THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TAYLEUR RAYE PICKUP, et al., And Others Similarly Situated, Plaintiffs,	)	
vs.	)	Case No. 20-CV-346-JED-FHM
THE DISTRICT COURT OF NOWATA COUNTY, OK, et. al., Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS TOWN OF ADAIR, CITY OF BARTLESVILLE, TOWN OF BIG CABIN, TOWN OF BLUEJACKET, CITY OF CATOOSA, TOWN OF CHELSEA, TOWN OF CHOUTEAU, CITY OF CLAREMORE, CITY OF COLLINSVILLE, TOWN OF COPAN, CITY OF DEWEY, TOWN OF DISNEY, CITY OF GROVE, CITY OF JAY, TOWN OF KANSAS, TOWN OF LANGLEY, TOWN OF LOCUST GROVE, TOWN OF NOWATA, TOWN OF OOLOGAH, CITY OF PRYOR, TOWN OF RAMONA, TOWN OF SALINA, TOWN OF SOUTH COFFEYVILLE, TOWN OF SPAVINAW, TOWN OF STRANG, TOWN OF TALALA, TOWN OF VERDIGRIS, CITY OF VINITA, TOWN OF WARNER, AND TOWN OF WEST SILOAM SPRINGS, MOTION TO DISMISS AND BRIEF IN SUPPORT (Doc# 27)

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TABLE OF CONTENTS AND AUTHORITIES

COME NOW John M. Dunn and Mark D. Lyons and for their response to *Defendants Town of Adair, City of Bartlesville, Town of Big Cabin, Town of Bluejacket, City of Catoosa, Town of Chelsea, Town of Chouteau, City of Claremore, City of Collinsville, Town of Copan, City of Dewey, Town of Disney, City of Grove, City of Jay, Town of Kansas, Town of Langley, Town of Locust Grove, Town of Nowata, Town of Oologah, City of Pryor, Town of Ramona, Town of Salina, Town of South Coffeyville, Town of Spavinaw, Town of Strang, Town of Talala, Town of Verdigris, City of Vinita, Town of Warner, and Town of West Siloam Springs, Motion to Dismiss and Brief in Support,* hereby state and allege as follows:

INTRODUCTION

With the decision of *McGirt v. State of Oklahoma*, ___ U.S. ___, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), the United States Supreme Court pointed out what was clearly the law, ie.- that for more than a century the State of Oklahoma and its political subdivisions have investigated, detained, charged, arrested, imprisoned, fined and otherwise taken large sums of money from Native American people without the authority of law. The reservations lands of the Cherokee and Creek Indians, contained within their treaty boundaries, were never disestablished by Congress. Because of that, most of the land in northeastern Oklahoma is still Indian Country as defined by federal statute. The municipality Defendants do not have jurisdiction over the Plaintiffs if the offenses were committed in "Indian Country." "Congress has defined Indian country broadly to include three categories of areas: (a) Indian reservations, (b) dependent Indian communities, and (c) Indian allotments. *See* 18 U.S.C. § 1151." *Murphy v. Royal*, 875 F.3d 896, 904 (10th Cir. 2017), certiorari granted by *Royal v. Murphy*, 138 S.Ct. 2026 (2018). "All land within the borders of an Indian reservation–regardless of whether the tribe, individual Indians, or non-Indians hold title to a given tract of land–is Indian country unless Congress has disestablished the reservation or diminished its

borders." *Id*. Because the Municipal Defendants, with the direct participation of their respective court clerks, have illegally applied and enforced criminal laws of the State of Oklahoma upon tribal citizens over which they have no subject matter jurisdiction, the Plaintiffs want back what was taken from them regardless of the legal theory or theories to get it. At the very least, the Defendants have been unjustly enriched through their unlawful actions. This lawsuit has been brought by the Plaintiffs on their own behalf, and all others similarly situated, to disgorge the State and its political subdivisions of their ill-gotten gains.

BRIEF STATEMENT OF FACTS.

Part of the analysis of this case should start with *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). There, the Tenth Circuit Court of Appeals analyzed the treaties and other history concerning the Creek Nation and determined that the Creek Reservation had never been disestablished and therefore remained an Indian Reservation. *Id.* at 966. The Tenth Circuit made it clear that the Creek Reservation remained "Indian Country" and that the State never had jurisdiction over crimes committed by Indians on that reservation. *Id*. (See also *Negonsott v. Samuels*, 507 U. S. 99, 102-103, 113 S. Ct. 1119, 122 L. Ed. 2d 457 (1993)). This was not "new law" or a "new interpretation". It was simply a reminder to the State of Oklahoma of the law it has been ignoring and reaffirmation of what has been the law for over 100 years. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020).

The *Murphy* Court also discussed Cherokee specific legislation. For example, the Cherokee Allotment Agreement of 1902, ch. 1375, 32 Stat. 716, dealt with the allotment of lands in restricted fee, §§ 11 23, 32 Stat. at 717 19; reserved some lands from allotment for named schools, colleges, and other purposes; allowed for any of those "school[s] or college[s] in the Cherokee Nation" to seek

additional acreage to be reserved for them, *Id*. § 24, 32 Stat. at 719 20; provided for the creation of a citizenship roll as the basis for allotment, *Id*. §§ 25 31, 32 Stat. at 721 21; created a Cherokee school fund, *Id*. §§ 32 36, 32 Stat. at 721 22; permitted the creation of public roads along section lines, *Id*. § 37, 32 Stat. at 722; provided for the establishment of townsites, *Id*. §§ 38 57, 32 Stat. at 722 25, "in the Cherokee Nation," *Id*. §§ 48 49, 32 Stat. at 724; and provided for the issuance of titles to the allotments, Id. §§ 58 62, 32 Stat. at 725. The Agreement also provided that the Cherokee government would be abolished effective March 4, 1906, but this provision was suspended by the Five Tribes Act. Like the Creek Allotment Agreement and Supplemental Agreement addressed in *Murphy*, the Cherokee allotment laws did not disestablish the Cherokee Nation's reservation.

These treaties that established the Cherokee Reservation take on a Constitutional Dimension under the Supremacy Clause of the United States Constitution as "the Supreme Law of the Land ". See Article VI, §2. From the creation of Oklahoma statehood to the present, the State of Oklahoma and the Defendants in this case have nonetheless continued to arrest, fine and assess fees against Indians for crimes committed on the reservations despite the total lack of subject matter jurisdiction and authority to do so.

Following *McGirt*, the Plaintiffs initiated this action seeking a return and disgorgement of the monies paid to the state and its political subdivisions by Indians which were collected at the point of a government gavel without lawful authority. Based upon laws passed by Congress, the *McGirt* decision and cases proceeding it, each of the convictions of the named Plaintiffs and others who qualify for inclusion in the class, should be declared *void ab inito*. Despite the misstatements of the Defendants to the contrary, the purpose of this action is to require the Defendants to disgorge their ill gotten and wrongly obtained monies paid to the Defendants by Indians as fines and fees for crimes

committed on the Cherokee Indian Reservation. This is not an action seeking to recover restitution. This is not an action seeking to recover from an intentional or negligent tort.

The Municipal Defendants' response is the perfect reason why this Court needs to keep this case and decide it on the merits. These Defendants wrongly claim the *McGirt* decision is limited to a finding the Federal Government or Indian tribal courts only have jurisdiction over "major crimes" because *McGirt* decided a case under the Major Crimes Act. The Supreme Court's finding that Congress did not disestablish the boundaries of the Creek (and Cherokee) Nation, means the State of Oklahoma has no subject matter jurisdiction over any crimes. That is why a federal court, familiar with federal law, must decide the issues in this lawsuit rather than forcing the Plaintiffs to suffer the vagaries of 20 separate municipal court interpretations of *McGirt* and *Royal*, followed by an appeal in the event of an adverse decision. There needs to be one, and only one, response to the same exact issue to be raised for each municipal court.

I. STANDARD OF REVIEW.

The Defendants have filed an FRCP 12(b)(1) and (6) motion to dismiss. "All well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997). "A 12(b)(6) motion should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id*. (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir.1991).

As this Court is undoubtedly aware, the Federal Rules of Civil Procedure are a relaxed standard of pleading markedly different from previous "fact pleading". The purpose of federal pleading rules is to keep litigants ***in court***, not out of court.

> Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz*, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim"). Charles E. Clark, the "principal draftsman" of the Federal Rules, put it thus:
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> > "Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." The New Federal Rules of Civil Procedure: The Last Phase--Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A. B. A. J. 976, 977 (1937) (hereinafter Clark, New Federal Rules).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The Defendants have argued the *Twombly* decision requires fact pleading with allegations that are "more than labels and conclusion and a formulaic recitation of the elements of a cause of action". *Twombly's* holding, for those statements of law, was describing claims brought under the Sherman Antitrust Act. *Id*., at p. 554-555. "In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a

probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id*., at p. 557.

Even if this Court applies a more rigid *Twombly* pleading standard to the Complaint other than notice pleading, the Complaint is more than adequate. This case is analytically simple. Based on the *McGirt* and *Murphy* decisions, the Plaintiffs have sued asking this Court for relief on behalf of Indian tribal members who have been illegally subjugated to Oklahoma criminal laws and been forced to pay untold hundreds of thousands or more of dollars for court costs, probation fees, district attorney supervision fees, etc., under threat of going to jail if the monies are not paid.

The factual basis common to all ultimate claimants are found in ¶¶ 53-58 of the complaint. These paragraphs state with specificity that the municipalities, district attorneys and state district courts have systematically prosecuted "members of a federal recognized American Indian tribe for crimes committed on the Cherokee Reservation", and that only the federal government or the Cherokee Nation have subject matter jurisdiction over such prosecutions. It is further alleged that in the recent United States Supreme Court decision of *McGirt v. Oklahoma*, ___ U.S. ___, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), the court reiterated that Congress had never disestablished the boundaries of the Cherokee Nation and that because Indian country still existed, the State of Oklahoma did not have subject matter jurisdiction over Indians for criminal prosecutions in Indian country.

The Complaint further alleges in ¶¶ 59-65 that the specifically named Plaintiffs were illegally prosecuted, convicted and paid court costs and fines for Oklahoma state law crimes in the Cherokee Nation reservation area, which is Indian Country, and over which only the federal government or the

Cherokee Nation, have exclusive criminal law subject matter jurisdiction. The exact cases numbers for each court, the crimes charged and for which the Plaintiffs were convicted, are specifically plead.

The Complaint specifically alleges in ¶¶ 1-49 how the district attorneys, court clerks and other defendants systematically enforced Oklahoma state criminal laws against the named Plaintiffs (and other putative class members), over which the Defendants had no subject matter jurisdiction.

The complaint has enough factual specificity to meet the *Twombly* requirements to describe the constitutional violations and claims for relief. There are not conclusory nor formulaic allegations made. That part of the Defendants' motion to dismiss, based on an FRCP 12(b)(6) claim the complaint fails to state a claim for relief, should be denied.

As for the Municipal Defendants' claim this Court lacks subject matter jurisdiction pursuant to FRCP 12(b)(1), that argument is not able to be understood and was never supported by relevant case law. Their throw down arguments on p. 3 offer no substantive analysis. The law is patently clear that federal courts have jurisdiction over §1983 claims against municipalities.[1] The Defendants' motion to dismiss on FRCP 12(b)(1) and 12(b)(6) grounds should be denied.

II. THE CURTIS ACT DOES NOT PREVENT THE PLAINTIFF'S RECOVERY.

The Defendants overstate the applicability and meaning of the Curtis Act and that the Act's

[1] "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

claimed grant of jurisdiction for municipal criminal violations over Indians. Notably, the Defendants have no case law supporting their interpretation of the Act.[2] It is simply their own view.

An overview of the Curtis Act is that it was passed in 1898 by Congress after the Dawes (Indian Allotment) Act of 1893 to allow white settlements in Oklahoma Territory, established the legal basis for towns being laid out, surveyed and plotted. Any individual could obtain title to the lot in fee simple. The title owner of a lot had the legal right to sell or mortgage the property. An incorporated town or city had the right to self-regulation and levy taxes, allowing them to establish public services. By 1900, the largest towns in Indian Territory had incorporated and were: Ardmore, with 1,500 residents; Muskogee 4,200; McAlester 3,500; Wagoner 2,300; Tulsa 1,300; and Eufaula 800.[3] An author for the Oklahoma Historical has written the Act subjected everyone in the Territory to federal law. "The Curtis Act helped weaken and dissolve Indian Territory tribal governments by abolishing tribal courts and subjecting all persons in the territory to federal law. "[4]

They would have the Court believe that the municipalities could enforce their laws against non-Indians and Indians alike. That is not accurate. While it is true that Section 14 incorporated the laws of Arkansas into the laws of the municipalities and arguably made them applicable to all persons residing in the municipality. However, what the Curtis Act did not do was give the towns

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[2] Counsel has performed a search of LexisNexus and has only found one federal case discussing the Curtis Act. See *Choctaw & Chickasaw Nations v. Seay*, 235 F.2d 30 (10th Cir., 1956) and it was a quiet title action brought by the tribes for lands in the Red River. If there are other, they simply were not found. The only Oklahoma cases found are found the early 1900's that discuss property rights. See for example *Cochran v. Hocker*, 1912 OK 452, 124 P. 953.

[3] https://en.wikipedia.org/wiki/Curtis_Act_of_1898

[4] https://www.okhistory.org/publications/enc/entry.php?entry=CU006

the ***authority*** to ***prosecute*** the Indians for violating those laws. The Tenth Circuit addressed the Curtis Act in *Murphy*.

> In 1898, Congress imposed new limitations on the powers of tribal governments in the Indian Territory. Under the Curtis Act, tribal courts would be abolished within the year. §28, 30 Stat. at 504-05. All cases would be transferred to the United States court in the Indian Territory, and tribal laws would be unenforceable. §§ 26, 28, 30 Stat. at 504-05. Congress instructed the Secretary of the Interior ("Secretary") to stop directing federal payments to tribal governments and to begin paying individual tribal members directly. § 19, 30 Stat. at 502. The Curtis Act included a default allotment scheme that would take effect following completion of the tribal citizenship rolls and survey of tribal lands. § 11, 30 Stat. at 497-98. But, as discussed in the next section, Congress and the Creek Nation later agreed to a different allotment plan. The Curtis Act made the most significant governance changes to date, but it did not address the Creek Reservation's borders.

Murphy v. Royal, 875 F.3d 896, 941 (10th Cir. Okla. November 8, 2017). Specifically, the Curtis Act contains the following language:

> For the purposes of this section all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory; **and the United States court therein shall have jurisdiction to enforce the same**, and to punish any violation thereof, and the city or town councils shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect :

The Curtis Act § 14.

In order to believe the Defendants, one would have to conclude that as a result of the Curtis Act, a patchwork of areas exists where political subdivisions of Oklahoma have jurisdiction but the state itself does not. In the alternative, a strict reading of the Act only sent cases to Federal Court - the act made no express provision in Section 14 for municipal or state court jurisdiction. Apparently

this was accomplished in Section 28 of the Act, which was subsequently repealed. The United States Supreme Court has already addressed this argument in *McGirt*.

> If Oklahoma lacks the jurisdiction to try Native Americans it has historically claimed, that means at the time of its entry into the Union no one had the power to try minor Indian-on-Indian crimes committed in Indian country. This much follows, Oklahoma reminds us, because the MCA provides federal jurisdiction only for major crimes, and no tribal forum existed to try lesser cases after Congress abolished the tribal courts in 1898. Curtis Act, §28, 30 Stat. 504-505. Whatever one thinks about the plausibility of other discontinuities between federal law and state practice, the State says, it is unthinkable that Congress would have allowed such a significant "jurisdictional gap" to open at the moment Oklahoma achieved statehood.
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> But what the State considers unthinkable turns out to be easily imagined. Jurisdictional gaps are hardly foreign to this area of the law. See, e.g., *Duro v. Reina*, 495 U. S. 676, 704-706, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990) (Brennan, J., dissenting). Many tribal courts across the country were absent or ineffective during the early part of the last century, yielding just the sort of gaps Oklahoma would have us believe impossible. **Indeed, this might be why so many States joined Oklahoma in prosecuting Indians without proper jurisdiction**. The judicial mind abhors a vacuum, and the temptation for state prosecutors to step into the void was surely strong.

McGirt v. Oklahoma, 140 S. Ct. 2452, 2478 (2020) (Emphasis Added.)

Based on the above, Courts have already resolved the issue raised by Defendants. For whatever the Curtis Act did - the Tenth Circuit concluded that it did *not* change the boundaries of the reservation and the United States Supreme Court found that at no time did the State of Oklahoma have jurisdiction over crimes not covered by the Major Crimes Act. If the State did not have jurisdiction, its political subdivisions can not be said to have more jurisdiction that it does.

III. THE PLAINTIFFS CLAIMS ARE NOT BARRED BY THE ROOKER-FELDMAN DOCTRINE.

The *Rooker-Feldman* doctrine has been described as a prohibition against seeking an "appeal" in Federal Court from an adverse state court decision. See *Rooker v. Fid. Trust Co.,* 263 US 41 (1923); *DC Court of Appeals v. Feldman,* 460 US 462 (1983). There are two general situations where Rooker-Feldman applies: (1) where a state-court loser explicitly asks a federal district court to exercise appellate review of the state-court judgment, and (2) where a state-court loser's federal claim constitutes a de facto appeal from a state-court judgment. *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 858-859 (9th Cir. 2008) (citing *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004)). A federal claim constitutes a de facto appeal where "claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that adjudication of the federal claims would undercut the state court's ruling or require the district court to interpret the application of state laws or procedural rules." *Id*. at 859. Neither case applies here. There is no appeal of a state court judgment nor is there *de facto* appeal of a state court judgment.

Unlike the cases cited by the Defendants, the issue brought in this case is separate from any contested determination made by a court. Each of the judgments in cases cited by the Defendants were *valid* judgments. The judgments that are contested in this case are not. Only a *valid* judgment is entitled to "full-faith and credit" under 28 USC § 1738. This case is brought following a clear pronouncement of the United States Supreme Court regarding reservations that have never been disestablished, which translates into the State of Oklahoma not having subject matter or personal jurisdiction over Indians for crimes committed in Indian County.

While *McGirt* was specific to the Creek Reservation, the logic and treaties discussed apply equally to the Cherokee Reservation. The first thing the Plaintiffs are asking this Federal Court to determine is whether the Cherokee Reservation has in fact been disestablished. *Such a finding, by*

operation of law would mean that neither the State or its political subdivisions ever had jurisdiction over an Indian on the Cherokee Reservation. Such a finding would make their convictions *void ab initio*. This is not an appeal or a review of a state court decision, rather it is a quest to recover monies collected by the State and its political subdivisions that were made without the Court ever having subject matter or personal jurisdiction to enter a judgment. The instant claims for disgorgement due to unjust enrichment don't trigger the Rooker-Feldman doctrine. *Cowan v. Hunter*, 762 F. App'x 521, 523 (10th Cir. 2019).

IV. THE PLAINTIFFS ARE NOT REQUIRED TO OBTAIN POST CONVICTION RELIEF.

The Defendants assert that the Plaintiffs are required to individually pursue Post Conviction Relief in order to vacate their conviction and then proceed to recovery. However, this makes no sense when the United States Supreme Court has already ruled that if the Plaintiffs' crimes occurred in Indian Country and the Plaintiff was an "Indian" the state would have no jurisdiction. This has long been the case. See *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992), *Rice v. Olson*, 324 U.S. 786, 789, 65 S. Ct. 989, 991 (1945) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). It is settled law that a result from a case in which a court acts outside its subject matter jurisdiction are void *ab initio* and are so even if no appeal is taken. As early as 1828, the U.S. Supreme Court has observed that, "Courts are constituted by authority and they cannot beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, *and this even prior to reversal*." *Valley v. Northern Fire & Marine Ins. Co.,* 254 U.S. 348 (1920), citing *Elliott v. Peirsol*, 1 Pet. 328, 340, 7 Led. 164 (1828).

It is uncontested that *McGirt* ruled that the State of Oklahoma lacked subject matter jurisdiction over the petitioner's cases because it was a Major Crime that was alleged to have occurred by an Indian within in Indian Country. It is further uncontested that the Plaintiffs and Class Members are members of a federally recognized tribe. As a result, the state convictions were made without subject matter jurisdiction, and are currently void, regardless of any collateral review (if fact, post-conviction review is not possible because there is no valid conviction to review). Any conviction had is *void ab initio*, there is no conviction to address through post conviction relief to achieve the ends sought.

The Plaintiffs would show the Court the United States Supreme Court case of *Nelson v. Colorado*, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017) for the proposition that post conviction relief is not required to achieve a refund for fines and fees. In *Nelson*, the Petitioners had already obtained post conviction relief, but the state required a separate action be instituted in which the Petitioners would be required to prove their actual innocence by clear and convincing evidence. The Court found that this offended the Fourteenth Amendment's guarantee of due process because it forced the petitioners to prove their innocence twice. *Id.* at 1255. However, this case provides an interesting framework for evaluating the case at bar. The Court went on to use the *Mathews* balancing test to determine if the money should be returned. This test requires the court to evaluate (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake. *Nelson*, 137 S. Ct. at 1255. All three considerations weigh decisively against the State's position in the case at bar. As in Nelson, the members of the Plaintiff class has an interest in regaining their money. Because the United States Supreme Court and the 10th Circuit Court of Appeals has determined that any convictions of the members of the

class are void *ab initio* due to a lack of jurisdiction, nothing else is required. With regard to the third factor, the Supreme Court said, [The State] has no interest in withholding from [Plaintiffs] money to which the State currently has zero claim of right. 137 S. Ct. at 1257.

Post Conviction Relief is not required in the instant matter. The Plaintiffs do not seek to have the State change their records to reflect that they have not received a conviction, rather the Plaintiff class merely seeks a refund of the monies that have been paid pursuant to judgments that are void ab initio as a result of a lack of jurisdiction of the courts of this state or its political subdivisions.

V. THE MUNICIPALITIES' RELIANCE ON *HECK* IS MISPLACED. THE PLAINTIFFS HAVE STATED A CLAIM UNDER §1983.

Defendant municipalities' reliance on *Heck is* misplaced. In summary, *Heck* prevents an action under Section 1983 where the underlying conviction is valid. *Heck* would require that a conviction be nullified through being overturned on appeal or declared invalid by a state tribunal or called into question by a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey,* 512 US 477, 486-487 (1994). However, it is important to remember that the holding in both *McGirt* and *Murphy* have found that the convictions of the subject class of plaintiffs was without subject matter jurisdiction and therefore would be *void ab initio.* Therefore, they should meet the test articulated in *Heck* because they have been declared invalid and certainly called into question by the writs of habeas issued in both *Murphy* and *McGirt.*

Unlike the facts presented in *Heck*, this case is about a custom and policy of state offices and political subdivisions (municipalities) prosecuting Indians, for offenses allegedly committed, in Indian Country. According to the *McGirt* Supreme Court decision, it is clear the State of Oklahoma

had no subject matter jurisdiction to do so. That is the essence of a §1983 action. An official policy or custom that directly causes the deprivation of one's 14th Amendment rights to their property without due process of law is a §1983 action.

First, the municipalities had an official policy and custom of filing criminal charges against Indians, for crimes committed in Indian Country; employing police officers that issue citations with preset fine amounts already filled out for judges to sign; suspending the driver's licenses or issueing an arrest warrant for those who did not pay the fines and even holding Indian defendants on a "cash only bond" until their fine was paid. These Defendants had ZERO right to take any of these actions Indians for crimes allegedly committed in Indian country.

This is a case seeking disgorgement of wrongly and illegally obtained monies from Indians against whom criminal charges were filed and prosecuted. This is not a damages cases in the sense of a case of malicious prosecution. It is a case seeking the refund of the ill gotten gains from the various defendants.

> The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Ex parte Young, 209 U.S. 123, 155-156, 28 S. Ct. 441, 52 L. Ed. 714 (1908)

As noted in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, the touchstone for suits for monetary, declaratory or injunctive relief "against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution". *Id*., at p. 690. "'Congress included customs and usages [in

§ 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" *Id*.

While the misapplication and misplaced reliance on *Heck* may offer hope to the municipalities, it only serves to muddy the water. This is not a case seeking monetary damages from a wrongful conviction that is still valid. It is a case that is seeking disgorgement of monies paid by Indians to political subdivisions of the State of Oklahoma (such as the municipal defendants) for fines and costs that were imposed by a municipal court without subject matter jurisdiction. These convictions (as a group) have been invalidated by the United States Supreme Court in *McGirt* and *Murphy*. The motion to dismiss based on *Heck* should be denied.

VI. A 12(b)(6) MOTION CANNOT DECIDE FACT BASED EQUITABLE DEFENSES.

The Defendants claim this Court should grant its FRCP 12(b)6) motion to dismiss and grant them *de facto* judgment on their affirmative defenses of laches, waiver, estoppel and unclean hands. Such a ruling would be in total derogation of the fact based inquiry and affirmative burdens of proof and persuasion placed on the Defendants to prove these claims. Furthermore, all these claims of equitable defenses are discretionary with a court.

Fundamentally waiver is the known relinquishment of a right with the specific intent to do so and the burden of proof is on the party asserting the defense. "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver." *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 609 F. Supp. 2d 988, 1029 (N.D. Cal., 2009).

The party alleging estoppel always carries the factual and legal burdens of persuasion and proof. *A. C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020, 1043 (Fed.Cir., 1992). "Finally, the trial court must, even where the three elements of equitable estoppel are established, take into consideration any other evidence and facts respecting the equities of the parties in exercising its discretion and deciding whether to allow the defense of equitable estoppel to bar the suit." *Id*.

Laches also requires the party asserting the claim to always bear the burden of persuasion and proof. See *Hedges v. Hedges*, 2002 OK 92, ¶ 8, 66 P.3d 364. "The party invoking the doctrine's benefit as an affirmative defense has the burden of proof and persuasion." "Application of the doctrine is discretionary and varies with the facts and circumstances of each case. The defendant is required to show more than mere lapse of time. Equity must follow the law. It may not allow legal limitations to be abridged unless there are equitable considerations of a compelling nature which demonstrate prejudice-dealing delay." *Id*.

If anything, the "unclean hands doctrine" favors a verdict in favor of plaintiff. Even when considering the public interest that may be at stake. A citizen has the right to expect fair dealing from his government, and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities. *S&E Contractors v. United States*, 406 U.S. 1, 10, 92 S. Ct. 1411, 1417 (1972). As part of the expectation of fair dealing, a citizen should have the right to expect the municipality will take no more than what it is entitled to.

In order for the concept of "latches" to be relevant, the delay must be "inexcusable" and for an "unreasonable and unexplained length of time". The single largest reason that plaintiffs did not bring an action or seek other relief following *Murphy*, was the state of Oklahoma requested and

received a stay pending appeal to the United States Supreme Court. Counsel can represent that prior to United States Supreme Court handing down the decision in *McGirt* (and simultaneously affirming *Murphy*, and vacating the convictions and for other cases[5]) the state and its subdivisions turned a deaf ear to any claims involving jurisdiction based upon Indians committing crimes on reservations. Finally, equity would require that the defense is being offered to keep one party from gaining an advantage over the other – that is to say some advantage was gained by delay on the part of plaintiff. However, not only of the municipalities failed to demonstrate how they have been prejudiced by plaintiffs waiting on the *McGirt* decision, but in fact the amount sought in refunds has only increased through the actions of the municipalities. This is another way the municipalities can be said to have "unclean hands". Had they taken heed of the *Murphy* decision the amount to be refunded would be zero. It is their own continued actions over the past three years that have contributed to the large amount of money that they now seek to wrongfully retain. Again, equity would favor the plaintiffs over the defendants.

VII. THE PLAINTIFFS HAVE STATED A CHOSE OF UNJUST ENRICHMENT, A CLAIM FOR DISGORGEMENT AND AN ACTION FOR MONEY HAD AND RECEIVED.

The Defendants further attempt to throw up roadblocks in order to prevent Plaintiffs from recovering the monies owed to them by asserting that none of the three elements of "monies had monies received" have been adequately pled. However, that is not accurate. To remind the

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1. *Travis W. Bentley v. Oklahoma*, Case No. 19-5417, involving a member of the Choctaw Nation, with the incident in Citizen Potawatomi Nation, prosecuted in Cleveland County.
2. *Keith E. Davis v. Oklahoma,* Case No. 19-6428, involving a member of the Cherokee Nation, with the incident in the Choctaw Nation, prosecuted in Latimer County.
3. *Patrick J. Terry v. Oklahoma,* Case No. 18-8801, involving a member of the Cherokee Nation, with the incident in the Ottowa Nation, prosecuted in Ottowa County.
4. *Joe Johnson v. Oklahoma,* Case No. 18-6098, involving a member of the Seminole Nation, with the incident in the Seminole Nation, prosecuted in Seminole County.

Defendants again, the federal court system employs notice pleading, not fact pleading. The essential elements of this claim are: (1) defendant received money belonging to plaintiff; (2) defendant benefitted from the receipt of money; and (3) under principles of equity and good conscience, defendant should not be permitted to keep the money." (See *Ellington Credit Fund, LTD. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 205 (S.D.N.Y. 2011), *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d 112, 125 (2d Cir. 1984), *Nordlicht v. N.Y. Tel. Co.*, 799 F.2d 859, 865 (2d Cir. 1986), *Pitman v. City of Columbia*, 309 S.W.3d 395, 402 (Mo. Ct. App. 2010), *Superior Edge, Inc. v. Monsanto Co.*, 44 F. Supp. 3d 890, 899 (D. Minn. 2014). In fact, Claims for money had and received are founded upon equitable principles whereby the law implies a contract to prevent unjust enrichment. *Karpierz v. Easley*, 68 S.W.3d 565, 570 (Mo. Ct. App. 2002), See also *Superior Edge, Inc. v. Monsanto Co*., 44 F. Supp. 3d 890, 899 (D. Minn. 2014).

It is unnecessary at this point in the pleading stage of the case to joust with each sides opposing facts. This claim simply can't be decided on an FRCP 12(b)(6) motion to dismiss a notice pleading complaint. This request should be denied.

VIII. THE OKLAHOMA GOVERNMENT TORT CLAIMS ACT DOES NOT APPLY.

The defendants further claim that the governmental tort claims act prevents this refund without going through the statutory hurdles. However, the Oklahoma Supreme Court is already addressed this issue and found that refunds do not fall in the realm of tort.

> Again, appellees are not seeking compensation for a loss caused by the state. Instead, they seek a refund of the amount overpaid for license reinstatement. Their action is one for money had and received. As such, the GTCA provides no bar to their action. Appellees were not required to comply with the claims procedure provided in the Act.

Sholer v. State ex rel. Dep't of Pub. Safety, 945 P.2d 469, 472-73 (Okla. 1995)

IX. THE FEE PROTEST STATUTE SIMILARLY DOES NOT APPLY.

The defendants further argue that plaintiff should avail themselves of the fee protest statute and the failure to do so again creates a bar to them being allowed to proceed. Again, this argument has already been addressed by the Oklahoma Supreme Court.

> We do not view the statute as an impediment to the District Court's exercise of jurisdiction. Okla. Const.Art. 7 § 7. However, even if it were otherwise, the statute, as explained below, would not be a bar to recovery.
>
> Appellees (the drivers who were charged multiple reinstatement fees) correctly assert that they were not required to follow Section 206, because they were not claiming a fee to be unconstitutional or invalid. They do not dispute the validity of reinstatement fees. Rather, they dispute only the accounting practices of the DPS in requiring the payment of multiple reinstatement fees. Appellees do not challenge the statute under which the fees are paid. In fact, they rely on the statute and its validity in asserting that the statute permits the collection of only one fee.

Sholer v. State ex rel. Dep't of Pub. Safety, 1995 OK 152, ¶¶ 1-3, 945 P.2d 469, 478.

Like the plaintiffs in *Sholer*, the plaintiffs in this case are merely seeking a refund for monies paid that were not in fact owed. They do not challenge the constitutionality or validity of the law they are accused of violating, rather they assert they were prosecuted in a court that had no jurisdiction over the. Had they been prosecuted in tribal court, as they should have been, no refunds would be due and they would have been correctly held to answer for their violation of law.

X. ALTERNATIVE THEORY TO RECOVERY.

The law regarding motions to dismiss for failure to state a claim clearly allow even unplead theories to defeat the motion, that motions to dismiss are strongly disfavored and all inferences in bringing a claim must be construed in favor or the non-moving party. *Conley v. Gibson, supra*. In

the dissenting opinion of *Sholer*, Justice Lavender opined that the better cause of action against the state would be an unjust enrichment claim, which may have the effect of enlarging the period of time for which plaintiffs could recover and affect the number of plaintiffs that would be eligible for this refund.

> Although I agree with the result reached by the court's pronouncement, I recede from the court's decision that three years is the applicable limitation period. While I would allow the plaintiffs' action to prevent the State's unjust enrichment, I would hold that the common-law principles which undergird their claims lie in the substantive law of restitution. Although quasi-contractual precepts are a part of the common law of restitution, not all restitutionary actions are properly classified as contractual in nature.

Sholer v. State ex rel. Dep't of Pub. Safety, 1995 OK 152, ¶ 6, 945 P.2d 469, 479

XI. PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION.

Defendants finally make a spurious argument that the Plaintiffs have no standing. While they correctly point out that only one of the *named Plaintiffs* has been prosecuted in a municipality (Ms. Sixkiller), the placement of paragraphs 65 and 69 answers the questions posed. Ms. Sixkiller recieved a traffic citation in Locust Grove on April 20, 2019. She was prosecuted by a political subdivision of the State of Oklahoma, and she has paid monies in the form of fines to that defendant.

In a more general sense The State of Oklahoma as previously represented to the United States Supreme Court that "somewhere between 10% and 15% of its citizens identify as Native American." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 (2020). Statistically, it is fair to say the population of the Cherokee Reservation would contain a larger percentage of citizens that are classified as "Indians" under law. Therefore, it is common sense that the same percentage of citations issued by law enforcement were issued to Indians on the Cherokee Reservation. Every dollar paid to those

municipalities by a member of the class would be a reason that the Plaintiffs and the Plaintiff Class has standing to proceed with this case.

XII. THE MUNICIPALITIES SHOULD BE ESTOPPED FROM DENYING EITHER THE EXISTENCE OF THE RESERVATIONS OR THE KNOWLEDGE REGARDING THE EXISTENCE OF RESERVATIONS.

The Defendants have previously sought to invoke the powers of Equity. In return, the Plaintiff would assert that the Defendants are barred from claiming that prior to *McGirt*, it was operating under a reasonable mistake of law in its improper prosecution of tribal members because of equitable estoppel. Equitable estoppel "operates to place the person entitled to its benefit in the same position he would have been in had the representations been true." Eaton § 62, at 176. And, as Justice Story long ago pointed out, equitable estoppel "forms a very essential element in . . . fair dealing, and rebuke of all fraudulent misrepresentation, which it is the boast of courts of equity constantly to promote." 2 Story § 1533, at 776. *CIGNA Corp. v. Amara*, 563 U.S. 421, 441, 131 S. Ct. 1866, 1880 (2011). The actions of the State in dealing with the Muscogee (Creek) Nation in various gaming issues demonstrate clearly that the State was aware of its dealing with a tribal sovereign nation. It cannot now claim ignorance of that sovereignty with respect to criminal prosecutions of Indians in Indian Country.

Previous State interactions with the various Indian tribes in arriving at gaming compacts demonstrates that Oklahoma did, in fact, behave as if it was negotiating with a tribal sovereignty. The State specifically acknowledges this sovereignty in these agreements.

In 1988, the US Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.,* with an intent to (*inter alia*) "provide a statutory basis for the operation of gaming by *Indian tribes* as a means of promoting tribal economic development, self-sufficient, and strong tribal

governments." 25 U.S.C. § 2702(1) (*emphasis added*). The IGRA regulatory framework outlines the circumstances of which different classes of gaming are allowed by tribes. Specifically, the IGRA allows for gaming on "Indian Lands" which are defined as:

> (4) The term "Indian lands" means –
> (A) all lands within the limits of any *Indian reservation*; and
> (B) any lands title to which is either held in trust by the United States for the benefit of any *Indian tribe* or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.
> 25 U.S.C. §2703(4)(A) and (B) (*emphasis added*)

McGirt ruled that the boundaries of the Muscogee (Creek) Nation were a reservation for purposes of federal law. However, tribal gaming existed in Oklahoma pre-*McGirt*, with the State entering into a gaming compact with the Muscogee (Creek) nation in 2005. (See, *infra*, Letter from U.S. Department of Interior to Honorable A.D. Ellis). Therefore, the State was behaving as if the Muscogee (Creek) Nation was "Indian lands" within the meaning of 25 U.S.C. §2703(4). As a result, Oklahoma was dealing with the tribe as if it were either an Indian reservation itself (§2703(4)(A)) or held land in trust by the United States for the benefit of an *Indian tribe* (§2703(4)(B), *emphasis added*). Either way, the State cannot make a colorable that it was proceeding under a mistaken understanding that the Muscogee (Creek) Nation could not have had jurisdiction for non-major crimes.

Not only did Oklahoma behave as if it were negotiating gaming compacts with an Indian tribe, it expressly acknowledged the sovereignty of the Muscogee (Creek) Nation in agreeing to the compact. In a letter dated March 16, 2005, the U.S. Department of Interior published an approval of the gaming compact agreed to by the State of Oklahoma and the Muscogee (Creek) Nation, with

a formal approval appearing in the Federal Register. 70 *Fed. Reg*. No. 67, p. 18041. In the compact which was approved, Oklahoma agreed to several recitals which manifest a recognition of the tribal sovereignty and jurisdiction, *viz.*

> Part 2. RECITALS
>
> 1. The tribe is a federally recognized tribal government possessing sovereign powers and right of self-governance
>
> …
>
> 3. The state and the tribe maintain a government-to-government relationship.
> 4. The United States Supreme Court has long recognized the right of an Indian tribe to regulate activity on lands within its jurisdiction.

Letter from U.S. Department of Interior to Honorable A.D. Ellis, dated March 16, 2005. https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-038435.pdf

Therefore, it is clear that the State of Oklahoma treated the Muscogee (Creek) Nation as a sovereign tribal sovereign possessing jurisdictional authority when it agreed to share revenues from casinos. Yet now, the State seems to oblivious to this when it comes to recognition of tribal sovereignty with respect to criminal law.

XIII. IF THE COURT GRANTS THE STATE'S MOTION, THE PLAINTIFF SHOULD BE GRANTED LEAVE TO AMEND

In the event this Court were to grant the defendant's motion to dismiss, the plaintiffs pray to be granted leave to amend the *Complaint* in order to state a claim based upon the orders of the court. "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." USCS Fed Rules Civ Proc R 15(a)(2).

CONCLUSION

The Defendant Municipalities have interposed an FRCP 12(b)(1) and (6) motion to dismiss the Plaintiffs' claims. The only way they can prevail is if they can prove there is "no set of facts" upon which the Plaintiffs can prevail. That is a fact based inquiry that cannot succeed at this point as too many facts are in dispute.

This case rests on the idea that plaintiffs, and members of plaintiff's class, or Indians who were subject to criminal prosecutions by the Defendant Municipalities while being sovereign citizens of sovereign Indian tribes. The *McGirt* decision decided that only federal district courts and tribal courts have subject matter and personal jurisdiction over crimes, by Indians, allegedly committed in Indian County. Each of the Plaintiffs' convictions should be declared *void ab initio* as neither the State of Oklahoma nor any of its political subdivisions have jurisdiction over these kinds of crime.

The legal analysis to these claims is simple and clear. The motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2020, I electronically transmitted the attached document to the Clerk of Court using the ECF system for filing and transmittal of Notice of Electronic Filing to all counsel of record as set forth below:

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