this case to file a petition for writ of certiorari with the United States Supreme Court. If he fails to timely file such a petition, and no application for post conviction relief is pending in this Court, this Court will set a date for execution of the judgment thirty days after that time condition is not met. 22 O.S.Supp.2005, § 1001.1(A).

¶ 61 Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

C. JOHNSON, P.J., LUMPKIN and LEWIS, JJ.: concur.

CHAPEL, J.: dissent.

CHAPEL, J., dissenting.

¶ 1 In Proposition I Magnan claims the state of Oklahoma has no jurisdiction to prosecute him because the murders were committed on Indian land. The majority concludes that the crime scene was not on Indian land and the State had criminal jurisdiction. I disagree.

¶ 2 We remanded the case for an evidentiary hearing on this issue. The district court heard evidence from an experienced title examiner attorney, a Superintendent of the Wewoka Agency, Bureau of Indian Affairs (BIA), a Field Solicitor for the Department of the Interior representing the BIA, and the former Deputy Commissioner for Indian Affairs. These witnesses explained in great detail and with documentation why, in their opinion and the opinion of the Bureau of Indian Affairs, the land in question is restricted Indian land. I find their expert arguments persuasive. No evidence before this Court suggests the land is anything other than restricted Indian land.

¶ 3 Three separate legal proceedings, in three separate cases over the course of almost forty years, have examined the status of the land where the crimes were committed. However, neither the District Court in this case, nor the federal court in the *Wood* case, truly made an independent assessment of the evidence presented to them. It is my opinion that they could not have done so, as the expert evidence before them indicated that the property is considered restricted land by the BIA and thus would be outside Oklahoma's jurisdiction. Rather than basing their conclusions on the evidence presented to them, both those courts ultimately rely on a 1970 proceeding in the District Court of Seminole County in which Kizzie Tiger Wolf conveyed the surface rights of the property to the Seminole Nation Housing Authority. That conveyance purported to be in fee simple. The federal experts and the title examiner here all testified that conveyance was improper under federal law.

¶ 4 The issue turns on the procedures for conveyance governing the types of ownership interest Tiger Wolf had in the property. Everyone agrees that she had a 1/5 heirship interest, and purchased a 4/5 interest. The federal experts have consistently testified that the applicable federal law treats heirship and purchase interests separately for purpose of conveyance. Heirship interests may be conveyed, under certain circumstances, without restriction. Purchase interests are restricted, and any conveyance of purchase interests must be approved by the Secretary of the Interior or his designee. The record shows that the Area Director for the BIA was a designee authorized to approve purchase conveyances at the time of the 1970 Seminole County District Court proceeding. However, nothing in the record indicates that Tiger Wolf's purchase interest conveyance was approved by either the BIA Area Director or the Secretary of the Interior. In fact, the record indicates that it was not.

¶ 5 The Area Director of the BIA and the Department of the Interior both received notice of the 1970 proceedings. The majority here, like the federal court in *Wood*, rely on the fact that Dean Storts, a Trial Attorney for the Department of the Interior, acknowledged receipt of the notice, appeared in the District Court of Seminole County, and did not object to the 1970 conveyance. However, testimony at the evidentiary hearing shows that Storts's appearance did not, as the majority holds, satisfy the legal requirements necessary for a proper conveyance of the purchase interest. As a Department of Interior Trial Attorney Storts could represent the federal government's interest insofar as the proceedings were conducted under the statute governing Tiger Wolf's 1/5 heirship interest. He was not delegated to act on the Secretary of the Interior's behalf and approve any conveyance conducted under the statute governing conveyance of the 4/5 restricted purchase interest. His agreement to the proceeding could only have covered the 1/5 heirship interest. The 4/5 restricted purchase interest was still subject to the statute restricting the property subject to approval by the Secretary of the Interior.[1] Thus, the

1. I note that Tiger Wolf's probate attorney testified that, at her death in 1991, the Final Decree determining heirs shows the 4/5 purchase interest was restricted. The Decree was based on information in records supplied by the Office of

record shows that Storts's presence did not provide authority for the conveyance. Contrary to the majority's conclusion, the 1970 conveyance could not have met the statutory requirements. The fact that the District Court of Seminole County clearly intended a conveyance of the entire property in fee simple is not controlling if that court did not have jurisdiction over all the various property interests.[2] As a matter of law, if conveyance of the 4/5 restricted purchase shares was not approved by the Secretary of the Interior, the state district court did not have jurisdiction over the conveyance.

¶ 6 The evidence presented at the evidentiary hearing, like the evidence presented to the federal court in *Wood*, shows that the 1970 Seminole County conveyance was not proper and 4/5 of the interest in the property is still restricted. This makes the property Indian land for jurisdictional purposes. Because I believe the property itself is not within Oklahoma criminal jurisdiction, I do not reach the argument concerning mineral interests.

¶ 7 The majority states that with the *Wood* decision the United States ceded criminal jurisdiction over this property. For this Court's purposes, that was true only for the *Wood* case. I believe the *Wood* case was wrongly decided, based as it was on a state district court conveyance which was improper and not authorized by federal law. This Court may choose to find the *Wood* decision persuasive in this case, as the majority does. However, I believe we should not rely on an incorrect legal conclusion, no matter how close the issue it presents is to the issue before us.

¶ 8 The majority suggests that, if we accept the testimony in this case and decline jurisdiction, no sovereign will have criminal jurisdiction over the property. That may be the case; it is also possible that if we decline jurisdiction the federal courts may reconsider their position should the issue be presented to them regarding this case. I also note that neither the record nor the majority discuss the possibility of tribal jurisdiction over this property. In any event, our decision to grant or decline jurisdiction must be based, not on the position of any other sovereign, but on whether Oklahoma in fact has jurisdiction. It appears to me from the record of the evidentiary hearing that we do not. I dissent.

the Field Solicitor of the Department of the Interior.

2. The 1970 hearing was very brief, and revolved around Tiger Wolf's desire to convey her land to the Housing Authority, which promised to build her a house and return the property. At no time was any issue of the nature of Tiger Wolf's property interests raised or decided.

2009 OK CIV APP 28

COMPSOURCE OKLAHOMA, Plaintiff/Appellant,

v.

L & L CONSTRUCTION, INC., Defendant/Appellee,

and

Granite Farmers Cooperative Association; Maria G. Valdes; A–Mac Oilfield Pipe Inspection, Inc.; Wanda Berrera; Fidel Solis; Beth Carriker; Katie Lynn DeBuhr, now Jackson; Cassandra Monroe; and Kirsten M. DeBuhr, Defendants.

Nos. 105,629, 105,641.

Released for Publication by Order of the Court of Civil Appeals of Oklahoma, Division No. 3.

Court of Civil Appeals of Oklahoma, Division No. 3.

Nov. 7, 2008.

Rehearing Denied Dec. 24, 2008.

Certiorari Denied March 11, 2009.

Background: Insurer brought action insured seeking declaration that it did not have to indemnify, defend, or compensate insured employer for intentional torts under workers compensation and employers liability policies following employee's death. The District Court, Oklahoma

ATTACHMENT 3

Report.

per annum on annual balances until so reimbursed: *Provided further*, That the Auditor for the State and other Departments and the auditor of the District of Columbia shall each annually report the amount of such advances, stating the account for each fiscal year separately, and also the reimbursements made under this section, together with the balances remaining, if any, due to the United States: *And provided further*, That nothing contained herein shall be so construed as to require the United States to bear any part of the cost of acquisition of land for street extensions, and all advances heretofore or hereafter made for this purpose by the Secretary of the Treasury shall be repaid in full from the revenues of the District of Columbia.

Street extensions from District revenues only.

Repeal.

SEC. 9. All laws and parts of laws to the extent that they are inconsistent with this Act are repealed.

Approved, May 26, 1908.

May 27, 1908.
[H. R. 15641.]

[Public, No. 140.]

CHAP. 199.—An Act For the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

Five Civilized Tribes. Status of allotments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:

Alienation restrictions removed.

All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions.

Restrictions continued.

All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

Removal by Secretary of the Interior.

The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act.

Oklahoma. Rights of way through Indian lands continued. Vol. 32, p. 47.

No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

Leases of restricted lands.

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years,

Provisos. Oil, gas, or mining purposes.

may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

Lands of minors, etc., under same restriction.

SEC. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

Rolls of citizens and freedmen evidence of quantum of Indian blood.

That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate.

Status of prior leases by allottees.

Proviso.
Power of owners of unrestricted lands over oil, etc., leases.

SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

Unrestricted lands subject to taxation.

Proviso.
Exemption from prior claims.

SEC. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

Alienation, etc., of restricted lands void.

SEC. 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner

Authority of Oklahoma probate courts over minor allottees.

Local agent of Interior Department for estates of minors.
Duties.

being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

Reports.

May be appointed guardian.

Other duties as to restricted lands.

And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Appropriation for expenses.

Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated, for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, to be available immediately, and until July first, nineteen hundred and nine, for expenditure under the direction of the Secretary of the Interior: *Provided*, That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.

Proviso. Restriction on lands of minors.

Appropriation for suits in Oklahoma.

And there is hereby further appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available and available until expended as the Attorney-General may direct, the sum of fifty thousand dollars, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma: *Provided*, That the sum of ten thousand dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the western judicial district of Oklahoma.

Proviso. For western district.

Suits against vendees, etc., of town lots.

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismissed and the title quieted upon payment of the full balance due on the original appraisement of such lot: *Provided*, That such investigation must be concluded within six months after the passage of this Act.

Proviso. Conclusion of investigation.

Suits as to title, etc., of restricted lands.

Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire

or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.

Contests of selections of allotment. Time limited.

SEC. 7. That no contest shall be instituted after sixty days from the date of the selection of any allotment hereafter made, nor after ninety days from the approval of this Act in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and, as early thereafter as practicable, deed or patent shall issue therefor.

Wills of full-blood Indians. Acknowledgment before Oklahoma judge.

SEC. 8. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words "or a judge of a county court of the State of Oklahoma."

Vol. 34, p. 145, amended.

Allottees. Restrictions removed by death. *Provisos.* Conveyances.

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

Distribution of estates of Indians of half-blood or more.

In case of no issue.

Acknowledgment of wills. Vol. 34, p. 145. *Supra.*

Choctaw and Chickasaw warrants. Payment of outstanding.

SEC. 10. That the Secretary of the Interior is hereby authorized and directed to pay out of any moneys in the Treasury of the United States, belonging to the Choctaw or Chickasaw nations respectively, any and all outstanding general and school warrants duly signed by the auditor of public accounts of the Choctaw and Chickasaw nations, and drawn on the national treasurers thereof prior to January first, nineteen hundred and seven, with six per cent interest per annum from the respective dates of said warrants: *Provided*, That said warrants be presented to the United States Indian agent at the Union Agency, Muskogee, Oklahoma, within sixty days from the passage of this act, together with the affidavits of the respective holders of said warrants that they purchased the same in good faith for a valuable consideration, and had no reason to suspect fraud in the issuance of said warrants: *Provided further*, That such warrants remaining in the hands of the original payee shall be paid by said Secretary when it is shown that the services for which said warrants were issued were actually performed by said payee.

Provisos. Payment to holders for value.

To original payees.

Seminole lands. Payment of royalties to lessor, etc.

SEC. 11. That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

Proviso. Interest of Seminole Nation to cease June 30, 1908.

Deposit of tribal allotment records.

SEC. 12. That all records pertaining to the allotment of lands of the Five Civilized Tribes shall be finally deposited in the office of the United States Indian agent, Union Agency, when and as the Secretary of the Interior shall determine such action shall be taken, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available as the Secretary of the Interior may direct, the sum of fifteen thousand dollars, or so much thereof as may be necessary to enable the Secretary of the Interior to furnish the various counties of the State of Oklahoma certified copies of such portions of said records as affect title to lands in the respective counties.

Appropriation for copies to counties of Oklahoma.

Tribal property. Vol. 34, p. 141, amended.

SEC. 13. That the second paragraph of section eleven of an act entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth nineteen hundred and six, is hereby amended to read as follows:

Money, records, etc., to be delivered to Secretary of the Interior.

That every officer, member or representative of the Five Civilized Tribes, respectively, or any other person, having in his possession, custody or control, any money or other property, including the books, documents, records or any other papers, of any of said tribes, shall make full and true account and report thereof to the Secretary of the interior, and shall pay all money of the tribe in his possession, custody or control, and shall deliver all other tribal properties so held by him to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided, prior to July thirty-first, nineteen hundred and eight, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by fine of not exceeding five thousand dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe or tribes in interest for the amount or value of the money or property so withheld.

Penalty for failure to account, etc.

Town sites. Sale of lots in established. Vol. 34, p. 142.

SEC. 14. That the provisions of section thirteen of the Act of Congress approved April twenty-sixth, nineteen hundred and six (Thirty-fourth Statutes at Large, page one hundred and thirty-seven), shall not apply to town lots in town sites heretofore established, surveyed, platted, and appraised under the direction of the Secretary of the Interior, but nothing herein contained shall be construed to authorize the conveyance of any interest in the coal or asphalt underlying said lots.

Coal and asphalt retained.

Approved, May 27, 1908.

ATTACHMENT 4

CHAP. 516.—An Act To provide for the times and places for holding court for the Eastern District of North Carolina.

May 10, 1928.
[S. 3947.]
[Public, No. 359.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the terms of the District Court for the Eastern District of North Carolina shall be held at Durham on the first Monday in March and September; at Raleigh a one-week civil term on the second Monday in March and September, and a criminal term only on the second Monday after the fourth Monday in April and October; at Fayetteville on the third Monday in March and September; at Elizabeth City on the fourth Monday in March and September; at Washington on the first Monday in April and October; at New Bern on the second Monday in April and October; at Wilson on the third Monday in April and October, and at Wilmington a two-weeks term on the fourth Monday in April and October: *Provided*, That this Act shall take effect on July 1, 1928: *And provided further*, That at Wilson and Durham it shall be made incumbent upon each place to provide suitable facilities for holding the courts.

North Carolina eastern judicial district.
Terms of court for.
Vol. 43, p. 661, amended.

Provisos.
Effective July 1, 1928.
Court rooms required at Wilson and Durham.

Approved, May 10, 1928.

CHAP. 517.—An Act To extend the period of restriction in lands of certain members of the Five Civilized Tribes, and for other purposes.

May 10, 1928.
[S. 3594.]
[Public, No. 360.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: *Provided*, That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

Five Civilized Tribes, Okla.
Restriction on allotments to members of one-half or more Indian blood further extended.

Proviso.
Removal authorized upon application of owners of land.

SEC. 2. That the provisions of section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," as amended by section 1 of the Act of April 12, 1926 (Forty-fourth Statutes at Large, page 239), entitled "An Act to amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes," be, and are hereby, extended and continued in force for a period of twenty-five years from and including April 26, 1931, except, however, the provisions thereof which read as follows:

Provisions for removing restrictions on death of allottees continued 25 years from April 26, 1931.
Vol. 44, p. 239.

"*Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the lands shall then descend to the

Provision for homesteads of decedent allottees repealed.
Vol. 44, p. 239, repealed.

heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided*, That the word "issue," as used in this section, shall be construed to mean child or children: *Provided further*, That the provisions of section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section:"

Effective, April 26, 1931.

Proviso.

Provisions for disposal of property by wills continued until April 26, 1956.

Vol. 34, p. 145, Vol. 35, p. 315.

Vol. 44, p. 240.

which quoted provisions be, and the same are, repealed, effective April 26, 1931: *Provided further*, That the provisions of section 23 of the Act of Congress approved April 26, 1906 (Thirty-fourth Statutes at Large, page 137), as amended by the provisions of section 8 of the Act of Congress approved May 27, 1908 (Thirty-fifth Statutes at Large, page 312), be, and the same are hereby, continued in force and effect until April 26, 1956.

Minerals produced from restricted lands subject to taxation after April 26, 1931.

SEC. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

Payment from funds of individual Indian owners.

Restricted lands in excess of 160 acres subject to State taxation after April 26, 1931.

SEC. 4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided*, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation and shall file with the superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *And provided further*, That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior and, when approved by the Secretary of the Interior, shall be recorded in the office of the superintendent for the Five Civilized Tribes and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir of devisee of the land: *Provided*, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

Provisos.

Selection to be made by owner of exempted tracts.

Selection by superintendent on failure of Indian, etc.

Designated lands exempt from taxation.

Exemption period limited.

Not over 160 acres exempt.

No restrictions reimposed nor taxation exempted hereby.

SEC. 5. That this Act shall not be construed to reimpose restrictions heretofore or hereafter removed by the Secretary of the Interior or by operation of law, nor to exempt from taxation any lands which are subject to taxation under existing law.

Approved, May 10, 1928.

ATTACHMENT 5

annuity beginning at the age at which the employee would otherwise have become eligible for retirement, computed as provided in section 96 of this title: *Provided*, That any employee retiring prior to attaining the age of sixty under the provisions of this paragraph with at least thirty years of service shall receive an immediate annuity having a value equal to the present worth of a deferred annuity beginning at the age of sixty years, computed as provided in section 96 of this title."

48 U. S. C. § 1371e; Supp. IV, § 1371e.

Approved July 2, 1945.

[CHAPTER 221]

AN ACT

To provide for the issuance of the Mexican Border Service Medal to certain members of the Reserve forces of the Army on active duty in 1916 and 1917.

July 2, 1945
[H. R. 2322]
[Public Law 114]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War is authorized and directed to issue the Mexican Border Service Medal to any officer of the Medical Reserve Corps or to any other member of a reserve component of the Army not eligible under existing law to receive such medal or the Mexican Service Medal heretofore authorized by the President who (1) served on the Mexican border at any time during the period from January 1, 1916, to April 6, 1917, or (2) was called to active duty during such period on account of the existing emergency and served in the field but rendered service elsewhere than on the Mexican border: *Provided*, That such medal shall not be issued to any person who has, subsequent to such service, been dishonorably discharged from the service or deserted.

Mexican Border Service Medal.

Restriction.

Approved July 2, 1945.

[CHAPTER 222]

AN ACT

To amend paragraph (c) of section 6 of the District of Columbia Traffic Act, as amended by Act approved February 27, 1931.

July 2, 1945
[H. R. 2552]
[Public Law 115]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the proviso of paragraph (c), section 6, of the District of Columbia Traffic Acts, as amended by the Act approved February 27, 1931, be, and the same is hereby, further amended by adding thereto the following: "*Provided further*, That such congressional tags shall be valid only for the Congress in which such tags are so issued, and it shall be unlawful to display such congressional tags for a period longer than thirty days after the opening of the next Congress.

D. C. Traffic Act, amendment.

46 Stat. 1425. D. C. Code § 40-603 (c).

Congressional tags.

"Any person violating this section shall be fined not more than $300 or imprisoned not more than ninety days, or both."

Approved July 2, 1945.

[CHAPTER 223]

AN ACT

To validate titles to certain lands conveyed by Indians of the Five Civilized Tribes and to amend the Act entitled "An Act relative to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma", approved January 27, 1933, and to validate State court judgments in Oklahoma and judgments of the United States District Courts of the State of Oklahoma.

July 2, 1945
[H. R. 2754]
[Public Law 116]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of enactment of this Act, of lands

Five Civilized Tribes.
Validation of certain conveyances.

purchased, prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior: *Provided*, That all such conveyances made after the date of the enactment of this Act must have the consent and approval of the Secretary of the Interior: *Provided further*, That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section.

SEC. 2. That nothing contained in the Act of January 27, 1933 (47 Stat. 777), shall be construed to impose restrictions on the alienation of lands or interests in lands acquired by inheritance, devise, or in any other manner, by Indians of the Five Civilized Tribes, where such lands, or interest therein, were not restricted against alienation at the time of acquisition, and all conveyances executed by Indians of the Five Civilized Tribes after January 27, 1933, and before the date of approval of this section, of lands, or interests in lands, which, at the time of acquisition by them, were free from restrictions, are hereby confirmed and declared to be valid, irrespective of whether such conveyances were or were not approved by the Secretary of the Interior, or by any county court of the State of Oklahoma: *Provided*, That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section: *Provided further*, That the provisions of this section shall not be construed to validate or confirm any conveyance made in violation of restrictions recited in any deed to lands purchased with the restricted or trust funds belonging to any Indian of the Five Civilized Tribes.

25 U. S. C. §§ 355, 375.

SEC. 3. That no order, judgment, or decree in partition made, entered, or rendered subsequent to the effective date of the Act of June 14, 1918 (40 Stat. 606), and prior to the effective date of this Act, and involving inherited restricted lands of enrolled and unenrolled members of the Five Civilized Tribes, shall be held null, void, invalid, or inoperative, nor shall any conveyance of any land pursuant to such order, judgment, or decree be held null, void, invalid, or inoperative because the United States was not a party to such order, judgment, or decree, or to any of the proceedings in connection therewith, or because the United States, its agents, or officers, or any of them, was not served with any notice or process in connection therewith, and all such orders, judgments, decrees, and conveyances, which are subject to attack solely by reason of any of the infirmities enumerated by this section, are hereby confirmed, approved, and declared valid.

Separability of provisions.

SEC. 4. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

Approved July 2, 1945.

ATTACHMENT 6

recorded, and to employ such personnel as may be required to operate the same and to perform necessary services in connection therewith; and all deeds and other instruments of writing entitled by law to be recorded in the Office of the Recorder of Deeds which are recorded by means of such machines or equipment are hereby declared to be legally recorded.

Approved August 4, 1947.

[CHAPTER 457]

AN ACT

August 4, 1947
[H. R. 3064]
[Public Law 335]

Authorizing and directing the Secretary of the Interior to issue a patent in fee to the surviving members of the Laguna Band of Mission Indians of California.

Laguna Band of Mission Indians, Calif.
Issuance of patent in fee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is authorized and directed to take such steps as are necessary to determine the membership of the Laguna Band of Mission Indians of California and, having determined such membership, is further authorized and directed to issue to the member or members of such band within six months from the enactment of this Act, a patent in fee to the following-described lands situated within the boundaries of the Laguna Indian Reservation, California: The south half southwest quarter section 28; north half southwest quarter and northwest quarter section 33, township 14 south, range 5 east, San Bernardino meridian, San Diego County, California.

Approved August 4, 1947.

[CHAPTER 458]

AN ACT

August 4, 1947
[H. R. 3173]
[Public Law 336]

Relative to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma, and for other purposes.

Five Civilized Tribes.
Removal of restrictions on land in Okla.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death: *Provided*, (a) That except as provided in subdivision (f) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated; (b) that petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereon, signed by the county judge, reciting the consideration offered and a description of the land shall be given by publication in at least one issue of a newspaper of general circulation in the county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor, and the court must be satisfied that the consideration has

Validity of conveyance.

Hearing.

been paid in full. Proceedings for approval of conveyances by restricted heirs or devisees under this section shall not be removable to the Federal court; (c) the evidence taken at the hearing shall be transcribed and filed of record in the case, the expense of which, including attorney fees and court costs, must be borne by the grantee. The court in its discretion, when deemed for the best interest of the Indian, may approve the conveyance conditionally, or may withhold approval; (d) that at said hearing competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor or when deemed necessary the court may set the petition for further hearing; (e) that the probate attorney shall have the right to appeal from any order approving conveyances to the district court of the county in which the proceedings are conducted within the time and in the manner provided by the laws of the State of Oklahoma in cases of appeal in probate matters generally, except that no appeal bond shall be required; (f) that sales of the interests of minor and incompetent persons shall be made in conformity with the laws of the State of Oklahoma. Notice of such sale shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition for sale is to be heard; (g) that nothing contained in this section shall be construed to modify or repeal the Act of February 11, 1936 (49 Stat. 1135), relating to leases for farming and grazing purposes.

Conditional approval by court, etc.

Competitive bidding.

Right to appeal.

Sales of interest of minors, etc.

25 U. S. C. § 393a.

Quantum of Indian blood.

SEC. 2. In determining the quantum of Indian blood of any Indian heir or devisee, the final rolls of the Five Civilized Tribes as to such heir or devisee, if enrolled, shall be conclusive of his or her quantum of Indian blood. If unenrolled, his or her degree of Indian blood shall be computed from the nearest enrolled paternal and maternal lineal ancestors of Indian blood enrolled on the final rolls of the Five Civilized Tribes.

Jurisdiction of guardianship, etc.

SEC. 3. (a) The State courts of Oklahoma shall have exclusive jurisdiction of all guardianship matters affecting Indians of the Five Civilized Tribes, of all proceedings to administer estates or to probate the wills of deceased Indians of the Five Civilized Tribes, and of all actions to determine heirs arising under section 1 of the Act of June 14, 1918 (40 Stat. 606).

25 U. S. C. § 375.

Effect of final judgment on U. S.

(b) The United States shall not be deemed to be a necessary or indispensable party to any action or proceeding of which the State courts of Oklahoma are given exclusive jurisdiction by the provisions of subsection (a) of this section, and the final judgment rendered in any such action or proceeding shall bind the United States and the parties thereto to the same extent as though no Indian property or question were involved: *Provided*, That written notice of the pendency of any such action or proceeding shall be served on the Superintendent for the Five Civilized Tribes within ten days of the filing of the first pleading in said action or proceeding. Such notice shall be served by the party or parties causing the first pleading to be filed. Section 3 of the Act of April 12, 1926 (44 Stat. 239), shall have no application to actions or proceedings covered by the provisions of subsection (a) of this section.

Notice of pendency.

Nonapplicability.

Removal of action to district court.

(c) No action or proceeding in which notice has been served on the Superintendent for the Five Civilized Tribes pursuant to the provisions of section 3 of the Act of April 12, 1926 (44 Stat. 239), shall be removed to a United States district court except upon the recommendation of the Secretary of the Interior or his duly authorized representative. The United States shall have the right to appeal from any order of remand entered in any case removed to a United States district court pursuant to the provisions of the Act of April 12, 1926 (44 Stat. 239).

Right to appeal.

(d) Nothing contained in this section shall be construed to limit any right of appeal.

Representation of restricted members.

SEC. 4. That the attorneys provided for under the Act of May 27, 1908 (35 Stat. 312), are authorized to appear and represent any restricted member of the Five Civilized Tribes in Oklahoma before any of the courts of the State of Oklahoma in any matter in which the said restricted Indian may have an interest.

Tribal funds and securities.

SEC. 5. That all funds and securities now held by, or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until otherwise provided by Congress, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe.

Tax-exempt lands.

SEC. 6. (a) Except as hereinafter provided, the tax-exempt lands of any Indian of the Five Civilized Tribes in Oklahoma shall not exceed one hundred and sixty acres, whether the said lands be acquired by allotment, descent, devise, gift, exchange, partition, or by purchase with restricted funds.

Continuation of exemption, etc.

(b) All tax-exempt lands owned by an Indian of the Five Civilized Tribes on the date of this Act shall continue to be tax-exempt in the hands of such Indian during the restricted period: *Provided*, That any right to tax exemption which accrued prior to the date of this Act under the provisions of the Acts of May 10, 1928 (45 Stat. 495), and January 27, 1933 (47 Stat. 777), shall terminate unless a certificate of tax exemption has been filed of record in the county where the land is located within two years from the date of this Act.

25 U. S. C. § 355 note.

(c) Any interest in restricted and tax-exempt lands acquired by descent, devise, gift, exchange, partition, or purchase with restricted funds, after the date of this Act by an Indian of the Five Civilized Tribes of one-half or more Indian blood shall continue to be tax-exempt during the restricted period: *Provided*, That the tax-exempt lands of any such heir, devisee, donee, or grantee, whether acquired by allotment, descent, devise, gift, exchange, partition, or purchase with restricted funds, shall not exceed one hundred and sixty acres in the aggregate: *Provided further*, That nothing contained in this subsection shall be construed to terminate or abridge any right to tax exemption to which any Indian was entitled on the effective date of this Act.

(d) Nothing contained in this section shall be construed to affect any tax exemption provided by the Act of June 26, 1936 (49 Stat. 1967).

25 U. S. C. §§ 501-509.

Post, p. 734.

Filing of statement showing tax-exempt lands, etc.

(e) On or before the 1st day of January of each year following the date of this Act, the Superintendent of the Five Civilized Tribes shall file with the county treasurer of each county in the State of Oklahoma where restricted Indians' lands of any type of members of the Five Civilized Tribes are situated, a statement showing what lands are regarded as tax exempt, and the names of the Indians for whom the lands are claimed as tax exempt. Before a county treasurer shall proceed to sell any restricted land for delinquent taxes, it must appear from the records of the office of the county treasurer that a list of the tracts included in the proposed sales of land for delinquent taxes in said county has been sent by registered mail to the Superintendent for the Five Civilized Tribes at Muskogee, Oklahoma, at least ninety days before the date fixed by the laws of the State of Oklahoma for sales of land for delinquent taxes.

Validation of prior removals of restrictions, etc.

SEC. 7. All removals of restrictions and approvals of deeds heretofore made by the Secretary of the Interior, regardless of whether applications were made therefor by the Indian owner, are hereby validated and confirmed.

Restricted lands.

SEC. 8. That no tract of land, nor any interest therein, which is hereafter purchased by the Secretary of the Interior with restricted funds by or for an Indian or Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, shall be construed to be restricted unless the deed conveying same shows upon its face that such purchase was made with restricted funds.

Validation of conveyances.

SEC. 9. That all conveyances, including oil and gas or mineral leases, by Indians of the Five Civilized Tribes in Oklahoma of lands acquired by inheritance or devise, made after the effective date of the Act of January 27, 1933, and prior to the effective date of this Act, that were approved either by a county court in Oklahoma or by the Secretary of the Interior are hereby validated and confirmed: *Provided*, That if any such conveyance is subject to attack upon grounds other than sufficiency of approval or lack of approval thereof, such conveyance shall not be affected by this Act.

47 Stat. 777. 25 U. S. C. § 355 note.

25 U. S. C. § 502.

SEC. 10. Section 2 of the Act of June 26, 1936 (49 Stat. 1967), commonly known as the Oklahoma Welfare Act, shall be amended by the addition of a new paragraph as follows:

Waiver of preference right.

"The preference right of the Secretary to purchase shall be considered as waived where notice of the pendency of sale is given in writing to the Superintendent of the Five Civilized Tribes for at least ten days prior to the date of sale and the Secretary does not within that time exercise the preferential right to purchase."

Applicability of oil and gas conservation laws to restricted lands.

SEC. 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: *Provided*, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

Repeals.

SEC. 12. Sections 1 and 8 of the Act of January 27, 1933 (47 Stat. 777), are hereby repealed.

SEC. 13. All Acts and parts of Acts in conflict herewith are hereby repealed.

Approved August 4, 1947.

[CHAPTER 459]

August 4, 1947
[H. R. 3215]
[Public Law 337]

AN ACT

To revise the Medical Department of the Army and the Medical Department of the Navy, and for other purposes.

Army-Navy Medical Services Corps Act of 1947.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Army-Navy Medical Services Corps Act of 1947".

TITLE I

ARMY MEDICAL SERVICE CORPS

Composition.

SEC. 101. Effective the date of enactment of this Act, there is established in the Medical Department of the Regular Army the Medical Service Corps, which shall consist of the Pharmacy, Supply, and Administration Section, the Medical Allied Sciences Section, the Sanitary Engineering Section, the Optometry Section, and such other sections as may be deemed necessary by the Secretary of War, and which shall perform such services as may be prescribed by the

ATTACHMENT 7

TITLE IV—MISCELLANEOUS PROVISIONS

12 USC 640b.

SEC. 401. (a) Section 5 (b) of the Farm Credit Act of 1937, as amended, is amended by changing the sixth sentence thereof to read as follows: "After the date of enactment of the Farm Credit Act of 1955, no person shall be eligible for election or appointment to membership on said Board if such person has within one year next preceding the commencement of the term been a salaried officer or employee of the Farm Credit Administration, or a salaried officer or employee of any corporation operating under the supervision of the Farm Credit Administration.".

12 USC 640d.

(b) Section 5 (d) of the Farm Credit Act of 1937, as amended, is amended—

(1) by substituting "six months" for "three months" wherever it occurs in paragraph (2) thereof; and

(2) by adding at the end thereof a new paragraph as follows:

"(4) As directed by the Farm Credit Administration, the election of a director under section 5 (d) (2) by any group may be begun any time within six months before the expiration of the term of office to which the director is to succeed, subject to the required determination being made as of the date six months before the expiration of such term of office that a director so elected by such group is to serve in lieu of a district director (or third district director)."

12 USC 636c.

SEC. 402. Section 4 of the Farm Credit Act of 1953 is amended—

(a) by inserting in the first proviso in subsection (a) "all persons so tied shall be considered designated as nominees" in lieu of "the procedure prescribed therein shall be followed again until the tie is broken";

(b) by inserting before the period at the end of the second sentence of subsection (b) ", except that one full term of six years shall be considered to include an additional four months if the particular term is one which was legally extended for an additional four months"; and

(c) by adding the following additional sentence at the end of subsection (c): "All terms of office which otherwise would expire on November 30 of any year following enactment of the Farm Credit Act of 1955 are extended four months to expire on the following March 31 so that the term of office of all successors to the terms so extended shall begin with the first day of April.".

Separability.

SEC. 403. (a) If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

(b) The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved August 11, 1955.

Public Law 348 CHAPTER 786

AN ACT

August 11, 1955
[S. 2198]

To extend the period of restrictions on lands belonging to Indians of the Five Civilized Tribes in Oklahoma, and for other purposes.

Five Civilized Tribes, Okla.
Land restrictions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subject to the provisions of section 2 of this Act, the period of restrictions against alienation, lease, mortgage, or other encumbrance of lands

belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half degree or more Indian blood, which period was extended to April 26, 1956, by the Act of May 10, 1928 (45 Stat. 495), is hereby extended for the lives of the Indians who own such lands subject to such restrictions on the date of this Act.

Removal.

SEC. 2. (a) Any Indian of the Five Civilized Tribes may apply to the Secretary of the Interior for an order removing restrictions. Within ninety days from the date of the application, the Secretary shall either issue the order or disapprove the application. The order shall be issued if in the judgment of the Secretary the applicant has sufficient ability, knowledge, experience, and judgment to enable him, or her, to manage his, or her, business affairs, including the administration, use, investment, and disposition of any property turned over to such person and the income or proceeds therefrom, with such reasonable degree of prudence and wisdom as will be apt to prevent him, or her, from losing such property or the benefits thereof.

(b) The Secretary of the Interior is authorized and directed to issue, without application, to any Indian of the Five Civilized Tribes, who in the judgment of the Secretary is able to manage his, or her, own affairs, in accordance with the standard specified in subsection (a) of this section, an order removing restrictions that will become effective six months after notice of the order is given to such Indian, unless it is set aside by a county court in accordance with proceedings initiated prior to such time pursuant to subsection (c) of this section. The timely initiation of such proceedings shall stay the effective date of an order until the proceedings are concluded. When the Secretary issues an order pursuant to this subsection, he shall notify the board of county commissioners for the county in which the Indian resides.

(c) If the Secretary of the Interior disapproves, or fails either to approve or disapprove, an application within the ninety-day period prescribed in subsection (a) of this section, the Indian affected may apply to the county court for the county in which he, or she, resides for an order removing restrictions. If the Secretary issues an order removing restrictions without application therefor in accordance with the provisions of subsection (b) of this section, either the Indian affected or the board of county commissioners may apply to the county court for the county in which the Indian resides for an order setting aside such order. The court shall set a hearing date not less than thirty days from the day it receives the application, and, under rules adopted by the court, notify the board of county commissioners, the welfare departments of the State and county governments, the local representative of the Commissioner of Indian Affairs, and any other persons the court considers appropriate. At the hearing the court shall examine the Indian and may require the persons who appear before the court to give testimony in the matter of the ability of the Indian to manage his, or her, own affairs. The Secretary of the Interior, and the attorney for the county in which such court is located, shall be given an opportunity to appear at such hearings and to participate in the examination of the Indian and other witnesses. The evidence taken at the hearing shall be transcribed and filed of record in the case. In determining capability, the court shall apply the standard specified in subsection (a) of this section with respect to determinations by the Secretary. If the court finds that the Indian is able to manage his, or her, own affairs, it shall issue an order removing restrictions or deny the application for an order to set aside an order of the Secretary issued without application therefor, as the case

Hearings.

may be. If the court does not find that the Indian is able to manage his, or her, own affairs, it shall deny the application for an order removing restrictions, or set aside an order of the Secretary issued without application therefor, as the case may be. The court shall furnish to the Secretary and to the applicant one certified copy of any final order issued by it. Any final order of the court shall be subject to appeal by the applicant, by the Secretary, or by the board of county commissioners in accordance with the probate laws of the State of Oklahoma, except that no appeal bond shall be required in an appeal by the Secretary.

(d) When an order removing restrictions becomes effective, the Secretary shall cause to be turned over to the applicant full ownership and control of any money and property that is held in trust for him or that is held subject to a restriction against alienation imposed by the United States, issuing, in the case of land, such title document as may be appropriate: *Provided*, That the Secretary may make such provisions as he deems necessary to insure payment of money loaned to any such Indian by the Federal Government or by an Indian tribe: *Provided further*, That nothing herein contained shall abrogate the interest of any lessee or permittee in any lease, contract, or permit that is outstanding when an order removing restrictions becomes effective.

25 USC 355 note.

SEC. 3. Section 23 of the Act of April 26, 1906 (34 Stat. 137), as amended by section 8 of the Act of May 27, 1908 (35 Stat. 312), which expires on April 26, 1956, is continued in force with respect to the restricted properties of Indians of the Five Civilized Tribes as long as such properties remain restricted.

25 USC 355 note, 502.

SEC. 4. Except as provided in section 2 of this Act, nothing in this Act shall be construed to repeal or to limit the application of the Act of August 4, 1947 (61 Stat. 731), the provisions of which shall continue in effect until otherwise provided by Congress.

Tax exemptions.

SEC. 5. Any existing exemption from taxation that constitutes a vested property right shall continue in force and effect until it terminates by virtue of its own limitations.

Approved August 11, 1955.

Public Law 349 CHAPTER 787

AN ACT

August 11, 1955
[H. R. 6199]

To amend the Act of October 14, 1940, to authorize the sale of personal property held in connection with housing under such Act.

Housing.
Sale of personal property.
64 Stat. 71.
42 USC 1588.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 608 of the Act entitled "An Act to expedite the provision of housing in connection with national defense, and for other purposes", approved October 14, 1940, as amended, is amended by inserting "(a)" immediately after "SEC. 608." and by adding at the end thereof the following new subsection:

"(b) Notwithstanding any other provision of law, any personal property held under this Act, and not sold with a project or building, may be sold at fair value, as determined by the Administrator, to any agency organized for slum clearance or to provide subsidized housing for persons of low income. Any sale of personal property under this subsection shall be made on a cash basis, payable at the time of settlement."

Approved August 11, 1955.

ATTACHMENT 8

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 53. Indians (Refs & Annos)
§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, 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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.)

Current through P.L. 112-139 approved 6-27-12

END OF DOCUMENT