Case No. 11-7072

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID B. MAGNAN,
Petitioner-Appellant,

v.

RANDALL G. WORKMAN, Warden,
Oklahoma State Penitentiary,
Respondent-Appellee.

BRIEF OF RESPONDENT/APPELLEE

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

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OCTOBER 12, 2012 **ORAL ARGUMENT IS NOT REQUESTED**

Brief has attachments in scanned pdf format

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IN THE UNITED STATES COURT OF APPEALS
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DAVID B. MAGNAN,	)	
	)	
Petitioner/Appellant,	)	
	)	
-vs-	)	Case No. 11-7072
	)	
RANDALL G. WORKMAN, Warden, Oklahoma State Penitentiary, E. SCOTT PRUITT, Attorney General, State of Oklahoma,	)	
	)	
Respondents/Appellees.	)	

BRIEF OF RESPONDENT/APPELLEE

STATEMENT OF JURISDICTION

On August 2, 2010, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Oklahoma pursuant to 28 U.S.C. § 2254. *Petition for Writ of Habeas Corpus* dated 8/2/2010, docket number 24.[1] On October 4, 2010, Respondent filed his response to Petitioner's petition. *Response in Opposition to Petition for Writ of Habeas Corpus* dated 10/4/2010, docket number 27. Petitioner then filed his reply to the Warden's response on November 19, 2010. *Petitioner's Reply Brief* dated 11/19/2010, docket number 28. On August 23, 2011, the district court denied Petitioner's request for habeas relief.

[1]Initial references to documents filed in the district court will be identified by name, date filed and docket number. After the initial reference, documents filed in the district court will be identified by docket number.

Opinion and Order dated 8/23/2011, docket number 36. Thereafter, Petitioner filed a notice of appeal to this Court. *Notice of Appeal* dated 10/24/2011, docket number 43. The district court granted a Certificate of Appealability ("COA") as to Petitioner's sole ground for relief. *Order Granting Certificate of Appealability* dated 8/23/2011, docket number 37. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253 and Fed. R. App. P. 4(a).

ISSUE PRESENTED FOR REVIEW

Whether the Oklahoma Court of Criminal Appeals' determination that the property on which the murders occurred was not Indian country was reasonable?

STATEMENT OF THE CASE

Petitioner is an inmate in state custody at the Oklahoma State Penitentiary in McAlester, Oklahoma, pursuant to a judgment and sentence issued in Seminole County District Court Case No. CF-2004-59. Petitioner waived trial by jury and pled guilty to three counts of first degree murder (Okla. Stat. tit. 21, § 701.7(A) (2001)) for the deaths of James Howard, Lucilla McGirt and Karen Wolf. Petitioner also pled guilty to one count of shooting with intent to kill (Okla. Stat. tit. 21, § 652(A) (2001)). Petitioner stipulated to the presence of five aggravating circumstances in connection with the murder convictions: (1) Petitioner presented a great risk of death to more than one person; (2) Petitioner had previously been convicted of a felony

involving the use or threat of violence to the person; (3) Petitioner committed the murders while on parole; (4) Petitioner posed a continuing threat to society; and (5) the murders were especially heinous, atrocious or cruel. The trial court accepted Petitioner's guilty pleas and found the existence of all of the aggravating circumstances as to one of the victims and all but the especially heinous, atrocious, or cruel aggravator as to the other two victims. The trial court sentenced Petitioner to death on each of the three murder counts and to life imprisonment for shooting with intent to kill.

Petitioner waived his right to appeal the convictions and sentences. Pursuant to its duty to conduct a mandatory sentence review, the Oklahoma Court of Criminal Appeals (OCCA) affirmed Petitioner's convictions and sentences in a published opinion filed on April 22, 2009. *Magnan v. State*, 207 P.3d 397 (Okla. Crim. App. 2009). Petitioner did not file a petition for rehearing. On October 5, 2009, the United States Supreme Court denied certiorari review. *Magnan v. Oklahoma*, ___ U.S. ___, 130 S. Ct. 276 (2009).

Petitioner filed a petition for writ of habeas corpus in the district court on August 2, 2010. Doc. 24. The district court denied relief on August 23, 2011. Doc. 36.

STATEMENT OF THE FACTS

The OCCA set forth the relevant facts in its published opinion on direct appeal. Such facts are to be presumed correct under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254(e)(1). According to the OCCA:

> 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 (Okla. Crim. App. 2009) (internal paragraph numbers omitted).

Additional facts, supported with citations to the record, will be discussed below as necessary in responding to Petitioner's various claims.

SUMMARY OF ARGUMENT

Petitioner's sole claim of error is that the land on which he committed the murders is Indian country. Therefore, according to Petitioner, Oklahoma did not have jurisdiction to try him for the murders. Petitioner's claim is that a 1970 conveyance of the land in question was not approved by the Secretary of the Interior. Therefore, according to Petitioner, the restrictions against alienation placed on land purchased by Indians with restricted funds have not been removed and the property remains Indian country.

Petitioner's claim must fail as he cannot identify any clearly established federal law regarding the procedure to be followed to remove restrictions from land purchased by Indians with restricted funds. Further, a United States Trial Attorney appeared on behalf of the Bureau of Indian Affairs at a hearing in state district court regarding the sale of the land and asked the court to approve the sale of the land. The OCCA reasonably concluded that this was sufficient to remove the restrictions on the land.

Petitioner also argues that the purported sale of the land was not really a sale but only created a resulting trust that did not extinguish the seller's title. This claim

was not raised in state court or in the district court. As such, the claim is both subject to an anticipatory procedural bar in state court and waived pursuant to federal law. This Court cannot consider this claim.

Finally, Petitioner argues that 80% of the mineral interests in the disputed property remains in Indian hands subject to restrictions against alienation. According to Petitioner, the entire property must, therefore, be considered Indian country. There is no clearly established federal law dictating that the federal government has criminal jurisdiction over crimes committed on property with restricted mineral rights. In fact, the Supreme Court's cases suggest otherwise. Petitioner committed the murders on the unrestricted surface estate, not underground where the minerals exist. Accordingly, whatever the status of the mineral rights, the OCCA reasonably determined that Petitioner was properly tried in state court.

Each of Petitioner's arguments will be shown below to be without merit. Accordingly, Respondent respectfully requests this Court affirm the district court's denial of habeas relief.

STANDARD OF REVIEW

When a state court has reviewed a claim on its merits, federal habeas relief may only be granted if the state court's decision was (1) either contrary to or involved an unreasonable application of clearly established federal law or (2) based upon an

unreasonable determination of the facts in light of the evidence presented at trial. 28 U.S.C. § 2254(d). Clearly established federal law refers only to the holdings, and not the dicta, of the United States Supreme Court at the time of the state court decision. *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008). Supreme Court holdings "must be construed narrowly and consist only of something akin to on-point holdings." *Id*.

A state court decision is contrary to clearly established federal law as determined by the Supreme Court when it reaches a conclusion opposite to that of the Supreme Court on a question of law or decides a case differently than the Supreme Court has on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000); *Mitchell v. Gibson*, 262 F.3d 1036, 1045 (10th Cir. 2001).

A state court decision involves an unreasonable application of clearly established federal law when the state court correctly identifies the governing legal principle but applies it to the facts of the particular case in an unreasonable manner. *Valdez v. Bravo*, 373 F.3d 1093, 1096 (10th Cir. 2004); *Gilbert v. Mullin*, 302 F.3d 1166, 1171 (10th Cir. 2002). Further,

> under the "unreasonable application" clause, a federal habeas court must ask whether the state court's application of Supreme Court law was objectively unreasonable. Therefore, under the clause, "a federal habeas court may not issue the writ simply because that court concludes in its

> independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

Williams, 529 U.S. at 411.

More recently, in *Harrington v. Richter*, ___ U.S. ___,131 S. Ct. 770, 786 (2011), the Supreme Court criticized a federal court of appeals for effectively reviewing a petitioner's ineffective assistance of counsel claim *de novo* and then declaring that the state court's decision was an unreasonable application of clearly established federal law. The Supreme Court made clear that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id*. at 786 (internal quotation marks omitted). The standard set by the AEDPA was meant to be difficult to meet. *Id*. Thus, a habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 786-787. Even a strong case for relief on direct review does not mean that the state court's denial of relief was unreasonable. *Id*. at 786. Further, the standard set by AEDPA is even more difficult to meet when the rule established by the Supreme Court is a general one. *Id*. A

habeas petitioner's ability to obtain relief is limited because habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems not a substitute for ordinary error correction through appeal." *Id*.

Finally, state court determinations of fact "shall be presumed correct" unless Petitioner rebuts the presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Thus, a state court's decision cannot be said to be based on an unreasonable determination of the facts until a petitioner has shown by clear and convincing evidence that the state court's factual determination was incorrect.

ARGUMENT AND AUTHORITY

PROPOSITION

THE OCCA'S REJECTION OF PETITIONER'S CLAIM THAT HE COMMITTED THE MURDERS IN INDIAN COUNTRY IS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

In his sole proposition of error, Petitioner claims that his crimes were committed in Indian Country, therefore, the State of Oklahoma does not have jurisdiction. The OCCA reasonably determined that the property on which Petitioner committed the murders was not Indian country. Accordingly, Petitioner is not entitled to a writ of habeas corpus.

A. Application of AEDPA

Petitioner first argues that AEDPA does not apply to a state court determination on the question of jurisdiction. The district court implicitly rejected Petitioner's argument and applied AEDPA's deferential standard to the OCCA's decision. Doc. 36 at 12-13. Petitioner's argument puts the proverbial cart before the horse and ignores that there is a general presumption *against* federal jurisdiction and he has the burden of proving that the federal court has jurisdiction over his crimes.[2] *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005). Therefore, Petitioner cannot presuppose that the OCCA does not have jurisdiction and thereby argue that the AEDPA does not apply.

Without expressly arguing that AEDPA is unconstitutional, at least in the context of jurisdiction, Petitioner asserts that "Congress, via AEDPA, cannot curtail the Court's full review of facts and law relevant to a federal court's jurisdiction." Opening Br. at 17. "While the authority of the federal courts comes from Article III of the Constitution, the existence of the lower federal courts . . . and the extent of [their] jurisdiction depend entirely on statutory grants from Congress, unlike the Supreme Court." *Evans v. Thompson*, 518 F.3d 1, 5-6 (1st Cir. 2008). Further, "[t]he

[2]In fact, in this case, the State assumed jurisdiction based on a prior ruling by a federal court that the land in question was *not* Indian country (12/13/2007 Tr. 16).

Constitution is not offended when lower federal courts are prevented from substituting for that of a state court their judgment as to reasonable application of Supreme Court precedent." *Id*. at 8. AEDPA does not curtail the ability of federal courts to fully review the facts and law pertaining to a case. *Id*. at 10. It merely restricts the ability of federal courts to grant relief. *Id*.; *see also Crater v. Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007) ("Section 2254(d)(1) does not restrict the federal courts' power to interpret the law, but only sets standards for what state court errors of law require federal habeas relief.").

In *Yellowbear v. Wyoming Atty. Gen.*, 636 F. Supp. 2d 1254, 1257 (D. Wyo. 2009), a habeas petitioner claimed that the state court did not have jurisdiction because his crime was committed on a reservation. The petitioner argued that the federal court should review his habeas petition *de novo*. *Id*. at 1258. The court disagreed, holding that AEDPA applied "because the underlying state case was adjudicated on the merits." *Id*. at 1258-1259; *see also Burgess v. Watters*, 467 F.3d 676, 681 (7th Cir. 2006) (reviewing under the AEDPA standard of review a claim that the state court lacked jurisdiction to conduct involuntary civil commitment proceedings against an Indian); *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007) (applying the AEDPA standard of review to the petitioner's claim that

Oklahoma lacked jurisdiction over the murder he committed in alleged Indian country).

On appeal, the petitioner in *Yellowbear* argued that AEDPA did not apply to his jurisdictional claim[3] because "[s]tate courts cannot rule on the extent of federal jurisdiction." *Yellowbear v. Attorney General of Wyoming*, No. 09-8069, 2012 WL 2053516, *2 (10th Cir. May 25, 2010) (unpublished). Although ultimately deciding that the petitioner would lose under either standard of review, this Court noted that state courts have concurrent jurisdiction to determine questions of federal law and the petitioner had offered no persuasive argument or authority to suggest that state courts cannot determine whether a federal statute divests them of jurisdiction. *Id.*

This Court has consistently held that AEDPA deference applies so long as the state court decided the petitioner's claim on its merits, rather than on procedural grounds. *Richie v. Workman*, 599 F.3d 1131, 1141-1142 (10th Cir. 2010); *Wilson v. Workman*, 577 F.3d 1284, 1291-1292 (10th Cir. 2009); *Matthews v. Workman*, 577 F.3d 1175, 1180 (10th Cir. 2009); *see also Richter*, 131 S. Ct. at 784-785 ("When a

[3]Petitioner also asserts that lack of jurisdiction is not a "claim." Opening Br. at 20. However, "*Black's Law Dictionary* defines a 'claim' as '[t]he aggregate of operative facts giving rise to a right enforceable by a court.'" *Wilson v. Workman*, 577 F.3d 1284, 1291 (10th Cir. 2009) (quoting *Black's Law Dictionary* (8th ed. 2004)). Petitioner's "claim" is that the land on which he committed the murders is within Indian country, thereby giving him the right to avoid prosecution in state court.

federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."). This Court's decision in *Park Lane Resources L.L.C. v. Department of Agriculture*, 378 F.3d 1132 (10th Cir. 2004), relied upon by Petitioner is inapposite. In *Park Lane*, this Court held that "jurisdictional *dismissals* are not 'on the merits.'" *Id*. at 1136 (emphasis added). The case had been dismissed because it was not ripe for review. *Id*. at 1135. Thus, the ruling in that case was a procedural, rather than substantive one, and *Park Lane* is not inconsistent with the cases holding that AEDPA applies to a state court's resolution of the substance of a party's claims.

The cases cited by Petitioner involving administrative agencies, bankruptcy judges, military courts and the like are also inapposite. "[S]tate judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings." *Williams v. Taylor*, 529 U.S. 420, 436-437 (2000). As set forth above, AEDPA does not prevent federal courts from inquiring into the propriety of the jurisdiction exercised by the state court. *Cf. United States v. Grimley*, 137 U.S. 147, 150 (1890) (holding that federal civil courts may inquire into the jurisdiction of a court-martial). AEDPA merely affords the state court's resolution of a question of jurisdiction the respect it is due.

In *Kalb v. Feuerstein*, 308 U.S. 433 (1940), the Supreme Court held that a federal bankruptcy statute deprived the state court of jurisdiction over the debtor's property. That case had nothing to do with whether a federal court reviewing a habeas petition owed deference to the state court's decision under AEDPA. Indeed, it was decided more than fifty years before AEDPA was enacted. Rather, *Kalb* stands for the unremarkable proposition that Congress has plenary power over bankruptcy proceedings. "The Supreme Court afforded no deference whatever to the state court judgment," Opening Br. at 19-20, because there was no federal statute requiring the federal courts to afford deference. Accordingly, *Kalb* is not on point.

The Supreme Court "ha[s] long recognized that the power to award the writ by any of the courts of the United States, must be given by written law, and [has] likewise recognized that judgments about the proper scope of the writ are normally for Congress to make." *Felker v. Turpin*, 518 U.S. 664, 651 (1996) (internal citations and quotation marks omitted). Congress has chosen to limit the ability of federal courts to grant writs of habeas corpus to state prisoners. Nothing in AEPDA excepts claims of lack of jurisdiction from those limitations. Petitioner has not cited a single case in which a federal court has applied *de novo* review to a state prisoner's claim, in a section 2254 petition, that the state court did not have jurisdiction over his

crime.[4] The OCCA decided the merits of Petitioner's claim. Thus, AEDPA restricts this Court's ability to grant relief.

B. The Surface Estate

According to the Indian Major Crimes Act, any Indian who murders another Indian within Indian country is subject to the exclusive jurisdiction of the United States. 18 U.S.C. § 1153. As relevant to this case, Indian country is defined as "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(c). There are two statutes that are relevant to the conveyance of allotted land. A statute enacted in 1945, 59 Stat. 313, requires the Secretary of the Interior to approve any conveyance of land that was purchased with restricted funds. A statute enacted in 1947, 61 Stat. 731, requires the county court in which the land is situated to approve any conveyance of land inherited by a person of one-half or more Indian blood when the land was restricted in the hands of the deceased.

It is undisputed that Petitioner and his victims were Indians. Accordingly, the issue to be resolved by this Court is whether any fairminded jurist could agree with

[4]Petitioner's argument also ignores that he had an opportunity for the Supreme Court to decide his jurisdictional challenge on direct review, without the limitations imposed by AEDPA. For whatever reason, Petitioner chose not to include his claim that Oklahoma does not have jurisdiction in his certiorari petition. A copy of the certiorari opinion is attached as Exhibit 1.

the OCCA's determination that the murders did not occur in Indian Country. *See Richter*, 131 S. Ct. at 786 (under AEDPA, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision.") (internal quotation marks omitted); *Bobby v. Dixon*, ___ U.S. ___, 132 S. Ct. 26, 27 (2011) (refusing to grant relief because "it is not clear that the [state court] erred at all, much less erred so transparently that *no* fairminded jurist could agree with that court's decision.") (emphasis added).

The land at issue is a 1.0123 acre tract that was part of a larger allotment that was given to Jimpsey Tiger. 1/2/2008 District Court's Findings of Fact and Conclusions of Law at 6 (Seminole County No. CF-04-59). An allotment is land that is either owned by the United States in trust for an Indian or is owned by an Indian subject to statutory restrictions on alienation. *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1133, n.4 (10th Cir. 2011). When Jimpsey Tiger died intestate in 1944, his land, including the tract at issue here, passed to his wife (Lena Tiger) and four children (George, Corena Mae, Mandy and Kizzie) in undivided 1/5 shares. *Magnan v. State*, 207 P.3d 397, 403 (Okla. Crim. App. 2009). Jimpsey Tiger was a full-blooded Seminole and his wife and children were all at least ½ Indian. *Id*. Accordingly, the interests of the heirs were restricted and, after August 4, 1947, could

not be conveyed without approval by the Seminole County Court. 61 Stat. 731, § 1 (1947); 47 Stat. 777, § 1 (1933).

In 1950, Jimpsey Tiger's widow, Lena Tiger, conveyed her interest in the land to Jimpsey Tiger's son, George Tiger. *Magnan*, 207 P.3d at 403. The deed was what is known as a Carney-Lacher deed, and recited that the land was purchased with funds held in trust by the United States and that it was restricted against alienation, subject to the approval of the Secretary of the Interior. 12/6/2006 Motion for Evidentiary Hearing to Determine Subject Matter Jurisdiction, Ex. N: Title Opinion of Attorney G. Dale Elsener, Ex. 1[5] (OCCA No. D-2005-683); *see Lewis v. Moore*, 199 F.2d 745, 750, n.2 (10th Cir. 1952) (recognizing that a deed containing a clause forbidding conveyances without the approval of the Secretary of the Interior is commonly known as a Carney-Lacher deed). The deed from Lena Tiger to George Tiger was approved by the Seminole County Court. Elsener Title Opinion, Ex. 1.

Later in 1950, George Tiger, Corena Mae Tiger and Mandy Tiger conveyed their interests in the property to Kizzie Tiger, who had married Redmond Wolf. Elsener Title Opinion, Ex. 2. This conveyance was approved by the Seminole County Court and the Department of the Interior, and was accomplished using a Carney-

[5]Exhibit N is Mr. Elsener's title opinion, which includes exhibits 1 through 7. Hereinafter, Exhibit N will be referred to as "Elsener Title Opinion."

Lacher deed. Elsener Title Opinion, Ex. 2. Accordingly, as of 1950, Kizzie Tiger owned the entire surface estate of the allotment (and 1/5th of the mineral rights acquired by inheritance), including the tract at issue in this case, in restricted status. *Magnan*, 207 P.3d at 403; Elsener Title Opinion, Ex. 2.

In 1970, Kizzie and Redmond Wolf conveyed the tract of land on which the murders would subsequently occur to the Seminole Housing Authority. Elsener Title Opinion, Ex. 3. The Seminole Housing Authority was to build a house on the land for the Wolfs. Elsener Title Opinion, Ex. 3. The effectiveness of the deed to the Seminole Housing Authority is the central issue in this case. The Seminole Housing Authority deeded the property back to Kizzie and Redmond Wolf in 1981. 12/6/2006 Motion for Evidentiary Hearing to Determine Subject Matter Jurisdiction, Ex. Q at Bate Stamp BLD0024 (OCCA No. D-2005-683). Kizzie Wolf died in 1991, at which time all of her interest in the surface estate and her 1/5th interest in the mineral rights of the land in question were divided between her husband and children. *Magnan*, 207 P.3d at 403. At the time of the murders, the aforementioned interests in the land remained in the possession of Kizzie Wolf's heirs and their successors, all of whom

are Indians of ½ or more blood.[6] *Id*.; 1/2/2008 District Court's Findings of Fact and Conclusions of Law at 8 (Seminole County No. CF-04-59).

Petitioner admits that the 1970 deed was effective as to Kizzie Wolf's 1/5th inherited interest in the property, but contends that the Secretary of the Interior or his designee did not approve the deed as to Kizzie Wolf's 4/5th purchased interest. Opening Br. at 26. In 1998, Carl King Woods, also an Indian, committed a murder at the exact same house at which these murders occurred. 1/2/2008 District Court's Findings of Fact and Conclusions of Law at 20 (Seminole County No. CF-04-59). Mr. Woods was prosecuted by the United States in the Eastern District of Oklahoma. 1/2/2008 District Court's Findings of Fact and Conclusions of Law at 20 (Seminole County No. CF-04-59). The federal district court declined jurisdiction, finding that the Bureau of the Interior agreed to the conveyance of Kizzie Wolf's entire interest in the property:

> on April 16th [1970] there was filed in the district court within and for Seminole County, State of Oklahoma an acknowledgement [sic] by M. Dean Swartz [sic], the United States trial attorney for the United States

[6]There have been several conveyance of the land before and after Kizzie Wolf's death. Elsener Title Opinion at 5. However, these conveyances are immaterial to this case. If Respondent is correct and the 1970 conveyance removed all restrictions from the surface estate of the land, the property has been unrestricted ever since. If Petitioner is correct and the 1970 conveyance only removed restrictions as to 1/5th of the property, the subsequent conveyances without proper approval were ineffective and the land remains restricted.

> Department of Interior, acknowledging written notice of [the conveyance]. There was also an acknowledgement [sic] 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 for simply a one-fifth interest. The transcript of the testimony reveals that M. Dean Swartz [sic] 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 [sic] of the signature and then it was asked if Mr. Swartz [sic], who was representing the B.I.A. and the Department of Interior, had any questions and there were no questions. The approval by the district court shows that it was an 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 20, 1970, conveying all of their right, title and interest to the property. The record further reflects that the appearance of M. Dean Swartz [sic], 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 [sic], 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 petitioner." The Court then goes on to approve the deed conveying, quote, "...all of their right, title and interest in and to the aboved [sic] 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 [of 1947] 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.

8/13/1998 Transcript of Hearing at 8-11, *United States v. Woods* (E.D. Okla. No. CR-98-26-B).[7] The Assistant United States Attorney then agreed with the Court that Mr. Storts was representing the Bureau of Indian Affairs and that the Eastern District did not have jurisdiction, and the Court so ruled. 8/13/1998 Transcript of Hearing at 11-12, *United States v. Woods* (E.D. Okla. No. CR-98-26-B).

The Supreme Court has held that "federal jurisdiction over the offenses covered by the Indian Major Crimes Act [18 U.S.C. § 1153] is 'exclusive' of state jurisdiction." *Negonsott v. Samuels*, 507 U.S. 99, 103-104 (1993). The OCCA

[7]This transcript was made part of the record in Petitioner's case on direct appeal.

recognized this fact. *Magnan*, 207 P.3d at 402. However, in determining whether a state court's decision is contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, "federal courts may no longer extract clearly established law from the general legal principles developed in factually distinct contexts." *House v. Hatch*, 527 F.3d 1010, 1017 (10th Cir. 2008). Rather,

> clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case sub judice. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

Id. at 1016.

Although the Supreme Court has had cases in which it decided whether a crime scene constituted Indian country for purposes of the Indian Major Crimes Act, Petitioner has not cited, and Respondent has not found, a Supreme Court case regarding what constitutes sufficient approval of a conveyance by the Secretary of the Interior. *See Negonsott*, 507 U.S. at 100-110 (holding that Congress had given the state of Kansas concurrent jurisdiction over crimes covered by the Indian Major Crimes Act); *Solem v. Bartlett*, 465 U.S. 463, 464-481 (1984) (analyzing whether a reservation had been diminished so as to permit the state to exercise jurisdiction over

a crime that would otherwise fall within the Indian Major Crimes Act); *United States v. John*, 437 U.S. 634, 635-654 (1978) (deciding whether land was within a reservation for purposes of jurisdiction under the Indian Major Crimes Act). "The absence of clearly established federal law is dispositive under § 2254(d)(1)." *House*, 527 F.3d at 1018. Accordingly, Petitioner has failed to establish that the OCCA's decision was contrary to or an unreasonable application of clearly established federal law.[8]

Should this Court disagree, and find that the Supreme Court's general pronouncements constitute clearly established federal law, Petitioner has failed to demonstrate that the OCCA's decision was unreasonable. First it must be noted that the standard set by AEDPA is even more difficult to meet when the rule established by the Supreme Court is a general one. *Richter*, 131 S. Ct. at 786. Further, Petitioner's task of establishing that the OCCA's decision was unreasonable is made

[8]In the standard of review section of his brief, Petitioner cites cases holding that relief may be granted where the state court has unreasonably refused to extend a legal principle to a new context. Opening Br. at 24. However, there must first be a clearly established legal principle. *House*, 527 F.3d at 1015-1019. As demonstrated above, there are no clearly established legal principles regarding the approval of the Secretary of the Interior of the removal of restrictions from Indian allotments.

much more onerous by the fact that there is a general presumption *against* federal jurisdiction. *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005).[9]

In this case, not only is there a general presumption against federal jurisdiction, in this case the Eastern District had already found, before the murders in this case, that it did not have jurisdiction over the land at issue here. The OCCA merely agreed with the federal court, holding that the 1970 proceeding in Seminole County District Court "was in effect a combined proceeding that satisfied the requirements of both

[9]Petitioner argues that the OCCA was required to resolve any ambiguities in favor of finding the land to be Indian country. Opening Br. at 41-43. All of Petitioner's cases set forth a canon of *statutory* construction, or construction of treaties between the United States government and Indian tribes. Petitioner has no authority for the proposition that a court must resolve any ambiguities in the process by which a single Indian has conveyed her property in favor of finding that the property was not properly conveyed.

the 1945 and 1947 Acts."[10] *Magnan*, 207 P.3d at 404. At this point, it should be reiterated that there is no clearly established federal law to the contrary.

Notice was given to the United States trial attorney and to the area director of the Bureau of Indian Affairs. In 1970, the area director was the person to whom the Secretary of the Interior had delegated his authority to approve the removal of restrictions from allotted land. (12/13/2007 Tr. 29). The petition and the deed were designed to convey *all* of Kizzie Wolf's interest in the land, as was made clear at the hearing. The deed did not indicate the property was restricted. Mr. Storts appeared not only on behalf of Ms. Wolf, who had her own attorney, but on behalf of the Department of the Interior. 8/13/1998 Transcript of Hearing at 8-11, *United States v. Woods* (E.D. Okla. No. CR-98-26-B). As was found by Judge Burrage, both the

[10]Petitioner briefly argues that a 1955 Act, rather than the 1945 Act, should control because it was enacted later in time. According to Petitioner's expert witnesses, the 1955 Act provides a means by which an Indian may apply to have restrictions removed from all of his or her property, rather than applying for approval of a particular conveyance (12/13/2007 Tr. 24-25, 36); *see* 69 Stat. 666(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 . . . ."). Accordingly, the 1955 Act does not apply in this case. In any event, Petitioner acknowledges that no matter which Act is relied upon, a conveyance of land purchased with restricted funds must be approved by the Secretary of the Interior. Opening Br. at 27-28. Nowhere in his brief does Petitioner argue that the different acts require different steps to be taken to secure Secretarial approval. The OCCA recognized that the conveyance of a portion of Kizzie Wolf's interest in the land had to be approved by the state district court and a portion had to be approved by the Secretary of the Interior. *Magnan*, 207 P.3d at 403-404. As such, it is immaterial which statute the OCCA cited.

Bureau of Indian Affairs and the Department of the Interior approved of and consented to the conveyance.[11] 8/13/1998 Transcript of Hearing at 8-11, *United States v. Woods* (E.D. Okla. No. CR-98-26-B). Accordingly, even if the regulations of the Department of the Interior were not followed to the letter, it is clear that the Department, through the area director and Mr. Storts, approved of the deed.

According to 25 C.F.R., § 1.2:

> Notwithstanding any limitations contained in the regulations of this chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 of the CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.

The burden is on Petitioner to prove that the state court did not have jurisdiction, i.e. that the land is Indian country. Petitioner has failed to prove that Mr. Storts' appearance at the hearing on the sale of the property, expressly on behalf of the Department of the Interior, was not intended to constitute Secretarial approval of the conveyance.

[11]Petitioner's assertion that Mr. Storts did not request the state district court to approve the deed is flatly contradicted by the state district court's order approving the deed. Petitioner has no evidence to rebut this factual finding. *See* 28 U.S.C. §2254(e)(1) (state court determinations of fact "shall be presumed correct" unless Petitioner rebuts the presumption by "clear and convincing evidence.").

Further strong evidence of the validity of the conveyance is the fact that the property is taxed by Seminole County. *See* Elsener Title Opinion at 1-2 (giving the legal description of the land); Doc. 27, Ex. 1 (property assessment for the land in question). Subsection (6)(c) of the 1947 Act provides that restricted land is tax-exempt, therefore the land could not be taxed if it was still restricted. Kizzie Wolf's heirs have apparently not attempted to avoid property taxes, as they could certainly do if they could prove the land was restricted. In addition, Kizzie Wolf's heirs have made conveyances of the property without seeking approval, further indicating they believe it to be unrestricted. *See* Elsener Title Opinion at 5. For the foregoing reasons, it cannot be said that the OCCA's holding constituted an extreme malfunction in Oklahoma's criminal justice system. *See Richter*, 131 S. Ct. at 786 (holding that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems").

Further, Petitioner is not entitled to relief assuming *arguendo* the 1970 conveyance was technically invalid. It is entirely appropriate for a court to rely on equitable considerations to determine whether property retains its Indian character; even the Supreme Court has done so. In *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 202 (2005), the Oneida Indian Nation claimed that they did not owe property taxes on land that was originally part of a reservation--but

which had been subject to state governance for two centuries--after the Nation reacquired title to the land. The Supreme Court relied on "standards of federal Indian law and federal equity practice"--i.e. the non-Indian character of the land and its inhabitants, the regulatory authority that had been exercised by the state and the Tribe's long delay in seeking judicial relief--to find that the land was not Indian.[12] *Id*. at 202-203. Further, the Supreme Court's cases interpreting whether land is still part of a reservation to determine jurisdiction under the Indian Major Crimes Act recognize pragmatic concerns such as the burden on state and local governments when a former reservation is occupied primarily by non-Indians with a few surviving pockets of Indian allotments. *See Solem*, 465 U.S. at 471; *see also International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310 (1945) (holding that due process permits the exercise of personal jurisdiction based on "contacts or ties with the state of the forum to make it *reasonable and just according to our traditional conception of fair play and substantial justice* to permit the state to [exercise jurisdiction].") (emphasis added).

Also, in cases not involving jurisdictional disputes, the Supreme Court has recognized the applicability of equitable considerations in disputes over land. For

[12]Thus, while a state's justifiable expectations may not always be determinative of jurisdiction, *see* Opening Br. at 45, they are certainly a relevant consideration.

example, in *Felix v. Patrick*, 145 U.S. 317, 325 (1892), the heirs of Sophia Felix, an Indian of one-half blood sought to reclaim land that was conveyed in spite of an express restriction on assignments. Someone acquired from Ms. Felix a blank power of attorney and quitclaim deed to the land. *Id*., at 325. Two years later, Patrick filled in his own name as grantee and used the power of attorney to acquire a warranty deed to the property. *Id*. The land remained in Patrick's hands for nearly twenty-seven years, during which time a large portion of it was platted, divided and sold. *Id*. at 325-326, 329. The Court held that the "real question" was whether equity entitled the heirs, who made no effort to assert their interest in the land for such an extended period of time, to possession of property that had been greatly improved in the meantime. *Id*. at 332-333.

In this case, the equities overwhelmingly favor the State's exercise of jurisdiction. As part of its analysis in *City of Sherrill*, the Supreme Court noted that "[a]s between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory." *City of Sherrill*, 544 U.S. at 218. As mentioned above, the land in this case is taxed by the State. When State law enforcement officials arrived at the scene of the murders, they were told by a local agent with the Bureau of Indian Affairs that the land was not Indian country. (12/13/2007 Tr. 16). As was discussed above, the Eastern District court has

disclaimed jurisdiction over the land. For the above reasons, the State of Oklahoma has reasonably exercised jurisdiction, expending time and resources in reliance on the acquiescence of the federal court and federal authorities.

Also of great significance is the fact that no individual with an actual interest in the land in question has ever challenged the 1970 conveyance, nor could they now. Oklahoma's fifteen (15) year statute of limitations applies to lawsuits concerning land belonging to restricted Indians of the Five Civilized Tribes. *Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F.2d 466, 472 (10th Cir. 1979). Admittedly, the Seminole Nation Housing Authority only possessed the land for eleven (11) years before it was conveyed back to Kizzie Wolf. However, this Court has held that the doctrine of laches also applies to land belonging to restricted Indians of the Five Civilized Tribes. *Id*.

In *Armstrong*, the plaintiff sought to quiet title to a tract of land that she had conveyed by warranty deed without the approval of the county court. *Id*. at 467. This Court agreed that at least part of the plaintiff's interest in the land was subject to the approval requirements of the 1947 Act. *Id*. at 468-469. This Court noted that the plaintiff was educated, had owned a business with her husband, had used part of the purchase price to build a new house, was represented by an attorney and was aware of the approval requirement. *Id*. at 469. Eight years after the deed was executed, the

original purchaser sold the land to a corporation that constructed apartments on the land. *Id*. at 470. The plaintiff was aware of the construction. *Id*. This Court held that "the delay of over eight years with knowledge of the facts and law and with reliance by defendants on the deed, the creation of substantial improvements, and the detriment by reason of the delay are more than sufficient to require the application of the doctrine [of laches]." *Id*. at 472.

Respondent recognizes that this is not an action by the heirs of Kizzie Wolf to quiet title to the land. However, if Kizzie Wolf had not reacquired the property, she (or her heirs or successors in interest to the property) would be prevented by the statute of limitations and/or the doctrine of laches from challenging the validity of the 1970 conveyance. Petitioner should not be heard to complain about a conveyance of land that he has no interest in, when those who do have an interest could not.

In addition to all of the above, it appears that Kizzie Wolf's heirs could obtain the Secretary of the Interior's retroactive approval of the deed. In *Lykins v. McGrath*, 184 U.S. 169, 169 (1902), the patentee of a tract of restricted land conveyed the land, and the conveyance was approved by the Secretary of the Interior almost a year after the deed. However, the patentee died after the conveyance and before the Secretary's approval. *Lykins*, 184 U.S. at 169. The patentee's heirs sued to eject the purchaser from the land. *Id*. The Supreme Court held that:

> It must therefore be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance.
>
> But the applicability of the doctrine of relation is denied on the ground that the interests of new parties, to wit, the plaintiffs, have sprung into being intermediate the execution of the conveyance and the approval of the Secretary. But one of the purposes of the doctrine of relation is to cut off such interests, and to prevent a just and equitable title from being interrupted by claims which have no foundation in equity. The doctrine of relation may be only a legal fiction, but it is resorted to with the view of accomplishing justice. What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same as any holder of a fee-simple title. The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein. When the Secretary approved the conveyance it was a determination that the purposes for which the restriction was imposed had been fully satisfied; that the consideration was ample; that the Indian grantor had received it, and that there were no unreasonable stipulations attending the transaction. All this being accomplished, justice requires that the conveyance should be upheld, and to that end the doctrine of relation attaches the approval to the conveyance and makes it operative as of the date of the latter.

Id. at 171-172. As the heirs had no equitable rights superior to those of the purchaser, the Court held that the title conveyed by the deed must be upheld. *Id*. at 173.

In *Wesley Wishkeno et al. v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 21, 22-23 (I.B.I.A. 1982), the Board of Indian Appeals held that:

> it is clear that the Secretary or his delegate has the authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if the Secretary is satisfied that the consideration for conveyance was adequate; the grantor received the full consideration bargained for; and there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance. Such approval will be applied retroactively to the date of the attempted conveyance and will extinguish third-party rights arising after the date of the conveyance, including rights acquired through inheritance or devise.

In this case, there is no dispute that the conveyance was adequate, Kizzie Wolf received the full consideration bargained for and there was no fraud, overreaching or other illegality in the procurement of the conveyance. Therefore, the purposes of the approval requirement were fully satisfied. Kizzie Wolf, her husband, her children and every other subsequent owner of the land have never challenged the conveyance and have acted as if the conveyance was valid by making several conveyances without seeking approval and by allowing the property to be taxed. *See* Elsener Title Opinion at 5.

It appears that retroactive approval of the deed could be easily obtained if any person with an interest in the land had a reason to seek it. Thus, even if there was a technical defect in the conveyance forty-two years ago, no one--including a federal court judge and the actual owners of the land--other than Petitioner and his expert witnesses consider the land to be Indian country.[13]

Respondent recognizes that most of the cases he relies upon involve civil actions regarding property interests. However, in this case, jurisdiction is dependent upon a determination of property interests, so it is appropriate to consider cases relevant to the determination of property rights. Further, as was discussed earlier, the question of jurisdiction is no less subject to such practical and equitable considerations than is the determination of property ownership.

The reality of this case is that Petitioner is the only person in the last forty years to challenge the validity of the 1970 conveyance. Petitioner has no interest in the property, but is merely trying to avoid criminal liability for murders he admits he committed by challenging a transfer of property that was fair in every respect and has been relied upon for forty years. The State of Oklahoma relied upon the opinion of local federal authorities (who in turn relied upon the federal court determination in

[13]There was one dissenting judge in the OCCA who believed the land to be restricted. *Magnan*, 207 P.3d at 414-415 (Chapel, J. dissenting).

1998) and proceeded at great expense to prosecute Petitioner. Accordingly, even if there was a technical defect in the Wolf's deed to the Seminole Housing Authority, the OCCA did not unreasonably determine that the state properly exercised jurisdiction in this case. Petitioner has failed to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-787. Therefore, Petitioner is not entitled to relief.

C. Resulting Trust

Petitioner also argues that the 1970 conveyance was, at most, a resulting trust, which did not extinguish the Indian title to the land. Petitioner did not raise this argument in state court. A state prisoner generally must exhaust his claims in state court before a federal court can consider a habeas corpus petition. *See* 28 U.S.C. § 2254(b)(1)(A); *Hawkins v. Mullin*, 291 F.3d 658, 668 (10th Cir. 2002). If Petitioner now attempted to return to state court and present his resulting trust claim, that claim would be barred. *See* Okla. Stat. tit. 22, § 1086 (2011); Okla. Stat. tit. 22, § 1086(C) (2011); *Fowler v. State*, 896 P.2d 566, 569 (Okla. Crim. App. 1995). This Court has repeatedly found Oklahoma's bar of claims not raised on direct appeal to be independent and adequate with respect to claims other than ineffective assistance of

counsel. *See Cannon v. Gibson*, 259 F.3d 1253, 1269 (10th Cir. 2001) (bar is adequate for *Brady* claims); *Hale v. Gibson*, 227 F.3d 1298, 1330 (10th Cir. 2000) (bar is independent and adequate for *Brady* claims); *Steele v. Young*, 11 F.3d 1518, 1521-22 (10th Cir. 1993) (bar of double jeopardy claims is independent and adequate).

Petitioner has not argued that he is entitled to have the procedural bar overlooked on the basis of cause and prejudice or a fundamental miscarriage of justice. *See Spears v. Mullin*, 343 F.3d 1215, 1255 (10th Cir. 2003) (recognizing exceptions to a procedural bar if the petitioner can establish cause and prejudice or that the court's refusal to review the claim will result in a fundamental miscarriage of justice). Accordingly, this Court should not consider this claim. *See Steele v. Young*, 11 F.3d 1518, 1524 (10th Cir. 1993) (when it is obvious that the state court would find the unexhausted claim to be procedurally barred, the federal court will forego the needless "judicial ping-pong" and hold the claim procedurally barred from habeas review).

Petitioner also failed to present this claim in the district court. As such, Petitioner has waived this claim. *See Toles v. Gibson*, 269 F.3d 1167, 1179 (10th Cir. 2001) (refusing to address a claim that was not adequately presented to the district court). Petitioner's claim that the 1970 conveyance did nothing more than create a

resulting trust is unexhausted and waived. Therefore, this claim must not be considered by this Court.

Alternatively, this claim is easily disposed of on the merits. *See Hooks v. Workman*, 689 F.3d 1148, 1179 (10th Cir. 2012) (exercising discretion to bypass issues of exhaustion and procedural bar and reject the claim on its merits). As there has been no prior determination of this claim in any court, this Court's review is *de novo*. *Douglas v. Workman*, 560 F.3d 1156, 1170-1171 (10th Cir. 2009).

Initially, it cannot be said with certainty that Oklahoma law would treat the conveyance as a resulting trust. Petitioner has not cited any Oklahoma cases holding that a sale of land to an Indian Housing Authority creates a resulting trust. Nor is there any evidence in the record that "Kizzie Tiger Wolf retained all benefits to the property while the house was constructed and paid for . . . ." *See* Opening Br. at 50.

Further, even if Oklahoma law would treat the sale as a resulting trust, Petitioner has cited no cases or statutes supporting his argument that an Indian allotment is not extinguished if the seller retains only an equitable interest in the property. In *Housing Authority of the Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990), a forcible entry and detainer case, the question before the court was whether land conveyed to the housing authority was a dependent Indian community. It is very significant that, although the land in question was a restricted allotment

before the conveyance to the housing authority, the Oklahoma Supreme Court did not even address whether the Indian title to the allotment had been extinguished. *See Id*. at 1099-1104. Rather, the court held that, by virtue of federal superintendence over the land, it was a dependent Indian community. *Id*. at 1100-1104. Thus, it appears that the parties and the court assumed the restricted allotment had been extinguished.

Further, Petitioner in this case is not claiming that the land on which he committed the murders is a dependent Indian community, and for good reason. There is no evidence in the record of federal superintendence over the land at the time of the murders. In fact, as noted above, the land was taxed by Seminole County and a federal district court had already disclaimed jurisdiction.

In *Ahboah v. Housing Authority of Kiowa Tribe of Indians*, 660 P.2d 625, 626 (Okla. 1983), also a forcible entry and detainer case, the appellants leased their trust allotments to the housing authority. After homes were constructed on the lands in question, the housing authority leased the land back to the appellants. *Id*. The Oklahoma Supreme Court first rejected the housing authority's argument that all tribal interest in the land was extinguished when the reservation was dissolved and divided into allotments. *Id*. at 627-629. In so holding, the court simply applied Supreme Court law to find that an allotment of land to the United States in trust for an Indian is Indian country, regardless of whether the land is within the boundaries

of a reservation. *Id*. at 628-629. The court also rejected the argument that a lease deprives land of its Indian character. *Id*. at 629.

In Petitioner's case, the land was not leased; it was sold in fee simple. As stated above, Petitioner has not proven that Oklahoma law would regard the sale as a resulting trust or that such an equitable interest transforms land into Indian country when the legal title to the land is held by a non-Indian. Further, as noted above, there is no evidence of federal superintendence over the land at the time of the murders. *Cf*. *Ahboah*, 660 P.2d at 629 (noting the extensive federal regulation of leased allotments).

Petitioner also relies upon *United States v. Jewett*, 438 F.2d 495 (8th Cir. 1971), in which the defendant was tried in federal court for a crime committed on a trust allotment. The issue of whether the allotment had been extinguished was *not* before the court. Rather, the claim made by the defendant was that the best evidence rule was violated by the testimony of a realty officer regarding records of transfers of the land. *Id*. at 497-498. As no one in *Jewett* challenged whether the land was Indian country, that case is inapposite.

Further, in *Jewett* it was undisputed that at the time of the crime, the legal title to the land was held by the United States in trust for the tribe. *Id*. at 497. By contrast, Petitioner's argument that the federal government was "effectively" the trustee of the

land on which he committed the murders is quite a stretch. *See* Opening Br. at 54. From 1970 to 1981, legal title to the land was in the hands of a state-created housing authority. *See* Okla. Stat. tit. 63, § 1057 (creating Indian housing authorities as agencies of the State). At the time of the murders, legal (and equitable) title to the land belonged to individuals. As set forth above, there is no evidence that the federal government had any involvement with the land at the time of the murders. Accordingly, *Jewett* does not entitle Petitioner to relief.

Finally, as a matter of policy, Petitioner's argument is untenable. Determining whether land is Indian country is complicated and often, as in this case, requires a title search. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 630 (1977) (Marshall, J., dissenting) (criticizing the majority's finding that a reservation has been diminished because such holding will require law enforcement to search tract books to determine jurisdiction); *Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1530 (10th Cir. 1997) (recognizing that a title search may be necessary to determine whether land constitutes Indian country). If law enforcement officials cannot rely upon documents in the chain of title, but instead have to research state and federal law, as well as the factual circumstances surrounding every prior conveyance of the land to determine whether there might be equitable interests in the land that remain in the hands of Indians, their task will be

all but impossible. As such intent appears nowhere on the face of section 1151, and Petitioner offers no relevant cases supporting it, this Court must deny relief.

D. The Mineral Interests

Petitioner also contends that the land is Indian country because 4/5ths of the mineral interests in the land remain restricted.[14] The OCCA applied its previous decision in *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005) to hold that the State's interests in the surface property "overwhelmed any fractional interest the Indian heir of the original allottee owned in the unseen mineral estate." *Magnan*, 207 P.3d at 404-406. The OCCA's decision in *Murphy* was affirmed on habeas review by the district court:

> the Major Crimes Act was not enacted to cover crimes occurring on subsurface unobservable mineral interests. Rather, the crimes enumerated in the Act are crimes which would occur on the surface of the land, i.e. murder, manslaughter, kidnapping, maiming, incest, etc. Congress simply was not, by enacting the Major Crimes Act, concerned with crimes which could occur on the mineral interest of an Indian allotment. Furthermore, Petitioner fails to identify any arguable nexus between the restricted Indian mineral interest and the crime of murder.

Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1291 (E.D. Okla. 2007).

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[14]Petitioner incorrectly states that Kizzie Wolf had a 4/5ths interest in the mineral rights. Opening Br. at 57. Respondent does not dispute that 4/5ths of the mineral rights remain restricted. However, Kizzie Wolf only acquired 1/5th of the mineral rights in the land in question. *See* Elsener Title Opinion at 3-4.

There is no clearly established federal law regarding what effect, if any, mineral interests have in determining whether land is considered Indian country. Petitioner relies upon *United States v. Ramsey*, 271 U.S. 467 (1926) for the proposition that "any restriction associated with an allotment means the allotment retains its Indian Country characteristic . . . ." Opening Br. at 57. *Ramsey*, which made no mention of mineral interests, merely holds that an allotment constitutes Indian country whether it is a trust allotment or a restricted allotment. *Ramsey*, 271 U.S. at 470-471. Consequently, *Ramsey* does not clearly establish that mineral interests are relevant to the determination of what constitutes Indian country.

Petitioner also cites *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 525 (1998). In *Venetie*, the issue was whether a particular piece of land was a dependent Indian community. The Court determined that a dependent Indian community exists when there is both a federal set-aside of land for Indian use and federal superintendence of the land. *Id*. at 530. The court below had recognized these two requirements and imposed a six factor balancing test to determine whether the requirements were met. *Id*. at 525-526. The Supreme Court rejected the balancing test because three of the factors were "extremely far removed from the requirements themselves." *Id*. at 531, n.7. The Court did not hold that it would be inappropriate to use a balancing test that applied factors that were relevant to the

ultimate determination. As there is no clearly established federal law regarding the relevance of mineral interests in determining whether land is Indian country or the test to be applied, Petitioner's claim must fail. *House*, 527 F.3d at 1018 ("The absence of clearly established federal law is dispositive under § 2254(d)(1).").

In fact, there are Supreme Court cases that strongly suggest that mineral interests are *not* relevant to the determination of whether land is Indian country. In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), the question was whether an Indian reservation had been dissolved, thus allowing the state court to exercise jurisdiction over crimes committed within the boundaries of the reservation. A 1906 Act provided for the reservation to be divided into allotments, with the surplus lands to be settled by non-Indians. *Id*. at 354-355. Significantly, the Act also "provided for the sale of mineral lands." *Id*. In spite of the partial settlement of the land by non-Indians, and the sale of mineral interests, the Supreme Court found the reservation was not dissolved. *Id*. at 355-357.

Also, in *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Supreme Court held that the tribe's right to regulate fishing by non-Indians on reservation land was terminated by the tribe's conveyance of land to the government. The fact that the tribe had retained all mineral interests in the land did not affect the Court's analysis. *See Bourland*, 508 U.S. at 684.

In *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1107 (9th Cir. 1981), the state was attempting to tax coal mined by non-Indians from a reservation. The tribe had ceded the surface estate of a large portion of the reservation to open it for settlement by non-Indians. *Id*. The mineral interest under the ceded strip was largely retained by the United States in trust for the benefit of the tribe. *Id*. The Ninth Circuit had previously held that the reservation was disestablished and the state had criminal jurisdiction over the land. *Little Light v. Crist*, 649 F.2d 682, 685 (9th Cir. 1981).

Although neither *Seymour* nor *Crist* directly answers the question presented here, they both strongly suggest that the status of the surface estate is all that matters in determining whether land is Indian country. Those cases also prove that there is no clearly established federal law holding land in which there is a restricted mineral interest constitutes Indian country. *See also Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) (finding disestablishment of a reservation in spite of the fact that the tribe retained all of the mineral rights).

Further, *Venetie* and *Ramsey* support the OCCA's decision. The Supreme Court's cases regarding Indian country, in all three of its forms, hold that what makes land Indian country is a federal set-aside and federal superintendence of the land. *See Venetie*, 522 U.S. at 527-530 (holding that 18 U.S.C. § 1151 codified the Court's

earlier cases holding that land is Indian country if there is a federal set-aside and federal superintendence); *Ramsey*, 271 U.S. at 471 (holding, in a case involving allotted land, that what is relevant is that the United States government possesses supervisory control over the land to ensure that it is used to benefit the Indian allottee); *United States v. Pelican*, 232 U.S. 442, 447 (1914) (holding that an allotment carved out of a former reservation is still Indian country because the land was "set apart for Indians under governmental care"). As the surface estate of the land in question in Petitioner's case is no longer restricted, it is the State, not the federal government, who has superintendence over the land. In fact, as mentioned above, the property is subject to local property taxes. The murders in this case were, of course, committed on the surface of the land. Federal superintendence over the minerals under the land has no bearing on the commission of crimes on the surface. Accordingly, the OCCA reasonably concluded that non-Indian land does not become Indian country merely because a portion of the mineral interests remain restricted.

Petitioner has offered no clearly established Supreme Court law that is contradicted by the OCCA's holding. Petitioner does claim that "title" must presumptively be determined by reference to Oklahoma law, and that Oklahoma law requires a finding that a land owner's reservation of a mineral interest does not extinguish his "Indian title." The question here is not how Oklahoma defines title,

but what Congress meant by the words "Indian titles." Further, Petitioner's argument that Oklahoma law recognizes a mineral interest as a separate estate in real property actually works against him. The fact that the mineral estate in the land is separate confirms that Kizzie Wolf's family members' reserved mineral interests do not affect the surface estate of the land.

Petitioner also argues that because Congress specifically excluded subsurface interests in land from the definition of "Indian Lands" in another statute, but did not specifically mention subsurface interests in section 1151, Congress must have intended mineral interests to constitute Indian country in section 1151. Opening Br. at 60. In a statute dealing with conservation of archaeological resources, Congress defined "Indian lands" as "lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual." 16 U.S.C. § 470bb(4). According to Petitioner, the fact that Congress excluded subsurface interests in that statute indicates it did not intend to exclude mineral interests from the definition of Indian country in 18 U.S.C. § 1151.

This argument also works against Petitioner. For one thing, section 470bb was enacted in 1979, much later than section 1151's enactment in 1948. Further,

archaeological resources are most likely to be found under the surface of the land. Therefore, Congress was tying the definition of Indian land to the nature of the right at issue, i.e. if Indians do not own the subsurface estate where the archaeological resources are found, then that subsurface estate is not considered Indian land. The same is true of Petitioner's reliance upon *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1254 (10th Cir. 2000), in which this Court held that, pursuant to the Safe Water Drinking Act and where Congress clearly intended to regulate water rights for the benefit of Indians regardless of whether ownership of the surface and mineral estates were split, the Environmental Protection Agency had jurisdiction to regulate drinking water if either the surface or mineral estate was owned by Indians. As argued above, criminal jurisdiction relates only to the surface of the land. Therefore, ownership of mineral interests has no bearing on criminal jurisdiction.

Petitioner also argues that Congress's intent is made clear by the fact that it used the plural "titles" in section 1151(c). The statute refers to "Indian allotments, the Indian titles to which have not been extinguished . . . ." 18 U.S.C. § 1151(c). The plural "titles" is used merely to be consistent with the plural "allotments." It is a very big stretch to infer that by virtue of being grammatically correct, Congress intended Indian interests in mineral rights to determine criminal jurisdiction.

Finally, Petitioner argues that this Court's decision in *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) supports his interpretation of section 1151. In *Watchman*, a mining company was challenging taxes imposed by the tribe on its operations at a mine that was outside the boundaries of the tribe's reservation. *Id*. at 1534. The area of the mine was approximately twenty to twenty-five square miles. *Id*. Forty-seven percent of the surface estate to the area encompassing the mine was owned by the United States in trust for individual Indian allottees.[15] *Id*. None of the subsurface coal rights were owned by the United States in trust or by individual Indians. *Id*. at 1534-1535.

The mining company argued that the tribe did not have jurisdiction because none of the subsurface rights were within Indian country. *Id*. at 1542. This Court disagreed, finding it "untenable" that jurisdiction would depend on commercial transactions between various parties and could change at any time.[16] *Id*. Rather, this Court held that "the mine is at least in part located in Indian country" because of the 47% of the surface estate that constituted an allotment. *Id*. at 1541. This Court did

[15]This 47% was comprised of 48 separate allotments. *Id*. at 1536.

[16]This language in *Watchman* overlooks the fact that, as in this case, a determination of whether land is Indian country will very often depend on transactions between various parties and jurisdiction can change as the result of a single transaction. This is just as true of the surface estate as it is of the mineral estate.

not hold that the entire surface estate of the area of the mine was Indian country. Nor did this Court hold that the subsurface estate was Indian country. Rather, "the 48 trust allotments comprising 47% of the surface area of the South McKinley Mine site are Indian country by definition under 18 U.S.C. § 1151(c)." *Id*. at 1542.

The ultimate question before this Court was whether the federal courts were required to abstain from deciding the jurisdictional question until after the tribal court had been given an opportunity to hear the issue. *Id*. at 1534. The abstention doctrine requires federal courts to abstain "when a suit sufficiently implicates Indian sovereignty or other important interests." *Id*. at 1542. This Court did not believe that the 47% of the surface estate that was held in trust was sufficient to require abstention. *Id*. Therefore, this Court remanded to the district court to determine whether the area including the mine was also a dependent Indian community. *Id*.

Watchman is inapplicable to this case. As stated above, this Court was not making an ultimate determination of jurisdiction. All this Court determined was that the 48 separate allotments that were held in trust by the government were Indian country. Therefore, there may be a sufficient tribal interest to require federal abstention. This Court did not hold that the entire area encompassing the mine was Indian country because 47% of the surface estate was restricted. Nor did this Court

hold that the subsurface estate was Indian country because part of the surface estate was.

Thus, *Watchman* is entirely consistent with Respondent's argument that for purposes of determining criminal jurisdiction, it is only the surface estate that matters. *Watchman* confirms that for purposes of determining Indian country, the surface and subsurface estates may be treated separately. *See Watchman*, 52 F.3d at 1542 (holding that the 47% *of the surface area* is Indian country). Petitioner committed the murders on the surface of the land, which is no longer Indian country. Accordingly, *Watchman* does not afford Petitioner relief.

There is no clearly established federal law requiring a court to consider mineral rights in determining whether land is Indian country. In fact, the Supreme Court's cases strongly suggest that mineral interests are irrelevant. Even if a portion of the mineral estate of the property at issue in this case is considered Indian country, the surface estate where the murders occurred is not Indian country. Accordingly, the OCCA's decision is not contrary to or an unreasonable application of clearly established federal law. Petitioner is not entitled to relief.

CONCLUSION

A federal judge determined that the land at issue was not Indian country. The State relied upon that finding. Petitioner, a person with no interest in the land, now

attempts to nullify all of the time and expense of his prosecution by posing a highly technical challenge to a forty-two year old conveyance that has been relied upon for all that time. Petitioner has simply not met his burden of overcoming the presumption against federal jurisdiction. As such, the OCCA's decision was not erroneous, much less unreasonable. For the reasons set forth herein, Respondent respectfully requests this Court affirm the district court's denial of habeas relief as to all of Petitioner's claims.

STATEMENT REGARDING ORAL ARGUMENT

Respondent respectfully does not request oral argument in this case. Counsel believes the issues in this death penalty case have been sufficiently presented in the briefs such that this Court would not be materially aided by the presentation of oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief is proportionally spaced and contains 12,798 words.

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

S/ JENNIFER L. CRABB

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of Respondent/Appellee was electronically filed with the Clerk of this Court on October 12, 2012, and for electronic transmission to the following:

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