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.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS APRIL FRAUENBERGER, JILL SPITZER, CAROLINE WEAVER, DEBORAH MASON AND LAURA WADE'S, MOTION TO DISMISS AND BRIEF IN SUPPORT (Doc# 70)

Mark D. Lyons, OBA #5590
LYONS & CLARK, INC.
616 S. Main, Suite 201
Tulsa, OK 74119
(918) 599-8844 Telephone
(918) 599-8585 Facsimile
lyonscla@swbell.net

and

John M. Dunn, OBA #20975
The Law Offices of John M. Dunn, PLLC
616 S. Main, Suite 206
Tulsa, OK 74119
(918) 526-8000 Telephone
(918) 359-5050 Facsimile
jmdunn@johndunnlaw.com
Attorneys for Plaintiffs

TABLE OF CONTENTS AND AUTHORITIES

COME NOW John M. Dunn and Mark D. Lyons and in response to the *Defendants' April Frauenberger, Jill Spitzer, Caroline Weaver, Deborah Mason and Laura Wade's Motion to Dismiss and Brief in Support (Doc #70),* hereby state and allege as follows:

INTRODUCTION

With the decision of *McGirt v. Oklahoma*, ___ U.S. ___, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020) by the Unites States Supreme Court of the United States, made it has become clear 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 State and its political subdivisions 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 for illegally and unlawfully criminally prosecuting, and collecting fines, all species of fees, and court costs, from members of Indian tribes for allegedly committing crimes in Indian country. Unquestionably the Defendants have no subject matter nor personal jurisdiction over the Plaintiffs nor putative Plaintiffs' class. See Dkts. 75, 76 and 77 for a brief statement of facts.

ARGUMENTS AND AUTHORITIES

I. STANDARD OF REVIEW.

The Defendants have filed an FRCP 12(b)(1) and (6) motion to dismiss for three reasons: 1) they claim the Court Clerks have 11th Amendment immunity, 2) because there are no facts plead for the Court Clerk liability; 3) the Plaintiffs' claims are barred by the Rooker-Feldman doctrine, 4) the Court Clerks have quasi-judicial immunity, 5) the declaratory judgment claims should be dismissed because the Defendants claim is seeks to declare officers have violated a plaintiffs past rights, 6) the Plaintiffs' claims are an impermissible collateral attack, ie.- post-conviction relief, on

their convictions, and, 7) the Plaintiffs' claims are barred by the Oklahoma Governmental Tort Claims Act.

The fundamental essence of this lawsuit is that the *McGirt* and *Murphy* decisions restated what has always been the law, but the State of Oklahoma willfully turned a blind eye to, ie.- that Congress meant what it said to the Creek and Cherokee Nations. Congress promised these Indian Nations would have reservations and gave them lands for reservations to the tribes it statutorily defined as Indian Country. The tribes' reservations were never disestablished. Therefore the 10th Circuit and Supreme Court did not make new law. They just pointed out what the State of Oklahoma chose to ignore, at its peril, for over a hundred years.

Furthermore, every 11th Amendment or court created judicial immunity case cited by the Defendants, is for damage claims. This is not a case seeking damages against a judge or court clerk. This is a case seeking equitable disgorgement of ill gotten gains wrongly obtained by the Defendants. Every judicial immunity case cited by the Defendants deals with damages, not cases where the Defendants acted in the complete absence of jurisdiction for equitable disgorgement.

What the Defendants argue is that judicially construed and created exceptions to liability is an accepted way of repealing Congress' will in enacting §1983 laws. Yet in the meantime, the Defendants want this Court to sanction the keeping of their ill gotten gains from Indian Citizens that they have taken from statehood forward.

"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". "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." *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 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.

II. THE DEFENDANTS, SUED IN THEIR CAPACITY AS COURT CLERKS, ARE NOT IMMUNE UNDER THE 11TH AMENDMENT.

A court clerk is an elected county official only for the county that person serves. Okla.Stat. tit. 19, §131(A)("At the general election to be held in November 1974, there shall be elected in each county of the state, a court clerk, a county sheriff, and a county clerk who shall hold office for a term of two (2) years, . . ."). Those persons eligible to run for county office must be residents and qualified voters of the county for which they seek election. See Okla.Stat. tit. 19, §131.1 and §132. They are like Sheriffs, who it is known can be sued for §1983 claims.

A. Section 1983 claims are specifically designed to challenge misuse of an office.

The claims against the District Court Clerks are brought against the office of the court clerk and in their official capacities for violations of federal law. The claims brought are not for damages, but for disgorgement of ill-gotten gains they received generically referred to as fines and court costs, and later disbursed, for the systematic, official policy and custom of illegal prosecution and punishment of Indian tribal members charged with crimes in Indian Country, over which the State of Oklahoma has no personal nor subject matter jurisdiction. Section 1983 lawsuits are specifically directed against abuse of a public office by the officials holding the office. See *Monroe v. Pape*, 365 U.S. 167, 171-72, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

> There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. See *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 287-296. The question with which we now deal is the narrower one of whether Congress, in enacting § 1979[1], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Cf. *Williams v. United States*, 341 U.S. 97; *Screws v. United States*, 325 U.S. 91; *United States v. Classic*, 313 U.S. 299. We conclude that it did so intend.

Actions against state officials (and court clerks), acting in their official capacities, performing ministerial acts, are not acts barred by 11th Amendment, judicial or quasi-judicial immunity. See *Scott v. Evans*, 2006 U.S. Dist. LEXIS 11326 (E.D. Mich. 2006), *Scott v. Evans*, 2006 U.S. Dist. LEXIS 11326 (E.D. Mich. 2006), *Snyder v. Nolen*, 380 F.3d 279 (7th Cir. 2004), *Geitz v. Overall*, 62 Fed. Appx. 744 (8th Cir. 2003) and *Smith v. Finch*, 342 F.Supp.3d 1012 (E.D. Mo. 2018).

Tindal v. Wesley, 167 U.S. 204, 17 S. Ct. 770, 42 L. Ed. 137 (1897) denied 11th Amendment immunity to the South Carolina Secretary of State who it was alleged was illegally holding property belonging to the Plaintiffs. " But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law." The case further held:

> The other class, the court said, 'is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial -- is not, within the meaning of the Eleventh Amendment, an action against the State" (citations omitted)

Id., at p. 220. The complaint alleges facts that officials acting in their official capacity are holding

---

[1] Section 1979 is §1983 of the Civil Rights Act. "This case presents important questions concerning the construction of R. S. § 1979, 42 U. S. C. § 1983, which reads as follows:" *Id*., at p. 169.

property of the Plaintiffs without lawful authority. The Defendant court clerks were paid court costs, fines, fees, and other sums of money in the total absence of jurisdiction to either receive or demand such fees. Under FRCP 12(b)(6) pleading requirements, the Defendants must prove there is no set of facts nor no legal theory upon which a Plaintiff can prevail, before such a motion can be granted. The Defendants' motion should be denied.

III. TITLE 42 USC § 1983 ALLOWS ALL CLAIMS FOR EQUITABLE RELIEF.

"Section 1983 by its terms confers authority to grant equitable relief as well as damages, . . .". *Rizzo v. Goode*, 423 U.S. 362, 378, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976). "'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id*., at 423 U.S. 376-77, citing to *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 11, 15 (1971). After a long and protracted trial, the district court in *Rizzo* "entered an order in 1973 requiring petitioners 'to submit to [the District] Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct' . . ." The 3rd Circuit affirmed the district court. The Supreme Court reversed in part.

IV. DISGORGEMENT IS AN EQUITABLE REMEDY FOR WHICH A COURT HAS BROAD AUTHORITY.

In *United States ex rel. Zissler v. Regents of Univ. of Minn.*, 992 F. Supp. 1097, 1109 (D. Min., 1998), the court held, "Disgorgement of illegal profits, however, is an equitable remedy, not a request for money damages. See *United States v. Incorporated Village of Island Park*, 791 F. Supp. 354, 370 (E.D.N.Y. 1992)." "Even if this Court were to construe the government's request for disgorgement as a remedy for its claims for unjust enrichment and breach of fiduciary duty, those

claims would not be claims for money damages, but for equitable relief." *Id*. A district court has broad remedial powers over parties who have no legitimate right to ill-gotten gains. The fact funds are no longer in the original parties' possession, but in someone else's, does not affect the return. See *Osborn v. Griffin*, 865 F.3d 417, 455 (6th Cir., 2017):

> As disgorgement is designed to equitably deprive those who have obtained ill-gotten gains of enrichment, it may be imposed upon innocent third parties who have received such ill-gotten funds and have no legitimate claim to them. [*S.E.C. v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998)], citing *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998). That is consistent with disgorgement's remedial purpose —disgorgement is imposed not to punish, but to ensure illegal actions do not yield unwarranted enrichment even to innocent parties.
>
> However, unjust enrichment may also be prevented by requiring the violator to disgorge the unjust enrichment he has procured for the third party. As our case law has indicated (and as our opinion here confirms), when third parties have benefitted from illegal activity, it is possible to seek disgorgement from the violator, even if that violator never controlled the funds. The logic of this . . . is that to fail to impose disgorgement on such violators would allow them to unjustly enrich their affiliates. Thus, ordering a violator to disgorge gain the violator never possessed does not operate to magnify penalties or offer an alternative to fines, but serves disgorgement's core remedial function of preventing unjust enrichment. District courts possess the equitable discretion to determine whether disgorgement liability should fall upon third parties or violators, a responsibility concordant with the district courts' broad discretion to assay disgorgement more generally.

S.E.C. v. Contorinis, 743 F.3d 296, 306-07 (2d Cir. 2014) (emphasis added).

> In sum, it does not matter that Defendants gave Plaintiffs' property to innocent third parties; the property was not Defendants' to dispose of. When tortfeasors unjustly enrich themselves, courts may force them to disgorge all of their ill-gotten gains. *Cavanagh*, 445 F.3d at 117. It makes no difference that Defendants have transferred the assets to innocent third parties, just as it would make no difference if Defendants gave the assets to charity. The district court (and by extension, Chilton) was well within its considerable discretion to order disgorgement of these sums.

The *Osborn* opinion also noted, "[D]isgorgement is not precisely restitution. Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. It is an equitable remedy meant to prevent the

wrongdoer from enriching himself by his wrongs. Disgorgement does not seek to compensate the victims of the wrongful acts, as restitution does.' . . . *S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) (citations omitted); see also *Cavanagh*, 445 F.3d at 117 (disgorgement's 'emphasis on public protection, as opposed to simple compensatory relief, illustrates the equitable nature of the remedy'); *S.E.C. v. Banner Fund Int'l*, 211 F.3d 602, 617, 341 U.S. App. D.C. 175 (D.C. Cir. 2000)."

V. SOVEREIGN IMMUNITY DOES NOT PREVENT A LAWSUIT AGAINST A GOVERNMENT OFFICIAL ACTING IN EXCESS OF HIS AUTHORITY.

The Eleventh Amendment does not bar individual liability for violations of federal law by individuals performing their state duties under color of state law. *Hafer v. Melo*, 502 U.S. 21, 28, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). "Sovereign immunity does not prevent a suit against a federal officer who is acting in excess of his authority. The instant action raises the sole question of whether the defendant officers are so acting. Since the decision in *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171, the traditional remedy of a person aggrieved by governmental action, and precluded from a suit against the sovereign by the doctrine of immunity, has been a suit against the government officer responsible for that action and such suits have been permitted when the officers have exceeded their statutory powers." *Pan American Petroleum Corp. v. Pierson*, 284 F.2d 649, 651 (10th Cir., 1960).

VI. SINCE §1983 CIVIL RIGHTS CLAIMS REQUIRE AN ACT OF STATE OFFICERS, IMMUNITY CLAIMS CANNOT BE JUDICIALLY EXTENDED TO THE POINT OF REPEALING THE CIVIL RIGHTS ACT.

Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) denied absolute immunity to prosecutors in a §1983 action under a "functional", "quite sparing" analysis of immunity when they fabricated evidence to implicate a defendant in a murder case and in making

false statements to the press . Immunity is based on "'the nature of the function performed, not the identity of the actor who performed it,' *Forrester v. White*, 484 U.S. at 229." *Id*., at p. 269.

Judges performing administrative functions do not have absolute immunity. Demoting and firing a probation officer, over which the judge had control, was not covered by judicial immunity. *Forrester v. White*, 484 U.S. 219, 224, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1988). The process of ordering the payment of (generically described) court costs, fines and probation fees, to be paid through the court clerk's office (which is then disbursed to the various entities due to be paid) is not an adjudicative process, but administrative. Necessarily the function of court clerks in collecting the funds and paying them to the respective state entities is also administrative, not adjudicative. See also *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir., 2009) which denied absolute immunity to a prosecutor in a §1983 action when a prosecutor sought a material witness warrant to investigate or detain a suspect, rather than to secure his testimony at another's trial, the prosecutor was at most entitled to qualified immunity.

Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971)(the State commissioner of police was sued[2]) was a black protest civil rights case where lawful, non-violent protestors, were rounded up, jailed, stripped of all their clothes, and held for days either without bond or being allowed to make bond. The 5th Circuit reversed a defendant's jury verdict and then granted judgment on §1983 claims for the plaintiffs noting the whole purpose of §1983 required suing state officials who violated citizens' rights.

"It should be equally clear that both the language and the purpose of the Civil Rights

---

[2] "It was stipulated that Commissioner Birdsong was charged by law with the duty of supervision and control of all Mississippi Highway Safety Patrolmen." *Id*., at p. 199. Commissioner Birdson ultimately was dismissed from the case on a fact based inquiry.

> Acts are inconsistent with the application of common law notions of official immunity in all suits brought under these provisions. See *Norton v. McShane*, 332 F.2d 855, 861 (5 Cir. 1964) *cert. denied*, 380 U.S. 981, 85 S. Ct. 1345, 14 L. Ed. 2d 274 (1965). In suits brought under § 1983 an indispensable element of a plaintiff's case is a showing that the defendant (or defendants) acted "under color of any statute, ordinance, regulation, custom, or usage, of any State * * *." 42 U.S.C. § 1983. This test can rarely be satisfied in the case of anyone other than a state official. See *Collins v. Hardyman*, 341 U.S. 651, 662, 71 S. Ct. 937, 95 L. Ed. 1253 (1951). To hold that all state officials in suits brought under § 1983 enjoy an immunity similar to that they might enjoy in suits brought under state law "would practically constitute a judicial repeal of the Civil Rights Acts." *Hoffman v. Halden*, 268 F.2d 280, 300 (9 Cir. 1959). Furthermore, and perhaps more basically, the purpose of § 1983 as well as the other Civil Rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action. To hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under § 1983. Cf. *Robichaud v. Ronan*, 351 F.2d 533 (9 Cir. 1965)."

438 F.2d at 201. Again, this is not a lawsuit for traditional type damages that are historically barred by 11th Amendment or common law immunity claims. This Court should find that Congress specifically empowered it to intervene when unconstitutional state action is involved.

VII. THE BURDEN IS UPON THE DEFENDANTS TO PROVE THE COMMON LAW IMMUNITY THEY CLAIM HAS BEEN INCORPORATED INTO §1983 WHEN IT WAS ENACTED.

"Our general approach to questions of immunity under § 1983 is by now well established. Although the statute on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. *Tower v. Glover*, 467 U.S. 914 (1984). If 'an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.' *Id.*, at 920. Thus,

while we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form." *Malley v. Briggs*, 475 U.S. 335, 339-40, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). "We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition." *Id*., at p. 342.

"These decisions have also emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. " *Burns v. Reed*, 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (absolute immunity denied a prosecutor for giving legal advice to police) and *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432,, 435, 124 L. Ed. 2d 391, 113 S. Ct. 2167 (1993)(absolute judicial immunity denied to court reporters under a "the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process," theory and because no such immunity existed at common law).

A court by judicial fiat cannot create new immunities not established. "'Recognizing that 'Congress intended [§1983] to be construed in the light of common-law principles,' the Court has looked to the common law for guidance in determining the scope of the immunities available in a §1983 action. *Kalina v. Fletcher*, 522 U.S. 118, 123, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). We do not simply make our own judgment about the need for immunity. We have made it clear that it is not our role 'to make a freewheeling policy choice,' *Malley v. Briggs*, 475 U.S. 335, 342, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986), and that we do not have a license to create immunities based solely on our view of sound policy, see *Tower v. Glover*, 467 U.S. 914, 922-923, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984). Instead, we conduct 'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.' *Imbler, supra*, at 421, 96

S. Ct. 984, 47 L. Ed. 2d 128." *Rehberg v. Paulk*, 566 U.S. 356, 362-63, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012)(common law immunity found for a private witness who lied during grand jury proceedings).

In *Pierson v. Ray*, 386 U. S. 547, 555, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), the Supreme Court held that police officers are not absolutely immune from a § 1983 claim arising from an arrest made pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity, but could only assert a defense of good faith and probable cause.

VIII. ABSOLUTE IMMUNITY IS RARE; QUALIFIED IMMUNITY IS THE NORM; AND, THE RECOGNITION OF ABSOLUTE IMMUNITY IS "QUITE SPARING".

In *Burns v. Reed*, 500 U.S. 478, 487, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (absolute immunity denied a prosecutor for giving legal advice to police), the Supreme Court employed a functional approach to the acts of an official to see if immunity applied. "These decisions have also emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. *Forrester, supra*, at 224; *Malley, supra*, at 340; *Harlow, supra*, at 812; *Butz, supra*, at 506. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been 'quite sparing' in our recognition of absolute immunity, *Forrester, supra*, at 224, and have refused to extend it any 'further than its justification would warrant.' *Harlow, supra*, at 811."

IX. THE "YOUNG" DOCTRINE SPECIFICALLY ALLOWS FOR SUITE AGAINST STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES AND THE DOCTRINE DOES NOT BAR THE EQUITABLE DISGORGEMENT CLAIMS BROUGHT IN THE INSTANT CASE.

"Although citizens may not generally sue states in federal court under the Eleventh Amendment, the *Ex parte Young* doctrine has carved out an alternative, permitting citizens to seek

prospective equitable relief for violations of federal law committed by state officials in their official capacities. *Ex parte Young*, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441 (1908)." *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 975 (10th Cir., 2001).

> The *Ex parte Young* doctrine allows plaintiffs to sue state officials even if they claim to be acting under valid state law because, if the officials' conduct constitutes an ongoing violation of federal law, the state "cannot cloak their actions with state authority or state immunity." *Id*. That is, when state officials are arguably violating federal law, "the state is not the real party in interest because the state cannot 'authorize' the officials to violate federal law." *Id*. at 610. Hence, in allegedly violating federal law, the officials are stripped of their state authority and the Eleventh Amendment will not protect them from suit. In the case before us, the defendants are two state officials exercising considerable control over the implementation and administration of the waiver services under New Mexico's Medicaid plan. The plaintiffs claim these officials, acting pursuant to state authority, are violating federal law in failing to provide waiver services to eligible individuals with "reasonable promptness." The plaintiffs have, therefore, properly sued state officials, rather than the state itself.

Id., at p. 976. A case right on point (and the related cases) that allows a federal lawsuit against a court clerk is *Bishop v. United States ex. rel. Holder*, 962 F.Supp.2d 1252 (N.D. Okla., 2014). There, the 10th Circuit reversed the dismissal of the case and strongly suggested/directed that Tulsa County Court Clerk Sally Howe Smith be added as a party. She was. The opinion noted the Court Clerk was a proper party because the office collected the fees for marriage licenses. "Marriage licenses are issued, fees collected, and the licenses recorded by the district court clerks." *Id.*

In *Stein v. Disciplinary Bd. of the Supreme Court of New Mexico*, 520 F.3d 1183 (10th Cir., 2008) the Plaintiff sued the New Mexico Supreme Court and the court created disciplinary board to stop disciplinary action against him for lawyer advertising. Ms. Ferrara, Chief Counsel for the state disciplinary board argued she was immune from claims against her because she was acting as the "clerk of the court" in her position. The Court denied the motion to dismiss based on immunity, but

granted it because the procedural claim alleged was not a liberty or property interest.

Henriksen v. Bentley, 644 F.2d 852 (10th Cir., 1981) was a Title 42, §1983 lawsuit against a court clerk and judge for the clerk refusing to twice pick up his certified mail to file a prisoner lawsuit. The case against the judge was dismissed and affirmed on appeal, but the dismissal against the clerk was reversed. "Denial of access to the courts violates a recognized constitutional right, and conceivably could be the basis of a suit pursuant to 42 U.S.C. § 1983. *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976)." *Id*., at p. 854. "The precise scope of the immunity, if any, that should be afforded to a clerk of court can only be determined on a more developed factual record. However, the courts which have considered the question have concluded that clerks are generally entitled to qualified immunity." *Id*., at p. 856.

X. A COURT SYSTEM AND JUDGE ARE LIABLE FOR ACTS IN THE ABSENCE OF ALL JURISDICTION.

While state court judges are typically immune from claims for **money damages**, that does not mean they are not a person subject to a § 1983 claim or that they can never be sued in federal court. Judges can be sued for failing to act in his/her judicial capacity and when that person has acted in the absence of all jurisdiction. See *Smith v. Glanz*, 662 Fed. Appx. 595, 597 (10th Cir. 2016), "'The Supreme Court of the United States has long held that judges are generally immune from suits for money damages.' *Stein v. Disciplinary Bd. of Supreme Ct. of N.M.*, 520 F.3d 1183, 1195 (10th Cir. 2008). 'There are only two exceptions to this rule: (1) when the act is not taken in the judge's judicial capacity; and (2) when the act, though judicial in nature, is taken in the complete absence of all jurisdiction.' *Id*."

"But when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes

or case law expressly depriving him of jurisdiction, judicial immunity is lost." *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir., 1980), citing to *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872), 20 L. Ed. 646. "An absence of personal jurisdiction may be said to destroy 'all jurisdiction' because the requirements of subject matter and personal jurisdiction are conjunctional. Both must be met before a court has authority to adjudicate the rights of parties to a dispute." *Id*. In *Rankin*, the act of a Kansas state district court judge, issuing a guardianship order allowing the son of the petitioners to be essentially kidnapped to be "deprogrammed" from the Unification Church, was found to contain issues of fact about a total absence of jurisdiction. Summary judgment in favor of the judge was reversed. "We conclude that a judge's private, prior agreement to decide in favor of one party is not a judicial act." *Id*., at p. 847.

In the case of *Dykes v. Hoseman*, Judge Hoseman motion to dismiss was denied in a § 1983 action for his acts in court proceedings that resulted in an *ex parte* custody order for his minor grandchild. This resulted in the child being taken, by force of a court order, from the child's mother. "It is clear that a judge who acts in the absence of subject matter jurisdiction may be held liable for his judicial acts. *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L. Ed. 646 (1872). The rationale for this limitation on judicial immunity is set out in *Bradley v. Fisher* and reiterated in *Stump v. Sparkman*: 'Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known, no excuse is permissible.' *Stump*, 98 S. Ct. at 1104 n. 6, quoting *Bradley*, 80 U.S. (13 Wall.) at 351." *Dykes v. Hosemann*, 743 F.2d 1488, 1495, (11th Cir., 1984).

Personal jurisdiction, and the lack thereof, is integrated into the concept of proper subject

matter jurisdiction. "Although the modern conception of personal jurisdiction generally refers to due process, see, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), the foundation of personal jurisdiction has always been a court's power to act. *McDonald v. McBee*, 243 U.S. 90, 37 S. Ct. 343, 61 L. Ed. 608 (1917); *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878). When a court acts without personal jurisdiction, its authority is as much a usurped authority as when the court acts without subject matter jurisdiction." *Id*., at p. 1497. " Because the issues of whether Judge Hosemann knew he lacked personal jurisdiction or acted in the face of clearly valid statutes or case law expressly depriving him of jurisdiction are matters for initial determination in the district court, we reverse the order dismissing the claim against Judge Hosemann and remand to the district court for further proceedings not inconsistent with this opinion." 743 F.2d at 1497.

The United States Supreme Court made it clear in *McGirt* that Congress never disestablished the boundaries of the Cherokee and Creek reservations. It did not make new law. The Supreme Court simply made the State of Oklahoma realize this law instead of ignoring it for the last 100+ years. By virtue of the Defendant court clerk's arguments they are an arm of the courts they serve, if the district courts are not entitled to judicial immunity, then the clerks likewise are not.

Furthermore, virtually all the cases that prohibit § 1983 claims against judges are for **damage claims**. Claims for equitable relief are specifically allowed. See the arguments below.

XI. CIVIL RIGHTS LIABILITY IS BASED ON TORT THEORY THAT A PERSON IS RESPONSIBLE FOR THE NATURAL CONSEQUENCES OF HIS/HER ACTS.

"We instead begin by emphasizing that section 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' *Monroe*

v. Pape, supra, 365 U.S. at 187, 81 S. Ct. at 484, 5 L. Ed. 2d 492; *Whirl v. Kern, supra*." *Anderson v. Nosser*, 438 F.2d 183, 198 (5th Cir, 1971). "So long as there is 'an intent to bring about a result which will invade the interests of another in a way that the law will not sanction' good faith is no defense." *Id.*

A. Each person in the chain responsible for the deprivation of rights is jointly responsible and liable.

In this case, the court clerks allege they did nothing wrong, and are entitled to immunity, because their acts were "performed in assistance of a judge which has an integral relationship to the judicial process." Their acts were simply administrative in collecting and processing the court ordered fines and associated fees. Besides, the clerks ended up with the ill gotten gains and must be the ones ordered to disgorge thye monies. This kind of case is precisely why everyone in the chain of wrongdoers is liable for depriving the Plaintiffs of their rights to due process of law. Every step in the process of approving charges, setting bail, prosecuting the Plaintiffs, ordering the payment and collection of every species of court costs, fines, probation fees, etc., under threat of imprisonment for failure to do so, was in excess of every Defendants' jurisdiction and authority. *Anderson v. Nosser*, 438 F.2d 183, 198 (5th Cir, 1971) describes the causal chain of liability that takes in every person or entity that participates.

> In view of these principles we think that the conduct involved here must be viewed as a continuum, beginning with the illegal incarceration for failure to bring plaintiffs before a magistrate and ending with the inhuman treatment at Parchman. Each incident flowed proximately and naturally into the other so that each defendant who played "a substantial role in bringing about the results" is liable jointly and severally for the entire injury and wrong. See *Nesmith v. Alford*, 5 Cir. 1963, 318 F.2d 110, 119, cert. denied, 375 U.S. 975, 84 S. Ct. 489, 11 L. Ed. 2d 420. Thus, Chief Robinson and police officers Rickard, Cowart, Beach, and Flowers played substantial roles in detaining plaintiffs, denying them access to a magistrate, and transporting them to Parchman where they would be subjected to maximum security treatment.

> Fire Chief Cameron assisted these police officers in the detention and ordered Natchez firemen both to escort the buses to Parchman and to remain at the penitentiary for the duration of the incarceration. Finally, Breazeale supervised and directed the treatment and detention at Parchman."

B. Every person who acts to deprive another of their rights, or sets in motion a series of acts that results in a deprivation of one's rights, has §1983 liability.

It is a fundamental rule of 42 USC §1983 law that all persons involved, or who set in motion a series of acts that results in a deprivation of ones rights, has liability whether or not they directly participated. *Miller v. City of Mission, Kansas*, 705 F.2d 368, 375 (10th Cir., 1983), citing to *McClelland v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979).

> A person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows, or reasonably should know, would cause others to inflict the unconstitutional injury.

The Defendant court clerks are necessarily involved in depriving the Plaintiffs of their rights by collecting the court costs, fines and other fees from the wrongly prosecuted Plaintiffs. More importantly, the clerks are the ones that should necessarily disgorge the ill gotten gains instead of them being able to claim they don't have the money anymore. When a party has a judgment against them on a contract claim for example, it is not a defense to say, go get the money from the grocery store, or my mortgage company, or the lender for my car, because that's where I spent it.

XII. PLAINTIFFS HAVE STATED A CLAIM AGAINST THE DEFENDANTS.

Defendants make an 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 received 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 has 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, 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 the court clerk by a member of the class would be a reason that the Plaintiffs and the Plaintiff Class have standing in this case.

XIII. *ROOKER-FELDMAN* DOCTRINE DES NOT APPLY.

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). However, 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 to the case at bar. There is no appeal of a state court judgment nor is there *de facto* appeal of a state court judgment. Each of the judgments entered by the courts 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. While *McGirt* was specific to the Creek Reservation, the logic and treaties discussed apply equally to the Cherokee Reservation. The Plaintiffs are asking this Court to determine the Cherokee Reservation has not been disestablished. *Such a finding, by operation of law* would mean that neither the State nor its political subdivisions ever had jurisdiction over an Indian within the boundaries of the Cherokee reservation and would make their convictions *void ab initio*. The claims for vacatur of the state-court judgment trigger the *Rooker-Feldman* doctrine; the claims for money damages do not. *Cowan v. Hunter*, 762 F. App'x 521, 523 (10th Cir. 2019).

XIV. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF.

The Plaintiffs are not seeking a declaration that would establish *liability,* rather, the Plaintiffs are seeking a ruling that would entitle them to a disgorgement from the Defendants of the monies taken when they lacked the subject matter and personal jurisdiction to collect these monies. This is not a "retroactive" ruling, it is merely seeking that the Court confirm what is over a century old body of law as the Supreme Court did in *McGirt.* The future conduct sought to be modified, is the continued prosecution of Indians on the Cherokee Reservation. That conduct not only continues, but is likely to continue until there is a ruling from a Federal Court.

Plaintiffs direct the Court to the Plaintiffs' Response to *Defendants Kevin Burchanan, Kenny Wright, Matt Ballard, and Steve Kunzweiler's Motion to Dismiss and Brief in Support* where the

Defendants tell the Court that the State Courts are try to solve this issue. However, it is important to that the Oklahoma Attorney General has circulated a memorandum requesting that all cases dealing with the Cherokee Reservation be put on hold while they try to find a way around *McGirt*. The *McGirt* opinion by Justice Gosurch makes it clear the lack of understanding the State has with regard to this subject matter and the lengths that it will go to in order to preserve its power and retain the monies that have been taken. In seeing how the 10th Circuit dealt with the Oklahoma Court of Criminal Appeals in *Murphy,* it is obvious that their record is no better. This Court must retain jurisdiction for a unified and solitary decision for dealing with these issues.

XV. THE PLAINTIFFS HAVE STATED A CLAIM FOR MONEY HAD/MONEY RECEIVED.

In an FRCP 12(b)6) motion, a defendant cannot legitimately claim the elements of a claim for relief are not properly plead, when only notice pleading is required. The Plaintiffs have plead the requisite elements of: (1) The Defendants received money belonging to Plaintiff; (2) They benefitted from the receipt of money; and (3) under principles of equity and good conscience, the Defendants 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).

The Court Clerks that collected court costs, fines and other fees are the "bursars" of the

District Courts and deposit the money collected into various accounts maintained for the court by the treasurer. *North Side State Bank v. Board of County Comm'rs of Tulsa County,* 1994 OK 34 ¶ 15, 894 P.2d 1046, 1051-52.

There is no reason that the court clerks would be allowed to retain monies that are derived from fines and fees which were obtained from the Plaintiffs based on convictions that are *void ab initio*. Regardless of the current state of the convictions, the *McGirt* makes it abundantly clear that those convictions are void and have been since they were entered based on the fact the court never had jurisdiction to enter a judgment. There is no just reason why the state or the court clerks should be allowed to retain these funds, regardless of how they are used.

XVI. THE GOVERNMENTAL 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 has 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). The Plaintiffs are not seeking "damages" from actions of the Defendants arising in "tort" and the Act does not apply.

A. The fee protest statute does not apply

The Defendants further argue that Plaintiffs 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.

B. Alternative theory to recovery

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. *Sholer v. State ex rel. Dep't of Pub. Safety*, 1997 Okla. LEXIS 85, *6.

XVII. THE PLAINTIFFS ARE NOT REQUIRED TO SEEK POST CONVICTION IN ORDER TO OBTAIN 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. This makes no sense when the United States Supreme Court has already ruled that if the Plaintiffs' crimes occurred in Indian Country and the Plaintiffs were "Indian" the state or its political subdivisions 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. "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). Here, the United States Supreme Court has affirmed *Murphy*, (*Sharp v. Murphy*, 2020 U.S. LEXIS 3551 (U.S., July 9, 2020)) which held that the Creek Reservation is Indian Land and therefore the State has no jurisdiction over crimes committed by Indians on the reservation. All convictions are *void ab initio*. There is no conviction to overturn through post conviction relief.

XVIII. PLAINTIFFS ARE NOT BARRED FROM RECOVERY BY EQUITY AND UNCLEAN HANDS DOCTRINE.

The Defendants have raised an FRCP 12(b)(6) motion to dismiss for failure to state a claim. The arguments the Plaintiffs should be barred from recovery on equitable grounds or due to unclean hands are affirmative defenses the Defendants have the burden of proof and persuasion to prove. These are fact based inquiries that cannot be granted in a 12(b)(6) motion to dismiss.

XIX. THE COURT CLERKS 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 Plaintiffs 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. As a result, it cannot now claim ignorance of that sovereignty with respect to criminal prosecutions of Indians within Indian Country.

XIX. IF THE COURT GRANTS THE COURT CLERKS' MOTION, THE PLAINTIFFS 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 Plaintiffs have plead sufficient facts to defeat the FRCP 12(b)(6) motion to dismiss. This is a case where necessarily this court must retain the case to correct past abuses that occurred under color of state law, and to prevent future abuses because the Defendants will each employ their own, separate interpretations of the *McGirt* and *Murphy* decisions. One unified voice needs to tell all the Defendants how to apply the *McGirt* and *Murphy* decisions and remind them of their consequences of their refusal to adhere to the obvious law for the last 100 + years. Ignorance of the law by the Court Clerk Defendants is not a legal nor factual excuse. The motion to dismiss should be denied.

Respectfully submitted,

/s/ Mark D. Lyons
Mark D. Lyons, OBA #5590
LYONS & CLARK, INC.
616 S. Main, Suite 201
Tulsa, OK 74119
(918) 599-8844 Telephone
(918) 599-8585 Facsimile
lyonscla@swbell.net

and

John M. Dunn, OBA #20975
The Law Offices of John M. Dunn, PLLC
616 S. Main, Suite 206
Tulsa, OK 74119
(918) 526-8000 Telephone
(918) 359-5050 Facsimile
jmdunn@johndunnlaw.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 7th 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:

Keith A Wilkes	kwilkes@hallestill.com
Christopher Collins	cjc@czwlaw.com
Jamison Whitson	jcw@czwlaw.com
Wellon Poe, Jr.	bp@czwlaw.com
Stephen Geries	sig@czwlaw.com
Thomas LeBlanc	leblanc@bestsharp.com
Michael Shouse	mshouse@tulsacounty.org
Andrew W. Lester	alester@spencerfane.com
Courtney D. Powell	cpowell@spencerfane.com
Anthony J. Ferate	ajferate@spencerfane.com
Douglas Wilson	douglas.wilson@tulsacounty.org
Erin M. Moore	erin.moore@oag.ok.gov
Stephanie E. Lawson	stephanie.lawson@oag.ok.gov
Jacqueline R. Zamarripa	jackie.zamarripa@oag.ok.gov
Randall J. Yates	randall.yates@oag.ok.gov

/s/ Mark D. Lyons