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

1. TAYLEUR RAYE PICKUP, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 20-CV-346-JED-FHM
	)	
1. THE DISTRICT COURT OF NOWATA COUNTY, OKLAHOMA, *et al.*,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS APRIL FRAUENBERGER, JILL SPITZER, CAROLINE WEAVER, DEBORAH MASON AND LAURA WADE'S MOTION TO DISMISS AND BRIEF IN SUPPORT

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DEFENDANTS FRAUENBERGER, SPITZER, WEAVER, MASON AND WADE'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendants April Frauenberger, in her official capacity, Court Clerk of Nowata County, Oklahoma; Jill Spitzer, in her official capacity, Court Clerk of Washington County, Oklahoma; Caroline Weaver, in her official capacity, Court Clerk of Delaware County, Oklahoma; Deborah Mason, in her official capacity, Court Clerk of Craig County, Oklahoma; and Laura Wade, in her official capacity, Court Clerk of Mayes County, Oklahoma (collectively referred to herein as "Defendants"), submit this Motion to Dismiss Plaintiffs' claims against them as set forth in the Plaintiffs' Complaint (Dkt. 2) pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(1)

Motions to dismiss under Rule 12(b)(1) generally take one of two forms – 1) an attack on the sufficiency of the allegations to make out subject matter jurisdiction on the face of the complaint; or 2) an attack on the underlying facts upon which subject matter jurisdiction is allegedly predicated. S*ee Holt v. U.S.*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id*. at 1002.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court lacking jurisdiction "cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 906 (10th Cir. 1974). Since federal courts are courts of limited jurisdiction, there is a presumption against federal jurisdiction. *Id*.

A federal district court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Federal–question jurisdiction exists when "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13, 57 S.Ct. 96, 81 L.Ed. 70 (1936)).

In addition to the requirement that the federal question appear on the complaint's face, a "plaintiff's cause of action must either be: (i) created by federal law; or (ii) if it is a state-created cause of action, 'its resolution must necessarily turn on a substantial question of federal law.'" *Nicodemus v. Union Pac. Corp.*, 318 F.3d 1231, 1235 (10th Cir. 2003) (quoting *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. at 808, 106 S.Ct. 3229). As for the second method, beyond the requirement of a "substantial" federal-law question at the case's heart, the federal question must also be "actually disputed," and its resolution must be necessary to the case's resolution. *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

Furthermore, the exercise of federal-question jurisdiction must also be "consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Id*. at 313. In particular, the court must determine whether recognition of federal-question jurisdiction will federalize a "garden variety" state law claim that will overwhelm the judiciary with cases traditionally heard in state courts. *Id*. at 318-19

(explaining that "there must always be an assessment of any disruptive portent in exercising federal jurisdiction" in accepting "garden variety" state law claims). The Supreme Court has underscored that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986). Indeed, the Supreme Court has "forcefully reiterated" that district courts must exercise "prudence and restraint" when determining whether a state cause of action presents a federal question, because "determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Id*. at 810.

Fed. R. Civ. P. 12(b)(6)

In considering a 12(b)(6) motion, the truth of a plaintiff's *well-pled* factual allegations must be viewed in the light most favorable to the plaintiff. *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005). In this regard, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957)). Furthermore, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 127 S.Ct. at 1965. The complaint must possess enough heft to "show that the pleader is entitled to relief." *Id*. at 1966. It is the plaintiff's duty to furnish factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief. *Id*.

The court need not credit bald assertions or legal conclusions. *Anspach v. Philadelphia Department of Public Health*, 503 F.3d 256, 260 (3d Cir. 2007) (citation omitted). "Legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Id*. (citation omitted). A "[p]laintiff's obligation to provide the 'grounds' of their entitlement to relief requires more than labels and conclusions or a formulaic recitation of the elements of the

cause of action." *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Twombly* 127 S.Ct. at 1964-65).

"The Court must ask whether there is plausibility in the complaint when addressing the issue of sufficient factual pleadings to overcome a FRCP 12(b)(6) Motion to Dismiss." *Hall v. Witteman*, 584 F.3d 859, 863 (10th Cir. 2009) (citing *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009)). The *Hall* Court also found that the complaint does not need detailed factual allegations, but the factual allegations must be enough to raise a right to relief above the speculative level. *Id.* The Court further held that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hall* at 863, *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In *Iqbal*, the Court stressed that it is not enough for the plaintiff to plead facts "merely consistent" with the defendant's liability, and that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id*.

A plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (citing *Twombly*, 550 U.S. at 570). Where the complaint pleads only facts that do not permit the court to infer more than the mere possibility of misconduct, such complaint has not shown that the plaintiff is entitled to relief. *Id*. *See also* Fed. R. Civ. P. 8(a)(2). Also, where a complaint contains no more than mere legal conclusions, such conclusions are not entitled to a presumption of truth. *Id.* at 679. Rather, a plaintiff must allege enough factual matter that, taken as true, suggest the legal conclusion plaintiff asserts. *Id.* at 680 (citing *Twombly*, 550 U.S. at 570 (because the well-pleaded fact of conduct, accepted as true, did not plausibly suggest an unlawful agreement, the complaint must be dismissed)). While the pleading standard of Fed. R. Civ. P. 8 does not require detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678.

I. DEFENDANTS ARE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

In *Speight v. Presley*, 203 P.3d 173 (Okla. 2008), the Oklahoma Supreme Court held that a county district court clerk is "both a county officer and an officer or 'arm' of the court." *Id.* at 177 (citing *Petuskey v. Cannon*, 742 P.2d 1117 (Okla. 1987)). The court further very clearly spelled out the duties of the district court clerks:

> Court clerks exercise powers and perform duties imposed by statutes and common law. **The district court clerk is 'judicial personnel' and is an arm of the court whose duties are ministerial**, except for those discretionary duties provided by statute. In the performance of clerk's ministerial functions, the court clerk is subject to the control of the Supreme Court and the supervisory control that it has passed down to the Administrative District Judge in the clerk's administrative district…Thus, where the court clerk is performing duties essential to the court, the Board of County Commissioners does not stand in agency relationship with Clerk and is not liable for negligence of the Clerk.

Id. (emphasis added, internal citations omitted). This is echoed by statute. Oklahoma law states that "actions filed in the district court, including criminal actions, shall be assigned to various dockets by the clerk of the court *pursuant to the direction and supervision of the presiding judge of the district*. Okla. Stat. tit. 20, § 91.2(A). The presiding judge is tasked with having supervisory authority over the work of the courts, as well as overall district court personnel. Okla. Stat. tit. 20, Appendix 2, Rules 1 and 2. Moreover, Okla. Stat. tit. 19, § 221 specifies that the district court clerk shall perform all duties of district courts, county courts, and the superior court. While district court clerks are elected county officials per Art. 17, § 2 of the Oklahoma Constitution, because of the nature of their job duties, they act as arms of the state with regard to their ministerial court duties.

In *North Side State Bank v. Board of County Com'rs of Tulsa County*, 894 P.2d 1046 (Okla. 1994), the Board of County Commissioners of Tulsa County was sued as a result of a check drawn on court funds by the court clerk. *Id.* at 1047. The Oklahoma Supreme Court determined that a court clerk is "an independently elected county executive heading a service agency for the district court." *Id.* at 1051. As a result, "the court clerk and his deputies are subject to *summary control* by

the judges." *Id.* (emphasis in original) (citing *Petuskey, supra*, at 1125; *Barrett v. Barrett*, P.2d 88, 90-91 (Okla. 1952); *Hirsh v. Twyford*, 139 P.313, 315 (1913); *Matney v. King*, 93 P. 737, 745 (1908)). The *North Side* court further specifically held that a court clerk is acting as an arm of the state when acting as a bursar for the district court:

> Moreover, the court clerk's functions *qua* the court's *bursar* are not county functions, but rather those of the *state*. The clerk's office collects court costs, filing and license fees, fines and forfeitures, as well as sums deposited by litigants in condemnation cases, interpleader suits, and matrimonial cases for support and alimony. *All* this money is deposited in various accounts maintained for the court clerk by the treasurer *as an agent of the state*. Although the funds drawn upon for the voucher in question were not *stricto sensu* "court funds" because they represented money deposited for *disbursement to the rightful recipient*, the court clerk's function of receiving and disbursing funds of *every* character is inextricably connected, not with *county government*, but with that official's duty as state court's bursar. In managing funds not derived from county appropriations the court clerk acts as a functionary of the *state district court* rather than *as a county official*. Only when handling appropriated county funds does the court clerk function as an elected executive county official.

Id. at 1051-52 (footnotes omitted, emphasis in original).

Here, Plaintiffs' claims against the Defendants are premised upon their alleged collection of judicially imposed fines, fees, and costs resulting from criminal convictions. (Dkt. 2, ¶¶ 10, 11, 13, 15, 16, 91-95). However, as the *North Side* case makes clear, the Defendants were acting as arms of the state with regard to such activity and are, thus, entitled to Eleventh Amendment immunity.

While "state officials are persons," a suit against an official "is no different from a suit against the state itself." *Will v. Mich. Dep't of State Poli*ce, 491 U.S. 58, 71 (1989) (citations omitted). With the state as the real party in interest when an official has been subjected to suit, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), a judgment in a § 1983 suit against an official "in his official capacity" imposes liability against the entity that he represents, *Brandon v. Holt*, 469 U.S. 464, 472 (1985). Thus, the Defendant Court Clerks are not "persons" subject to suit under 42

U.S.C. § 1983 and there is no basis in the Complaint which would entitle Plaintiffs to monetary relief against them under federal law. *See Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (the Eleventh Amendment bar suits against state agencies "regardless of the nature of the relief sought."). Accordingly, Plaintiffs' claims against the Defendants should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

II. PLAINTIFFS' PUTATIVE 42 U.S.C. § 1983 CLAIMS AGAINST THE DEFENDANTS SHOULD BE DISMISSED

A. Plaintiffs Have Failed to Allege Sufficient Factual Allegations to State a 42 U.S.C. § 1983 Claim Against the Defendants Which is Plausible on its Face

Plaintiffs contend that the Defendants have denied them of their constitutional right to due process "by subjecting them to trial and punishment before a Court that had no subject matter jurisdiction." However, the Complaint is devoid of any non-conclusory factual allegations indicating that the Defendants subjected them to trial and punishment. Rather, Plaintiffs' own allegations indicate that it was the Defendant District Attorneys who prosecuted them. (*See* Dkt. 2, ¶¶ 9, 12, 14, 18). Under Oklahoma law, a district attorney acts as an arm of the state, not of the county, with regard to the prosecution of criminal cases. *See Erickson v. Pawnee County Bd. of County Comm'r*s, 263 F.3d 1151, 1153-54 (10th Cir. 2001). Plaintiffs also allege that "[e]ach of the political subdivisions listed above as Defendants have executed a policy of arresting, investigating, issuing citations to…Tribal members within the boundaries of the Cherokee Reservation." (Dkt. 2, ¶ 91). However, this is a wholly conclusory allegation which is not entitled to a presumption of truthfulness. *Iqbal*, 556 U.S. at 679. The Complaint is completely devoid of any supporting allegation of fact indicating that the Defendants were involved in arresting, investigating, or issuing citations to Tribal members within the boundaries of the purported Cherokee Reservation, and Plaintiffs do not name any county officials other than the Court Clerks as defendants herein.

Plaintiffs further allege that "these political subdivisions have collected monies for fines and costs from Tribal members within the borders of the Cherokee Reservation in the form of fees and costs" and that "the political subdivisions have continued to execute the policy of fining and assessing costs and fees against tribal members for misdemeanor crimes and traffic infractions committed on the Cherokee Reservation." (Dkt. 2, ¶¶ 93, 95). However, the Defendants do not have the legal authority or ability to assess criminal penalties, including fees, and costs on a criminal defendant. Rather, that authority belongs to, and is exercised by, the State of Oklahoma acting through the sentencing district courts. *See* Okla. Stat. tit. 22, § 991a. In that regard, the assessment of fines, fees, and costs in a criminal proceeding "is exclusively an adjudicative function of a judge, and not the court clerk" and the "district court clerk has no authority to act in a judicial capacity and demand payment of fines, fees and costs, until there has been an adjudication that the person must pay." *Petuskey v. Cannon*, 742 P.2d 1117, 1122 (Okla. 1987). Furthermore, as discussed above, in collecting judicially imposed fines, fees, and costs, the Defendants act as arms of the state, not as county officials, and are thus clothed in Eleventh Amendment immunity with regard to such conduct.

Accordingly, Plaintiffs have failed to state a § 1983 claim against the Defendants which is plausible on its face and said claims against the Defendants should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

B. Plaintiffs Have Failed to State Any Claim Relating to Nowata, Washington, Delaware, or Craig Counties

Moreover, the Complaint is entirely devoid of any non-conclusory allegation that any of the named Plaintiffs were convicted or were subjected to the assessment and collection of fines, fees, or costs in Nowata, Washington, Delaware, or Craig Counties. Rather, Plaintiffs Pickup, Chanda Butcher, Lindsey Butcher, and Leach only alleged that such actions against them

occurring in Mayes County. (Dkt. 2, ¶¶ 59-64). Consequently, they have failed to state any claim against Defendants Frauenberger, Spitzer, Weaver, or Mason at all, much less one which is a plausible on its face. Additionally, Plaintiff Sixkiller does not allege that she was subjected to such actions in any of the counties. (Dkt. 2, ¶ 65).

Accordingly, Plaintiffs have failed to state a § 1983 claim against the Defendants which is plausible on its face and said claims against the Defendants should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

C. Plaintiffs' Putative 42 U.S.C. § 1983 Claims are Barred by the *Rooker-Feldman* and *Heck* Doctrines

The *Rooker-Feldman* doctrine recognizes that federal district courts generally lack subject matter jurisdiction to review state court judgments. *Bolden v. City of Topeka, Kan.,* 441 F.3d 1129, 1139 (10th Cir. 2006) (The "*Rooker–Feldman* doctrine prohibits federal suits that amount to appeals of state-court judgments.") The doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by "state-court losers" challenging "state-court judgments rendered before the district court proceedings commenced." *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (citing *Exxon Mobil Corp v. Saudi Basic Indus. Corp*., 544 U.S. 280, 284 (2005)). The state court loser is "barred from seeking what in substance would be appellate review of the state court judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). Review of the state court judgment must proceed to the state's highest court and then to the United States Supreme Court pursuant to 28 U.S.C. § 1257. *See Facio v. Jones,* 929 F.2d 541, 543 (10th Cir. 1991).

The *Rooker–Feldman* doctrine bars not only cases seeking direct review of state court judgments; it also bars cases that are "inextricably intertwined" with a prior state court judgment.

Mann v. Boatright, 477 F.3d 1140, 1147 (10th Cir. 2007). A claim is inextricably intertwined "if the relief requested in the federal action would effectively reverse the state court decision or void its ruling." *B.J.G. v. Rockwell Automation, Inc.,* No. 11-CV-262-GKF-TLW, 2012 WL 28077 at *2 (N.D. Okla. Jan. 5, 2012) (unpub) (citing *Charenko v. City of Stillwater,* 47 F.3d 981, 983 (8th Cir. 1995)).[1] Furthermore, the *Rooker–Feldman* doctrine "precludes not only review of adjudications of the state's highest court, but also the decisions of its lower courts." *Jordahl v. Democratic Party of Va*., 122 F.3d 192, 199 (4th Cir. 1997).

In this case, Plaintiffs allege that "the actions of these Defendants have violated the due process rights of the Tribal members by subjecting them to trial and punishment before a Court that had no subject matter jurisdiction." (Dkt. 2, ¶ 92). As such, Plaintiffs' § 1983 claims are inextricably intertwined with their state court convictions because granting Plaintiffs relief under § 1983 would validate the alleged lack of jurisdiction and, thus, effectively reverse or void those convictions. Consequently, this Court lacks subject matter jurisdiction over Plaintiffs' § 1983 claims and said claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Likewise, Plaintiffs' putative § 1983 claims in this regard are also barred by the *Heck* doctrine. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the U.S. Supreme Court ruled that "to recover damages for...harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a party raising a § 1983 claim "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id*. at 486-87.

> A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus…the district court must consider whether a judgment in favor of the plaintiff would necessarily imply

[1] A copy of this unpublished Opinion and Order is attached as Exhibit 1.

> the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id. at 487 (emphasis in original).

Here, a judgment in favor of Plaintiffs on their § 1983 claims would necessarily imply the invalidity of their convictions as the entire basis for those claims is that the convictions were allegedly obtained in the absence of jurisdiction. Furthermore, the Complaint is entirely devoid of any allegation that any of the Plaintiffs' state court convictions have been overturned on appeal, expunged, vacated, or otherwise called into question by issuance of a habeas writ. Accordingly, Plaintiffs have failed to state a § 1983 claim against the Defendants which is a plausible on its face, and said claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

D. Defendants are Entitled to Quasi-Judicial Immunity

The Tenth Circuit has held that "[i]mmunity which derives from judicial immunity may extend to persons other than a judge where performance of judicial acts or activity as an official aid of the judge is involved." *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir. 2000) (quoting *Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981), internal quotation marks omitted). This immunity extends to "non-judicial officers where 'their duties had an integral relationship to the judicial process'" *Id*. (quoting *Eades v. Sterlinkse*, 810 F.2d 723, 726 (7th Cir. 1987)). "[W]hen a court clerk assists a court or a judge in the discharge of judicial functions, the clerk is considered the functional equivalent of the judge and enjoys derivative immunity." *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1247 (10th Cir. 2007). "To hold otherwise would have a chilling effect on the judicial duties and actions of the clerk, who would be readily subject to suit in the course of

performing his or her duties…." *Coleman v. Farnsworth*, 90 Fed. Appx. 313, 317 (10th Cir. 2004) (unpub).[2]

Here, Plaintiffs' putative § 1983 claims against the Defendants are premised upon their alleged collection of judicially imposed fines, fees, and costs resulting from criminal convictions. (Dkt. 2, ¶¶ 10, 11, 13, 15, 16, 91-95). However, there can be no doubt that the collection of judicially imposed fines, fees, and costs is either a judicial act or an act performed in assistance of a judge which has an integral relationship to the judicial process. Accordingly, the Defendants are entitled to quasi-judicial immunity and Plaintiffs' claims against them should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

III. PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF SHOULD BE DISMISSED

The Supreme Court has recognized an exception to the Eleventh Amendment when a plaintiff seeks prospective enforcement of his or her federal rights. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). However, this exception "may not be used to obtain a declaration that a state Officer has violated a plaintiff's federal rights in the past." *Buchwald v. Univ. of New Mexico School of Med.,* 159 F.3d 487, 495 (10th Cir. 1998) (citations omitted). Declaratory relief is not meant to proclaim liability for a past act, but to define the legal rights and obligations of the parties in anticipation of some future conduct. *See Utah Animal Rights Coalition v. Salt Lake City Corp*., 371 F.3d 1248, 1266 (10th Cir. 2004) (McConnell, J., *concurring*) ("[A] declaratory judgment action involving past conduct that will not recur is not justiciable."); *Francis E. Heydt Co. v. United States*, 948 F.2d 672, 676-77 (10th Cir. 1991). The court "treat[s] declaratory relief as retrospective 'to the extent that it is intertwined with a claim for monetary damages that requires us to declare whether a past constitutional violation occurred.'" *Winsness v. Yocom*, 433 F.3d 727,

[2] A copy of this unpublished Opinion is attached as Exhibit 2.

735 (10th Cir. 2006) (citation omitted)). The Eleventh Amendment bars retrospective claims for declaratory relief. *See Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1232 (10th Cir. 2004) ("As the district court correctly held, the claims for back pay, monetary damages, and retrospective declaratory relief are barred by the Eleventh Amendment.") Importantly, "[c]ourts indulge every reasonable presumption against waiver" of immunity. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999).

Here, Plaintiffs seek only relief which is retrospective in nature – requesting the Court to Declare the Defendants' past actions were unlawful and without jurisdiction. Consequently, their claims for declaratory judgment is barred by the Eleventh Amendment. *See Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir. 1995) ("The Eleventh Amendment does not permit judgments against state officers declaring that they violated federal law in the past.") (citations and quotations omitted).

Moreover, even if the Court should determine that Plaintiffs' claim for declaratory relief is not subject to dismissal, it should nevertheless abstain from considering that claim for the reasons set forth in the Defendant District Attorneys' Motion to Dismiss (see Dkt. 24, pp. 26-28).

IV. PLAINTIFFS' STATE LAW CLAIMS AGAINST THE DEFENDANTS SHOULD BE DISMISSED

A. Plaintiffs Have Failed to Allege Sufficient Factual Allegations to State a Claim for Money Had and Received Against the Defendants Which is Plausible on its Face

A claim for money had and received may be brought against the actual "receiver and holder of the money." *Duncan v. Anderson*, 1926 OK 924, ¶¶ 2-3, 250 P. 1018, 1019. That is, it is to be brought against the party who actually holds the money. In that regard, Plaintiffs allege in conclusory manner that "[t]he State of Oklahoma and its political subdivisions are currently in possession of monies that were tendered pursuant to void orders or that were otherwise obtained

without jurisdiction." (Dkt. 2, ¶ 87). However, under Oklahoma law, the Defendant Court Clerks do not actually hold any fines, fees, or costs which are assessed as a result of a criminal conviction. Rather, those monies are deposited in a fund in the county treasury designated "The Court Fund" which is maintained and handled by the County Treasurer acting as an *agent of the state*. *See* Okla. Stat. tit. 20, § 1301.

Moreover, Plaintiffs fail to allege any amount due. Instead, they simply rely on conclusory, general allegations, such as that they "have each been made to pay fines and costs." (Dkt. 2, ¶ 82). Plaintiffs' failure to plead a sum certain is fatal to their claims for money had and received. *See Continental Oil v. Rapp*, 301 P.2d 198, 199 (Okla. 1956) (action for money had and received lies "to recover **a sum certain**, whenever one has the money of another which he in equity and good conscience has no right to retain") (emphasis added); *Lampton Welding Supply Co., Inc. v. Stobaugh*, No. 11-CV-319-TCK-TLW, 2012 WL 5878875, at * 1 (N.D. Okla. Nov. 21, 2012) (unpub) (rejecting plaintiff's theory of "money had and received" because plaintiff had not alleged any sum certain).[3] *See also Ehlers v. Vinal*, 382 F.2d 58, 66 (8th Cir. 1967) (noting that in an action for money had and received a plaintiff must "show the exact amount the government is wrongfully holding); *New England Mut. Life Ins. Co. v. Grant*, 56 F.Supp. 192, 193 (D.Mass. 1944) ("if the exact amount due is not definitely known … the law is well established that an action will not lie for money had and received").[4]

[3] A copy of this unpublished Opinion and Order is attached as Exhibit 3.

[4] Moreover, as discussed in Proposition II(B) above, Plaintiffs Pickup, Chanda Butcher, Lindsey Butcher, and Leach do not even allege that they were convicted or were subjected to the assessment and collection of fines, fees, or costs in Nowata, Washington, Delaware, or Craig Counties (Dkt. 2, ¶¶ 59-64) and Plaintiff Sixkiller does not allege that she was subjected to such actions in any of the counties. (Dkt. 2, ¶ 65).

Consequently, Plaintiffs have failed to allege sufficient facts to state a claim money had and received against the Defendants and said claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

B. Plaintiffs' Claims are an Impermissible Collateral Attack on Their Convictions

Plaintiffs' suit is, in reality, an attempt to collaterally attack their underlying criminal convictions. Specifically, Plaintiffs seek disgorgement of fines, fees, and costs they allege they paid as a consequence of having been found guilty of various criminal charges. Yet, Plaintiffs did not seek any type of state court redress before filing this lawsuit. They did not appeal and they did not request any sort of post-conviction relief under the Oklahoma Uniform Post-Conviction Procedure Act ("OUPCPA"), Okla. Stat. tit. 22, §§ 1080, *et seq*.[5] Furthermore, Plaintiffs do not do not allege that they were in any way prevented from seeking appellate or post-conviction relief. However, their failure to do so is fatal to their claims.

The OUPCPA provides a means for challenging a state court conviction or sentence that occurred in violation of the United States Constitution or even where the court was without jurisdiction. Okla. Stat. tit. 22, § 1080. The OUPCPA "encompasses and replaces all common law and statutory methods of challenging a conviction or sentence." *Id*. It creates a "post-conviction remedy that supplant[s] the common-law writs and redefined what post-conviction claims may be made." *Dutton v. City of Midwest City,* 353 P.3d 532, 541 (Okla. 2015). Such "[a] proceeding is commenced by filing a verified 'application for post-conviction relief' with …the court imposing judgment." *Id*. at § 1081. Furthermore, The Oklahoma Court of Criminal Appeals has "exclusive appellate jurisdiction" in all criminal cases which includes review of applications for post-conviction relief. Okla. Stat. tit. 20, § 40; Okla. Stat. tit. 20, § 1087.

[5] Furthermore, Plaintiffs do not allege that they have the requisite notice and payed their fines, fees, and costs under protest pursuant to Oklahoma's fee protest statute. Okla. Stat. tit. 62, § 206.

Due to Plaintiffs' failure to seek any appellate or post-conviction relief, their claims are barred by the doctrines of *res judicata*, or claims preclusion, and collateral estoppel, or issue preclusion. "[O]nce a court has decided an issue of fact or law necessary to its judgment, the same parties or their privies may not relitigate that issue in a suit brought upon a different claim." *Oklahoma Dep't of Pub. Safety v. McCrady*, 176 P.3d 1194, 1199 (Okla. 2007), *as corrected on denial of reh'g* (Sept. 17, 2007). Issue preclusion operates as a "bar from relitigation [of] both correct and erroneous resolutions of jurisdictional and nonjurisdictional challenges." *Id.*

Here, Plaintiffs are asking this court to find their criminal convictions invalid based on a lack of jurisdiction. Because the jurisdiction issue would have previously been necessarily decided in the particular criminal cases, previously Plaintiffs are precluded from collaterally attacking the judgments here. Consequently, Plaintiffs' claims for money had and received against the Defendants should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

C. Plaintiffs' Claims are Barred by the Oklahoma Governmental Tort Claims Act

The Oklahoma Governmental Tort Claims ("OGTCA"), Okla. Stat. tit. 51, § 151, *et seq.*, is the exclusive remedy by which an injured plaintiff may recover against an Oklahoma governmental entity in tort. *Fuller v. Odom*, 741 P.2d 449, 451 (Okla. 1987); *see also* Okla. Stat. tit. 51, § 153(B). In the OGTCA, Okla. Stat. tit. 51, § 152.1(A), the legislature adopted and reaffirmed sovereign immunity for the State, its political subdivisions, and all employees acting within the scope of their employment. This immunity is subject to a limited waiver to the extent and the manner specifically provided for by the provisions of the other sections of the OGTCA. Okla. Stat. tit. 51, § 152.1(B); *see also Salazar v. City of Oklahoma City*, 976 P.2d 1056, 1066 (Okla. 1999).

In order to be entitled to relief with regard to any tort claims asserted against the state or a political subdivision thereof, a plaintiff must first comply with the notice and filing provisions of the OGTCA, which require a written notice of claim to be submitted to the political subdivision within one year of loss, require a ninety-day notice period for the political subdivision to consider the claim before suit is filed, and require suit be filed within one hundred and eighty days of the denial of the claim or the expiration of the ninety-day notice period. Okla. Stat. tit. 51, §§ 156-157. "[C]ompliance with the written notice of claim and denial of claim provisions in §§ 156 and 157 are prerequisites to the state's consent to be sued and to the exercise of judicial power to remedy the alleged tortious wrong by the government." *Shanbour v. Hollingsworth*, 918 P.2d 73, 75 (Okla. 1996) (citing *Cruse v. Atoka County Board of Commissioners*, 910 P.2d 998, 1004-05 (Okla. 1995)). The court in *Shanbour* further noted, "judicial power is invoked by the timely filing of the governmental tort claims action pursuant to § 157." *Id. See also Lasiter v. City of Moore*, 802 P.2d 1292, 1293 (Okla. 1990); *Gurley v. Memorial Hosp. of Guymon*, 770 P.2d 573, 576 (Okla. 1989).

Furthermore, a complaint must allege sufficient facts to show compliance with the OGTCA's notice and filing provisions enough facts to determine whether actual or substantial requirements of the notice provisions of the OGTCA have been satisfied. *Girdner v Board of Commissioners of Cherokee County*, 2009 OK CIV APP 94, ¶ 20, 227 P.3d 1111, 1115-16 (Okla. Civ. App. 2009). Here, Plaintiffs have failed to plead compliance with the OGTCA's notice and filing provisions and have, therefore, failed to state a state law claim against the Defendants which is plausible on its face. Moreover, the Defendants are immune from suit for Plaintiffs' state law claims under Okla. Stat. tit. 51, § 155(2) and (4) of the OGTCA which provide complete immunity for any loss or claim which results from "[j]udicial, quasi-judicial, or prosecutorial functions" or "[a]doption or enforcement of or failure to adopt or enforce a law, whether valid or invalid,

including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy…"

Although Plaintiffs contend that their state law claims are a quasi-contractual action for money had and received and are not subject to the provisions of the OGTCA, the elements Plaintiffs must prove to succeed on their claims lie soundly and exclusively in tort. In that regard, the OGTCA defines a tort is "a legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association, or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment." Okla. Stat. tit. 51, § 152(14). Furthermore, Okla. Stat. tit. 51, § 153(B) of the OGTCA provides that "[t]he liability of the state or political subdivision under The Governmental Tort Claims Act shall be exclusive and shall constitute the extent of tort liability of the state, a political subdivision or employee arising from common law, statute, the Oklahoma Constitution, or otherwise." This is precisely the basis for Plaintiffs' lawsuit. Plaintiffs allege that the Defendants committed a legal wrong, independent of contract, and in violation of their constitutional rights by prosecuting and convicting them and assessing them fines, fees, and costs without jurisdiction. Plaintiffs further allege that they have suffered a loss as a result of having to pay those fines, fees, and costs. Every relevant allegation in this lawsuit demonstrates that Plaintiffs' state law claims are actually a tort action as contemplated by the OGTCA and which are subject thereto.

In support of their assertion that their state law claims are not subject to the provisions of the OGTCA, Plaintiffs rely on *Sholer v. State ex rel. Dept. of Public Safety*, 945 P.2d 469 (Okla. 1995). However, the *Sholer* case is readily distinguishable and thus inapplicable to the allegations

in this case.[6] The plaintiffs in *Sholer* had their driver's licenses revoked or otherwise suspended and were charged fees by the Department of Public Safety ("DPS") to reinstate the licenses. *Id.* at 471. The crux of that lawsuit was that while state law authorized DPS to collect fees for the reinstatement of licenses, DPS was charging fees in excess of what was allowed by statute. *Id.* at 473. The plaintiffs in *Sholer* were therefore seeking a refund of the overcharged amount; they were not seeking a refund of the entire amount, and they were not challenging the legal authority of DPS to collect fees. In fact, the *Sholer* court was careful to note that the plaintiffs were NOT challenging the assessment of those fees. *Id.* The *Sholer* plaintiffs did not make ANY argument that the fees were not applicable to them, or that they were wrongly imposed, or that they should not have been assessed, and it was for that reason that the court found the OGTCA did not apply. *Id.*

The complete opposite is true in this case. Plaintiffs are expressly challenging the authority of the defendants to assess and collect fines, fees, and costs for criminal actions they committed. The very essence of their suit in this case is that the fines, fees, and costs they allegedly paid were wrongly imposed and that they should not have been assessed due to the alleged lack of jurisdiction. Plaintiffs are not seeking a refund of fines, fees, or costs charged in excess of what the law allows, as the plaintiffs in *Sholer* were. They are seeking compensation in this case based on the alleged erroneous imposition of fines/fees which they allege they paid. As the *Sholer* case points out, the OGTCA considers any attempt to recover compensation "for an act or omission of a political subdivision or its employee" falls within the OGTCA's definition of a "tort claim." *Id.* at 472. The *Sholer* decision regarding actions for money had and received therefore does not apply to this case, but the rules and requirements of the OGTCA certainly do. Plaintiffs cannot avoid

[6] It should be noted that the current versions of Okla. Stat. tit. 51, § 152(14) and Okla. Stat. tit. 51, § 153(B), discussed above, were enacted on April 21, 2014 – some nineteen years after the Oklahoma Supreme Court's decision in *Sholer*.

application of the OGTCA simply by labeling their state law claims as an action for money had and received. Consequently, Plaintiffs' state law claims against the Defendants, however they may be designated, are subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction, and for failure to state a claim upon which relief can be granted.

D. Plaintiffs' Claims Should be Dismissed Under the Equitable Principles of Laches, Waiver, and Estoppel, and Unclean Hands

Finally, Plaintiffs' claims for money had and received against the Defendants should be dismissed under the equitable principles of laches, waiver and estoppel, and unclean hands. In the *McGirt* case itself, the Supreme Court acknowledged that "[m]any…legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law." *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2481 (2020). These equitable principles are clearly applicable to Plaintiffs' claims for money had and received because such claims are "in the nature of a suit in equity and [are] governed by equitable principles." *Continental Oil*, 301 P.2d at 202 (quoting *Ryan v. Spaniol*, 193 F.2d 551, 553 (10th Cir. 1951)).

Laches is an equitable defense that prevents the advancement of claims after an "inexcusable delay" for an "unreasonable and unexplained length of time." *Parks v. Classen Co.*, 9 P.2d 432, 435 (Okla. 1932); *Smith v. The Baptist Foundation of Oklahoma*, 50 P.3d 1132, 1138 (Okla. 2002) (noting that laches is an equitable defense). The "[m]ere ignorance of the facts will not excuse delay. One must be diligent and make such inquiry and investigation as the circumstances reasonably suggest and means of knowledge are equivalent to actual knowledge." *Winn v. Shugart*, 112 F.2d 617, 622 (10th Cir. 1940). An unreasonable delay in asserting a claim that materially prejudices a defendant is sufficient to invoke laches. *Hutchinson v. Pfeil,* 105 F.3d 562, 564 (10th Cir. 1997).

Here, Plaintiffs slept on their rights and unreasonably delayed in bringing their claims against the Defendants. As discussed above, they did not seek appellate or post-conviction relief and, apparently, did not even challenge the district court's jurisdiction at the time of trial. Furthermore, Plaintiffs' unreasonable delay in finally asserting their rights in this suit has caused substantial prejudice to the Defendants.

Likewise, for the same reasons, Plaintiffs have waived their opportunity to now allege that the Defendants lacked subject matter jurisdiction. At all times, Defendants acted in good faith and in accordance with case law and Oklahoma law. *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. 1936); *Hous. Auth. of Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990) (both *Nowabbi* and *Harjo* demonstrate how Oklahoma's top appellate courts struggled with the contours and consequences of what they then-considered the "checkerboard" Indian country); *see also* Oklahoma Enabling Act, 34 Stat. 267 (1906) (by which Oklahoma was admitted to the Union "on equal footing"). Plaintiffs do not allege otherwise.

Equity bars Plaintiffs from asserting claims "against a person who, in good faith, relied on such conduct and has been thereby led to change his position to his detriment." *Apex Siding & Roofing Company v. First Federal Savings & Loan of Association of Shawnee*, 301 P.2d 352, 355 (Okla. 1956). When parties are operating under a mutual mistake of law, equity does not benefit one party to the detriment of the other party after the fact. *See, e.g., Louisiana Realty Co. v. City of McAlester,* 1910 OK 81, ¶ 4, 108 P. 391, 392 (noting that to recover funds, they must have been paid through mistake of fact, and not of law."). Even assuming the validity of the Plaintiffs' jurisdictional argument, they should be estopped from their pursuing claims based on the good faith efforts of the Defendants to follow the understanding of the law as it existed prior to *McGirt* and the mutual misunderstanding thereof.

Furthermore, the doctrine of unclean hands also prohibits Plaintiffs' claims. When the conduct complained of is criminal in nature, equity weighs strongly in favor of a finding of unclean hands. *See, e.g., Reid v. Reid,* 944 S.W.2d 559 (Ark. App. 1997); *Houston Oilers, Inc. v. Neely*, 361 F.2d 36, 42 (10th Cir. 1966) ("equity will not in any manner aid a party whose conduct in relation to the litigation matter has been unlawful, unconscionable, or inequitable"). Application of the doctrine of unclean hands "gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant." *Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co.,* 324 U.S. 806, 815 (1945). Unclean hands "prevents a wrongdoer from enjoying the fruits of his transgressions" and "averts an injury to the public." *Id*.

In this action, the entire basis of Plaintiffs' claims involves Plaintiffs having committed criminal conduct. Plaintiffs are attempting to disgorge fines, fees, and costs they allege they paid to the Defendants as a result of their criminal convictions. As such, Plaintiffs' claims are barred by the unclean hands doctrine.

Moreover, the Court should dismiss Plaintiffs' pendent state law claim as all other federal claims are subject to dismissal as discussed above. *See Smith v. City of Enid*, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims."); *see also* 28 U.S.C. § 1367(c)(3).

WHEREFORE, premises considered, Defendants April Frauenberger, Jill Spitzer, Caroline Weaver, Deborah Mason and Laura wade, in their official capacities as Court Clerks of Nowata, Washington, Delaware, Craig and Mayes Counties, respectively, respectfully request this Court dismiss Plaintiffs' claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2020, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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