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

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

DEFENDANT DON NEWBERRY'S MOTION TO DISMISS
AND BRIEF IN SUPPORT

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ATTORNEYS FOR DEFENDANT DON NEWBERRY, COURT CLERK OF TULSA COUNTY, IN HIS OFFICIAL CAPACITY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

In accordance with Fed. R. Civ. P. 12(b)(1), Fed. R. Civ. P. 12(b)(6), and Fed. R. Civ. P. 21, Defendant, Don Newberry, in his official capacity as the Tulsa County Court Clerk ("Newberry"), moves this Court for an order dismissing Plaintiffs' claims against him with prejudice on the grounds that he is an improper party in his county capacity, this Court lacks subject-matter jurisdiction, and Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

I.
PRELIMINARY STATEMENT

Plaintiffs' claims cannot lie against Tulsa County or any of its officers in their official capacities. Plaintiffs allege that Newberry unlawfully collected money from them pursuant to judicial order. However, when a court clerk acts as a district court's bursar, he acts as an agent of the state district court, not as a county official. As a state actor, Newberry is immune from suit in this Court. Furthermore, Plaintiffs failed to state a claim for relief under any theory. Therefore, Plaintiffs' claims against Newberry must be dismissed.

II.
BACKGROUND

Plaintiffs complain that the State of Oklahoma and its political subdivisions were without jurisdiction[1] to charge, fine, or impose court costs upon Plaintiffs, who are members of federally recognized Indian tribes and were convicted or received deferred adjudications in state or municipal court for traffic offenses or misdemeanor crimes. (*See* Doc. 2, at 3-4). Although Plaintiffs recognize that the Supreme Court's opinion only addressed the Creek Reservation, they allege that the crimes they committed lie within the Cherokee Nation's Reservation, which was likewise, never disestablished. *Id*. Plaintiffs request an order from this Court that would declare

[1] Based on the Supreme Court's decision in *McGirt .v Oklahoma*, 140 S.Ct. 2452 (2020).

the Cherokee Nation Reservation is still established and thereby void their state or municipal criminal convictions or deferred adjudications. *Id.* at ¶ 85. Plaintiffs further seek the return of the money allegedly paid by them as a result of their adjudications under a state-law claim for money had and received, and assert a violation of 42 U.S.C § 1983. *Id.* at ¶¶ 79-95.

Plaintiffs' sole allegation against Newberry is that he "collected monies from Tribal members that were assessed by the Court as a fine, a court cost, or other fees." (Doc. 2, at ¶ 19). Nowhere in Plaintiffs' Complaint is it alleged that any of the Plaintiffs were prosecuted in Tulsa County, nor is it alleged that Plaintiffs paid any money to Newberry or one of his deputy clerks. Furthermore, Plaintiffs' claims against Newberry are improperly brought against him in his capacity as a Tulsa County official. When court clerks receive money from those convicted of criminal violations, they do so as agents of the state, not the county. As state actors, court clerks are immune from suit under the Eleventh Amendment when they function as the court's bursar. Therefore, the Eleventh Amendment deprives this Court of subject-matter jurisdiction.

Additionally, Plaintiffs do no allege that they have sought relief from their convictions through the appropriate post-conviction procedures under Oklahoma law. Plaintiffs seek to side step this requirement and have this Court declare their convictions are void even though Oklahoma courts have not had the opportunity to decide important subject-matter jurisdiction questions with regards to Native Americans under the State's post-conviction statutes.

Finally, Plaintiffs failed to state claims for declaratory relief, money had and received, and under § 1983.

III.
STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) should be granted when, as here, a complaint fails to make allegations sufficient to support a right to relief. "Factual allegations must be enough to

raise a right to relief above the speculative level . . . .” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief,” but a complaint must “contain enough facts to state a claim for relief that is plausible on its face.” *Allen v. Town of Colcord*, 874 F. Supp. 2d 1276, 1282 (N.D. Okla. 2012) (citation and quotation omitted). “Mere ‘labels and conclusions’ and ‘a formulaic recitation of the elements of a cause of action’ are insufficient.” *The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1107 (10th Cir. 2016). “Accordingly, in examining a complaint under Rule 12(b)(6), [the court] will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable.” *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012).

Further, “Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms.” *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). “[A] facial attack on the complaint’s allegations as to subject matter jurisdiction questions the sufficiency of the complaint.” *Id.* (citation omitted). “In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.” *Id.* Alternatively, under a factual attack “a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends.” *Id*. at 1003. “When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations.” *Id.*

Under Rule 21, the Court may drop an improper party upon motion or *sua sponte*.

IV.
TULSA COUNTY IS NOT RESPONSIBLE FOR THE ACTS OF THE COURT CLERK WHEN HE ACTS AS AN ARM OF THE STATE DISTRICT COURT

Plaintiffs impermissibly seek to hold Tulsa County liable for the acts of Newberry when he functions as the State Court's bursar.[2] Oklahoma's seventy-seven (77) counties are divided into twenty-six (26) judicial districts, each with its own district court and at least one (1) district court judge; these judicial districts are then divided into nine (9) judicial administrative districts, each with its own presiding administrative judge. Okla. Stat. tit. 20, §§ 22-23 and 92.1-92.27; Okla. Const. art. 7, § 7. Each county is required to provide a court room and an office for the judge of the district court, but each judge serves his or her district, not the county. Okla. Stat. tit. 19, § 401; George B. Fraser, "Oklahoma's New Judicial System," *Okla. L. Rev*. 373, 375 (1968) ("Fraser"); Okla. Const. art. 7. Unless granted statutory authority to exercise his discretion, the Court Clerk and his deputies serve within the State's judicial hierarchy subject to the authority of a District Judge, the Presiding Administrative Judge, and ultimately the Chief Justice of the Supreme Court. Rule 2 of the Oklahoma Supreme Court Rules on Administration of Courts sets forth the following chain of command.[3]

Chief Justice of the Oklahoma Supreme Court
Presiding Judge of the Judicial Administrative District
A District Court Judge of the Judicial District
District Court Clerk

Okla. Stat. tit. 20, Ch. 1, App. 2, Rule 2. The Oklahoma Supreme Court exercises significant authority over the assessment and collection of criminal costs, fines, and fees by virtue of its

[2] A suit against a county official in his or her official capacity is a suit against the county under both state and federal law. *See Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010); *Pelligrino v. State ex rel. Cameron v. University ex rel. Board of Regents of State*, 2003 OK 2, ¶ 5, 63 P.3d 535, 537

[3] The role of Chief Judge of the Judicial District is omitted because the Presiding Administrative Judge takes on the role of Chief Judge in Oklahoma and Tulsa Counties.

general superintendent control over all inferior courts, Okla. Const. art. 7, §§ 4, 6, and express statutory authority to institute fines, fees, and costs collection programs. Okla. Stat. tit. 28, § 151(D).

District Attorneys prosecute on behalf of the State of Oklahoma individuals charged with violating the State's criminal code. In all such proceedings, certain, fines, fees, and costs and/or restitution are imposed against defendants at the time of sentencing. *See e.g.*, Okla. Stat. tit. 21, § 64; Okla. Stat. tit. 28, § 153. This criminal court debt is "part of the penalty of the offense of which the defendant [is] convicted." Okla. Stat. tit. 28, § 101. Upon payment of this court debt to the court clerk in satisfaction of the sentence, it is deposited in the Court Fund to defray the expense of holding court. Okla. Stat. tit. 20, § 1301. By statute the county treasurer acts "as an agent of the state in the care and handling of the Court Fund." *Id*.

The subject court costs, fees, and fines are assessed as a matter of law and collected by the clerk of the district court. *See* Okla. Stat. tit. 28, § 153; Okla. Stat. tit. 20, § 1301. The efforts of Newberry and his deputies in the assessment and collection of fines, fees, and costs are performed under the administrative and supervisory control of the Presiding Judge of the judicial administrative district, and ultimately, the Chief Justice of the Supreme Court. *See* Rule 2, Oklahoma Supreme Court Rules on Administration of Courts; Okla. Stat. tit. 20, Ch. 1, App. 2, Rule 2; *see also Petuskey v. Cannon*, 1987 OK 74, ¶ 20, 742 P.2d 117, 1121 ("[T]he District Court Clerk is 'judicial personnel' . . . an arm of the court, whose duties are ministerial, except for those discretionary duties provided by statute. As such, the court clerk is subject to the control of the Supreme Court, and the supervisory control is passed down to the Administrative District Judge in his Judicial Administrative District in the performance of his ministerial functions.").

The Supreme Court publishes a Uniform Schedule of fees for use by the district courts. *See Uniform Oklahoma Fee Schedule*, OKLAHOMA STATE COURTS NETWORK (effective November 1, 2019), http://www.oscn.net/static/schedules/SCaD2019-0089.pdf. It is Newberry's duty "to charge and collect fees imposed by this title and other fees, assessments and payments as imposed by the Oklahoma Statutes, fines, costs and assessments imposed by the district courts or appellate courts, and none others, in all cases . . . ." Okla. Stat. tit. 28, § 151(A). Newberry does not have authority to waive costs.

> In order to have a unified, organized judiciary in Oklahoma, there must be one individual at the apex: the Chief Justice of the Supreme Court. Through the powers vested in the Supreme Court, by the Oklahoma Constitution and statutes, it has passed down the authority for the administration of district courts to the Administrative Judge of an Administrative Judicial District. This authority for the orderly operation of justice.
>
> In ministerial matters, the District Court Clerk is serving his Court subject to the authority of the Administrative Judge. Even though he may disagree with a particular order of the Administrative Judge, he has no discretion but to follow it in ministerial matters.

Petuskey, 742 P.2d at 1123. To this end, "[t]he court clerk's function of receiving and disbursing funds of every character is inextricably connected, not with county government, but with official's duty as state court's bursar." *N. Side. State Bank v. Bd. Of Cty. Comm'rs of Tulsa Cty.*, 1994 OK 34, ¶ 15, 894 P.2d 1046, 1052.

The alleged actions taken by Newberry confirm the legal principle that a court clerk is "both a county officer and an officer or 'arm' of the court," (*Speight v. Presley*, 2008 OK 90, ¶ 14, 203 P.3d 173, 177) and "[i]n the performance of all *ministerial* court functions, the court clerk and his deputies are subject to *summary control* by the judges." *N. Side State Bank*, 894 P.2d at 1051. Thus, Oklahoma courts have recognized that the court clerk is an arm of the court in performing duties related to the judicial system. *See Barrett v. Barrett*, 1952 OK 327, ¶ 8, 207 Okla. 234, 235,

249 P.2d 88, 89 ("The clerk is the arm of the court for which he is clerk."); *Hirsch v. Twyford*, 1913 OK 755, ¶ 3, 40 Okla. 220, 139 P. 313, 316 ("The clerk of the district court [is] the arm of that court, and subject to the exclusive control and jurisdiction of the district court."); and *Matney v. King*, 1908 OK 1, ¶ 3, 20 Okla. 22, 93 P. 737, 745 ("the clerk of the district court is an officer of the court."). Likewise, the Tenth Circuit has held:

> [A] district court clerk [in Oklahoma] is a "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 [a] clerk's ministerial functions, the court clerk is subject to the control of the Supreme Court and the supervisory control that has passed down to the Administrative District Judge in the clerk's administrative district.

Bishop v. Oklahoma, 333 Fed. App'x 361, 365 (10th Cir. 2009) (quoting *Speight*, 203 P.3d at 177).

The state judiciary and state legislature control and manage all aspects of funds paid to the Court Fund pursuant to state law. *See N. Side State Bank*, 894 P.2d at 1051-52. Under Plaintiffs claims for money had and received and under § 1983, Tulsa County is not responsible for the actions of Newberry or his deputies when they collect money from those convicted of state law violations as neither a county actor nor county policy was the moving cause of the harm alleged.

V.
NEWBERRY IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

As Newberry is a state actor when he functions as the state court's bursar, he is immune from suit in federal court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984). Section 1983 requires that a person acting under color of state law violate another's rights. 42 U.S.C. § 1983. A judgment against a government official in his official capacity is a judgment against the entity that the official represents. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 878, 83 L. Ed. 2d 878 (1985). "And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred

regardless of whether it seeks damages or injunctive relief." *Pennhurst State Sch.*, 465 U.S. at 101–02. Therefore, Newberry is not a "person" subject to suit under § 1983. Accordingly, Plaintiffs' claims against Newberry should be dismissed for lack of jurisdiction.

VI.
THIS COURT CANNOT ACT AS AN OKLAHOMA APPELLATE COURT

Plaintiffs attempt to have this Court overturn their state court convictions is barred by the Rooker-Feldman Doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). "The *Rooker–Feldman* doctrine bars 'a party losing in state court . . . from seeking what in substance would be appellate review of the state 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."' *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1169 (10th Cir. 1998) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1005–06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)). "Rooker–Feldman precludes federal district courts from effectively exercising appellate jurisdiction over claims 'actually decided by a state court' and claims 'inextricably intertwined' with a prior state-court judgment."' *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1233 (10th Cir. 2006) (quoting *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir.2002)).

Here, Plaintiffs seek a declaration from this Court ordering all of their convictions or deferred adjudications to be overturned so that they can receive money from the State of Oklahoma. (Doc. 2, at ¶ 21). Plaintiffs' alleged wrongful convictions are necessarily intertwined with the judgment of the state court, as they are one and the same. The Rooker-Feldman doctrine forbids such action. Therefore, Plaintiffs claims must be dismissed.

VII.
PLAINTIFFS ARE NOT ENTITLED TO DECLARATORY RELIEF

As above, a state is entitled to Eleventh Amendment Immunity in federal court. However, a narrow exception applies when a plaintiff seeks to prospectively enjoin state officials in their official capacities. *See Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714. This exception "may not be used to obtain a declaration that a state officer has violated a plaintiff's right in the past." *Buchwald v. Univ. of New Mexico Sch. of Med*., 159 F.3d 487, 495 (10th Cir. 1998). Here, Plaintiffs seek retrospective relief in the form of a declaration which would void past criminal violations. The Eleventh Amendment bars such relief. *See Johns v. Stewart,* 57 F.3d 1544, 1553 (10th Cir. 1995). Therefore, Plaintiffs' request for declaratory relief should be denied.

VIII.
PLAINTIFFS FAILED TO STATE A CLAIM AGAINST NEWBERRY UNDER § 1983

Plaintiffs allege that Newberry violated Plaintiffs' rights to due process by subjecting them to trial and punishment before a Court that did not have jurisdiction over them. (*See* Doc. 2, at ¶ 92). As above, Newberry is immune from Plaintiffs' § 1983 claim. However, even if this Court were to hold otherwise, Plaintiffs' claim must still be dismissed as Tulsa County did not maintain a constitutionally deficient policy that caused Plaintiffs' alleged harms nor have Plaintiffs pled sufficient facts to show that Newberry acted with deliberate indifference. *See Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29, 36-37, 131 S. Ct. 447, 452, 178 L. Ed. 2d 460 (2010) (section 1983 plaintiffs must prove that a county policy was the moving force behind their constitutional deprivations whether they seek damages or declaratory or injunctive relief against a county).

A. No Tulsa County Policy was the Moving Force Behind Plaintiffs' Alleged Harms

Tulsa County cannot be liable under § 1983 for carrying out the statutes, policies, rules or directives created or issued by the state legislature or state judiciary. To establish municipal

liability under § 1983, Plaintiffs must establish (1) an official policy or custom of Tulsa County; (2) the policy or custom was the moving force behind the constitutional violation (i.e. causation); and (3) the policy was enacted or maintained with deliberate indifference to the injury. *See Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769-71 (10th Cir. 2013). "In a series of cases, the Supreme Court has consistently held that the question of who is a final policymaker for purposes of attributing liability to a government entity under § 1983 is a question of state law." Karen M. Blum, "Support Your ~~Local~~ Sheriff: Suing Sheriffs Under § 1983," 34 Stetson L. Rev. 623, 630, fn. 46 (Spring 2005) (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); and *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)).

> The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies. (Citation omitted). Without attempting to canvass the numberless factual scenarios that may come to light in litigation, we can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business.… *[A] federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.*

City of St. Louis v. Praprotnik, 485 U.S. 112, 124-25 (1988) (emphasis added). "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 403-04 (1997). "[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."

Pembaur, 475 U.S. at 483-84 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985)) ("'policy' generally implies a course of action consciously chosen from among various alternatives").

Here, Plaintiffs broadly assert that "[e]ach of the political subdivisions listed above as Defendants have executed a policy of arresting, investigating, issuing citations to and collecting fines from Tribal members within the boundaries of the Cherokee Reservation." (Doc. 2, at ¶ 91). The sole allegation applicable to Newberry is that "he and his predecessors collected monies from Tribal members." *Id.* at ¶ 19. The Complaint fails to allege that Newberry or his deputy clerks caused any harm to or had any interaction with any of the named Plaintiffs. For this reason alone, Plaintiffs' claim should be dismissed.

The assessment and collection of fines, fees, and court costs is a matter established by state statute and ordered by the judiciary to be carried out by the court clerk. Newberry assess those costs that the Oklahoma statutes and state court judges direct him to asses. Okla. Stat. tit. 28, § 151(A). When Newberry acts as the state district court's bursar, he is a state actor. *See N. Side State Bank*, 894 P.2d at 1051-52. Plaintiffs fail to and cannot allege that the collection of fines, fees, and costs by a state actor pursuant to state law, which were issued by a state district court judge is part of a Tulsa County policy.

Moreover, even if this Court were to hold that Newberry was a county actor when he functioned as the district court's bursar, the alleged policy of collecting monies from those convicted of criminal violations, which does nothing more than implement state law and requires adherence to state court judicial orders, is insufficient to establish municipal liability against Tulsa County. *See Whitesel v. Sengenberger*, 222 F.3d 861, 872 (10th Cir. 2000) (board of county commissioners "cannot be liable for merely implementing a policy created by the state judiciary"); *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1190 (10th Cir. 2003) (collecting cases) (acts of

a municipal judge *in performing a state judicial function* do not establish municipal policy); and *Shepp v. Fremont County, Wyo*., 900 F.2d 1448, 1456-57 (10th Cir. 1990) (denial of bail was the responsibility of state judge and could not be attributed to the county). *See also Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791-92 (7th Cir. 1991) ("It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a 'policy' simply cannot be sufficient to ground liability against a municipality."); *Thompson v. Duke*, No. 84 C 5082, 1987 WL 33188, *5 (N.D. Ill. Jan. 4, 1988) ("the fact that the county defendants executed the state's policy does not, without more, open them up to § 1983 liability"); *Robinson v. City of Tupelo, Mississippi*, No. 1:17-CV-55-SA-DAS, 2018 WL 2348666, *6 (N.D. Miss. March 23, 2018) (County could not be held liable for charging $25 fee mandated by state law when releasing someone on bail. "Here, Plaintiff has not identified any policy or custom attributable to Lee County that was the moving force behind the alleged violation. Though generally the Sheriff acts as a policymaker within the County, and often the Sheriff's actions may justifiably be considered to constitute county policy under *Monell*, the Sheriff's actions here are more fairly 'characterized as the effectuation of the policy of the State' of Mississippi. This is especially true considering the Sheriff's inability to exercise discretion in assessing the fee under the statute.") (Internal citation omitted); *Humphries v. Milwaukee County*, No. 10-CV-99-JPS, 2011 WL 5506676, *6 (E.D. Wisc. Nov. 10, 2011) ("a municipality 'cannot be held liable under section 1983 for acts that it did under the command of state or federal law'") (quoting *Bethesda Lutheran Homes and Services, Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998); *Frobe v. Village of Lindenhurst*, No. 11 C 17222014, WL 902878, *9 (N.D. Ill. March 7, 2014) ("the state law is a state law, not municipal policy");

and *Ayala v. County of Imperial*, No. 15CV397-LAB (NLS), 2017 WL 469016, *7 (S.D. Cal. Feb. 3, 2017) ("A *Monell* claim requires that the municipality's policy be the 'moving force' behind the constitutional violation. If some other agency's policy … were the driving force, and if the County did not create that policy, the County would not be liable.").

B. Newberry was not Deliberately Indifferent

Plaintiffs have failed to plead sufficient facts to show that Newberry was deliberately indifferent to the alleged constitutional violations. Deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, 1391, 137 L. Ed. 2d 626 (1997). "A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Id.* at 411.

Nothing in Plaintiffs' Complaint sets forth that Newberry knew or should have known that by following state law and judicial orders he would have been violating anyone's constitutional rights. Plaintiffs do not allege Newberry knew that he was collecting money from Tribal members for crimes committed on the alleged Cherokee Reservation and then chose not to rectify the issue. Plaintiffs simply state that "[i]t has long been recognized that the state government has no jurisdiction over the crimes committed by a Tribal member on a reservation." (Doc. 2, at ¶ 94). As Newberry was never notified that Plaintiffs were Tribal members, he could not have known that by acting as the state district court's bursar, he could unlawfully harm anyone. Further, Plaintiffs do not allege that Newberry believed at the time of their convictions that the Cherokee Nation Reservation was still established. As "the State of Oklahoma and its political subdivisions have been arresting, fining, and assessing fees against Tribal members for over a hundred years," (Doc.

2, at ¶ 58) it can hardly be said that court clerks consciously knew that they were collecting money unlawfully, when it has been the sole practice in Oklahoma to prosecute all persons that commit crimes within its borders. Importantly, none of the named Plaintiffs actually paid money to Newberry or his deputy court clerks. (*See* Doc. 2, at ¶ 59-65). Therefore, Plaintiffs have failed to state a claim against Tulsa County under § 1983.

C. Plaintiffs Failed to Allege that their Adjudications have been Overturned

Plaintiffs cannot state a claim under § 1983 for a wrongful conviction or sentence when the "conviction or sentence has *not* been so invalidated." *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383 (1994). To state a valid claim, a "plaintiff 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 Court must dismiss a § 1983 claim if a judgment in favor of the plaintiff would effectively invalidate a state conviction that has yet to be overturned on direct appeal or granted relief through a writ of habeas corpus. *See Id.* at 487.

Here, Plaintiffs request a declaration which voids their criminal adjudications. Based on that declaration, Plaintiffs seek compensation from Defendants. Without overturning Plaintiffs' convictions or deferred adjudications, Plaintiffs are not entitled to the relief they seek. Plaintiffs have not alleged that they have been granted relief from their state or municipal adjudications. Therefore, Plaintiffs' § 1983 claim should be dismissed as they have failed to state a valid claim.

D. Newberry is Entitled to Quasi-Judicial Immunity

Plaintiffs seek to impose liability on Newberry for collecting fines, fees, and costs, pursuant to state law and judicial order. Newberry is entitled to quasi-judicial immunity as the collection of

the above is intertwined with the judicial process. *See Whitesel*, 222 F.3d at 872. Accordingly, Plaintiffs' claim against Newberry should be dismissed.

IX.
PLAINTIFFS' STATE LAW CLAIM SHOULD BE DISMISSED

A. No Tulsa County Actor "Had and Received" any Money Paid by Plaintiffs

Plaintiffs attempt to circumvent the Oklahoma Governmental Tort Claims Act ("GTCA"), by alleging a claim for money had and received.[4] (Doc. 2, at ¶¶ 86-89). Plaintiffs assert that Defendants are currently in possession of monies paid by Plaintiffs pursuant to state or municipal adjudications that are now void. (Doc. 2, at ¶ 87). A claim for money had and received "lies whenever one has money of another which he, in equity and good conscience, has no right to retain." *Sarber v. Harris*, 1962 OK 4, ¶ 5, 368 P.2d 93, 95. "While [a money had and received claim] is an action at law triable to a jury, its determination is controlled by principles of equity and fair dealing." *Id.*

Here, Plaintiffs do not and cannot allege that Newberry's duties in collecting fines, fees, and costs set forth by judicial order and state statute, are discretionary. *See Petuskey*, 742 P.2d at 1121. The complained actions of Newberry and all other court clerks were in the performance of ministerial court functions. *See N. Side. State Bank*, 894 P.2d at 1051. Further, when Newberry collects court funds in his capacity as the district court's bursar, he acts not as a county officer but as an arm of the state district court. *Id.* at 1051-52. Therefore, this Court should dismiss Plaintiffs' money had and received claim against Tulsa County based on the official actions of Newberry in his capacity as the district court's bursar.

[4] Under Oklahoma law, any claim against a county must be raised within two (2) years after it has accrued. Okla. Stat. tit. 19, § 247.

Assuming *arguendo*, that Newberry was the correct party to sue under Plaintiffs' claim for money had and received, Plaintiffs still failed to state a claim upon which relief can be granted. Under Oklahoma law, a claim for money had and received will lie against the "holder of the money." *Duncan v. Anderson*, 1926 OK 924, ¶ 3, 120 Okla. 194, 250 P. 1018, 1019. Further, a plaintiff must allege that the holder retains a specific amount of the plaintiff's money or a "sum certain." *See Lampton Welding Supply Co, Inc. v. Stobaugh*, No. 11-CV-319-TCK-TLW, 2012 WL 5878875, at *1 (N.D. Okla. Nov. 21, 2012) (quoting *Continental Oil Co. v. Rapp*, 1956 OK 171, 301 P.2d 198, 199).

Plaintiffs' allegation against Newberry in its entirety provides:

> Don Newberry, in his official capacity as the Court Clerk of Tulsa County, Oklahoma. During all times relevant in this lawsuit, both he and his predecessors collected monies from Tribal members that were assessed by the Court as a fine, a court cost, or other fees. Under the structure of the District Court, the Court Clerk is the proper party to refund the monies sought by this action.

(Doc. 2, at ¶ 19). Plaintiffs are incorrect.

Plaintiffs cannot state a claim for money had and received under the facts alleged until their adjudications have been overturned. Until then, the State has every right to keep monies paid pursuant to valid criminal judgments. As Plaintiffs have failed to avail themselves of the proper avenues to overturn their adjudications, equity demands that the money stay where it is.

Furthermore, Plaintiffs only allege that Newberry collected monies from Tribal members, not that he still holds that money. *Id.* As a matter of law, Newberry does not retain any monies paid by those convicted of criminal violations in Tulsa County. Okla. Stat. tit. 20, § 1301.

Additionally, none of the named Plaintiffs were convicted of a misdemeanor or traffic violation in Tulsa County. (*See* Doc. 2, at ¶¶ 59-65). None of the named Plaintiffs paid money to

Newberry. *Id.* None of the named Plaintiffs paid a sum certain to any of the Defendants. Accordingly, Plaintiffs' claim for money had and received against Newberry must be dismissed.

B. Plaintiffs' Claim is Barred by Equitable Defenses

As a money had and received claim is controlled by principles of equity and fair dealing, *Sarber*, 368 P.2d at 95, Plaintiffs claim is barred by equitable defenses. "Many . . . legal doctrines" such as "procedural bars, res judicata, statutes of repose, and laches" are "designed to protect those who have reasonably labored under a mistaken understanding of the law." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481, 207 L. Ed. 2d 985 (2020).

"[L]aches bars a claim where delay in bringing or prosecuting the claim is unreasonable, and the defendant has been materially prejudiced by the delay." *Osage Nation v. Bd. of Commissioners of Osage Cty.*, 2017 OK 34, ¶ 33, 394 P.3d 1224, 1236. Here, Plaintiffs cannot show that their delay in challenging the subject-matter jurisdiction of the state district court was reasonable. Plaintiffs could have challenged jurisdiction in their state court proceedings or through appropriate appellate or post-conviction relief. Plaintiffs failed to do so. Plaintiffs claim their status as members of a federally recognized Indian tribe prevent Oklahoma courts from subjecting them to suit therein. However, Plaintiffs knew they were members of a federally recognized tribe when they pled in their state court proceeding and have given no reason why they failed to timely raise the issue. If Plaintiffs are granted relief, their inexcusably delay would materially prejudice the above Defendants.

Furthermore, Plaintiffs waived their opportunity to challenge state court jurisdiction. Equity prevents a plaintiff 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 Co. v. First Fed. Sav. & Loan Ass'n of Shawnee*, 1956 OK 195, ¶ 6, 301 P.2d 352, 355.

When money is paid pursuant to a mistake of law, equity does not allow one party to benefit at the expense of the other. *See Louisiana Realty Co. v. City of McAlester*, 1910 OK 81, ¶ 4, 25 Okla. 726, 108 P. 391, 392. Newberry has always acted in good faith and diligently followed Oklahoma law in the performance of his official duties. Plaintiffs failed to allege otherwise.

Additionally, Plaintiffs claim is likewise barred under the voluntary pay doctrine. "[P]ayment, with full knowledge of all facts, cannot be recovered because of payer's misapprehension of legal rights and obligations." *McWethy v. Telecommunications, Inc.*, 1999 OK CIV APP 91, ¶ 3, 988 P.2d 356, 357 (citing *Hadley v. Farmers National Bank of Oklahoma City*, 125 Okla. 250, 257 P. 1101 (1927)); *Markel Serv., Inc. v. Nat'l Farm Lines*, 426 F.2d 1123, 1126 (10th Cir. 1970). The doctrine applies even when the payor is subject to legal process for failure to make payment. *See Smith v. City of St. Louis*, 409 S.W.3d 404, 420 (Mo. Ct. App. 2013); *see also Sinclair Ref. Co. v. Roberts*, 1949 OK 103, ¶ 21, 201 Okla. 358, 361, 206 P.2d 193, 198.

Plaintiffs also come to this Court with unclean hands. 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*.

Here, Plaintiffs claim that they have been unlawfully subjected to state court criminal judgments without jurisdiction. Plaintiffs do not challenge that they committed criminal violations,

but instead challenge the state court's power to prosecute and collect monies from them. Therefore, Plaintiffs' claim is barred by the unclean hands doctrine.

C. Plaintiffs' Proper Avenue of Relief is under Oklahoma's Uniform Post-Conviction Procedure Act

To obtain the relief they seek, Plaintiffs must obtain a judicial order overturning their criminal adjudications. Oklahoma's Uniform Post-Conviction Procedure Act ("OUPCPA") is the exclusive means to achieve this remedy. Okla. Stat. tit. 22, §§ 1080, *et seq.* "Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence." Okla. Stat. tit. 22, § 1080. The Act provides a mechanism to challenge a conviction or sentence obtained in violation of the United States Constitution or where "the court was without jurisdiction to impose the sentence." *Id.* at (a), (b). A post-conviction proceeding is "commenced by filing a verified 'application for post-conviction relief' with the clerk of the court imposing judgment if an appeal is not pending." Okla. Stat. tit. 22, § 1081. Moreover, under Oklahoma law, the Oklahoma Court of Criminal Appeals is the only court that can hear direct appeals in criminal cases. Okla. Stat. tit. 20, § 40; Okla. Stat. tit. 20, § 1087. Plaintiffs have not alleged that they have attempted either.

Oklahoma state courts should decide the application of procedural bars or equitable doctrines to Plaintiffs' claims for relief stemming from convictions in Indian Country. Further, Oklahoma courts may decide that as subject-matter jurisdiction is an affirmative defense, Plaintiffs have waived this defense as it was not raised before their adjudications became final. Although, subject-matter jurisdiction can never be waived under traditional post-conviction principles, Plaintiffs' status as a member of a federally recognized tribe presents a different issue. *See Wallace v. State*, 1997 OK CR 18, 935 P.2d 366. Such status is peculiarly within the knowledge of a criminal defendant.

Courts in Oklahoma are Courts of general jurisdiction. *Hawkins v. Bryan*, 1927 OK 414, ¶ 3, 128 Okla. 27, 261 P. 167, 168. Oklahoma has subject-matter jurisdiction to prosecute crimes committed within its territorial borders. *See* Okla. Const. art. 7, § 7; Okla. Stat. tit. 22, § 121. Criminal prosecutions shall be tried in the county in which the crime occurred. Okla. Stat. tit. 22, § 121. Defendant bears the burden to prove his status as an Indian and show that Oklahoma does not have jurisdiction to prosecute them. *State v. Klindt*, 1989 OK CR 75, ¶5, 782 P.2d 401, 403.

Here, Plaintiffs are not challenging traditional principles of subject-matter jurisdiction, but are challenging state court jurisdiction based on their personal status as a member of a federally recognized tribe. Oklahoma courts should decide these important matters integral to state law.

D. Plaintiffs Failed to Plead Compliance with the Oklahoma Governmental Tort Claims Act

In *Vanderpool v. State*, the Oklahoma Supreme Court abrogated the judicially created common law doctrine of governmental immunity from tort suits. 1983 OK 82, 672 P.2d 1153. In doing so, it recognized that it was only abrogating the judicially created and recognized doctrine of governmental immunity and not rendering ineffective the Legislature's ability to establish governmental immunity and define its terms and conditions by statute. *Id*. at 1157; *see also Fuller v. Odom*, 1987 OK 64, ¶ 3, 741 P.2d 449, 451; *Perry v. City of Norman*, 2014 OK 119, ¶ 13, 341 P.3d 689, 692.

The Legislature responded by explicitly adopting the doctrine of governmental immunity from tort suits. *See* Okla. Stat. tit. 51, § 152.1(A). "The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts." *Id.* The liability of a political subdivision under the GTCA is exclusive and constitutes the extent of its tort liability. *See* Okla. Stat. tit. 51, § 153(B).

The GTCA's grant of immunity is waived *only* in the manner and to the extent provided for in the Act. *See* Okla. Stat. tit. 51, § 152.1(B). Accordingly, in tort cases involving political subdivisions of the State, "the Court begins with the understanding that the [political subdivision] is immune from tort suit unless the Legislature has expressly waived that immunity." *Barrios v. Haskell County Public Facilities Authority*, 2018 OK 90, ¶ 8, 432 P.3d 233, 237; *see also State ex rel. Williamson v. Superior Court of Seminole County*, 1958 OK 52, ¶ 6, 323 P.2d 979, 981 ("It is fundamental that the State cannot be sued in any manner, or upon any liability, constitutional, statutory, or contractual, unless there is express consent thereto."); *State ex rel. Department of Highways v. McKnight*, 1972 OK 3, ¶ 34, 496 P.2d 775, 782 ("the statutes must clearly permit the state to be sued or the right to do so will not exist").

Whether the GTCA applies to an action presents a jurisdictional question for the court. *See Chambers v. City of Ada*, 1995 OK 24, 894 P.2d 1068. Under the GTCA, "claims against the state or a political subdivision are to be presented within one year of the date the loss occurs, and unless notice is presented, the claim shall be forever barred." *Slawson v. Bd. of Cty. Comm'rs of Logan Cty.*, 2012 OK 87, ¶ 4, 288 P.3d 533, 534 (citing Okla. Stat. tit. 51, § 156(B)). Under the Act, a notice of claim must be in writing and filed with the office of the clerk of the governing body. This written notice shall state the date, time, place and circumstances of the claim, the identity of the state agency involved as well as the amount of compensation or other relief demanded. *See* Okla. Stat. tit. 51 § 156(D), (E). "A person may not initiate a suit against the state or political subdivision unless the claim has been denied in whole or in part." Okla. Stat. tit. 51, § 157. The claim is deemed denied ninety (90) days after this notice date.[5] *Id*. From that date, the claimant is required to bring

[5] Of course, the political subdivision could deny it sooner than ninety (90) days, but this would start the statute of limitations period clock running even earlier.

suit within one hundred eighty (180) days of the date of the denial. *See* Okla. Stat. tit. 51, § 157 (B).

"[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*, 1996 OK 67, ¶ 7, 918 P.2d 73, 75. Judicial power to extend the above deadlines cannot be invoked unless the suit is timely filed pursuant to the Act. *Id.* at 75. Here, Plaintiffs failed to plead compliance with the GTCA's notice and filing requirements. (*See* Doc. 2). Therefore, this Court does not have jurisdiction to hear Plaintiffs' claim. Additionally, Newberry is immune from suit from losses or claims that result from "[j]udicial, quasi-judicial, or prosecutorial functions," the [e]xecution or enforcement of the lawful orders of any court," and the "[a]doption or enforcement of or failure to adopt or enforce a law . . . ." Okla. Stat. tit. 51, § 155(2-4).

Plaintiffs cite to *Sholer v. State ex rel. Dept of Public Safety*, 1995 OK 150, 945 P.2d 469, for support that their claim lies outside of the GTCA. (*See* Doc. 2, at ¶ 52). However, *Sholer* is not dispositive of the factual situation in the present case. Unlike in *Sholer*,[6] where the plaintiffs were challenging an overpayment of an otherwise lawful fee, Plaintiffs here argue that the State of Oklahoma has no authority whatsoever to assess and collect fines, fees, and costs against them. *See Sholer*, 945 P.2d at 472-73. The *Sholer* Court explicitly stated the power of the government to collect fees was not at issue in the case. *Id*. at 472. Here, it is the sole issue. Further, the legislature has amended and expanded the definition of "tort" since *Sholer* was decided. 2014 Okla. Sess.

[6] *Sholer* does not prevent the application of Okla. Stat. tit. 62 § 206(2), Oklahoma's fee protest statute, which requires in all cases in which a payor is challenging the legality of the imposition of fees by the government, to do so by notifying the collecting officer in writing that he will be seeking the return of all or a portion of the fees paid.

Law Serv. Ch. 77 (H.B. 2405)(codified at Okla. Stat. tit. 51, § 152(14)). Therefore, Newberry requests that this Court dismiss Plaintiffs' tort claim against him for lack of jurisdiction under Oklahoma's GTCA.

CONCLUSION

For these reasons set for forth above, and as articulated by his co-defendants in this case, Newberry respectfully requests that this Court dismiss Plaintiffs' claims against him with prejudice.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT DON NEWBERRY IN HIS OFFICIAL CAPACITY

CERTIFICATE OF ELECTRONIC NOTICE

I hereby certify that on September 17, 2020, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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Stephanie Lawson
Shannon Davies
Courtney Powell
Anthony Ferate

s/ Mike Shouse
Mike Shouse