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-CDL
THE DISTRICT COURT OF NOWATA COUNTY, OK, et. al., Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF OWASSO'S MOTION TO DISMISS (Doc. #87)

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

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COME NOW the Plaintiffs, by and through their attorneys of record, John M. Dunn and Mark D. Lyons and for their response to *Defendant City of Owasso's Motion to Dismiss,* hereby state and allege as follows:

INTRODUCTION

The Defendant in this matter begins with a misstatement of the impact of the *McGirt* Decision. The Defendant would lead the Court to believe that *McGirt* only impacts the crimes enumerated by the Major Crimes Act and has no other impact. That is not an accurate statement of Federal law concerning Indian Country or Indian Reservations.

The Defendant's perjorative and condescending reference to the Plaintiffs' assertion of the right to Indian sovereignty as "lottery tickets" should stop. According to the Supreme Court *McGirt* decision, the State of Oklahoma, and necessarily cities, town and other political subdivisions in Oklahoma, have ignored Native American's sovereignty rights for over 100 years. So to imperiously castigate the Plaintiffs for seeking to hold the State to its promises, that likely has thousands of tribal members as its residents, should be beneath the dignity of the City of Owasso. The Plaintiffs have just as much rights as anyone else to come to this Court and seek legal and equitable relief for their mistreatment through the years. And if the Plaintiffs' claims are accurate, they have the right to have returned to them the ill gotten gains from the Defendant.

The one thing that the Defendant admittedly correctly states is that their **finding** that the Muscogee (Creek) nation had never been disestablished was limited to that tribe. This case effects the Cherokee Nation and the necessary interpretation of treaties and law that would determine whether the Cherokee Reservation has been disestablished guarantees Federal jurisdiction because the interpretation of Federal law and treaties is an area reserved to the Federal courts.

The reason the Plaintiffs filed this Court in federal court is implicit in the *McGirt* decision *(McGirt v. State of Oklahoma*, ___ U.S. ___, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020)). That case required a decision by the United States Supreme Court, for the sole and highest authority in the land, to point out what was clearly the law, i.e.- 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 of Oklahoma was given this opportunity countless times in the past and it ignored what the Supreme Court found was clearly established law, i.e.- that the reservations lands of the Cherokee and Creek Indians, contained within their treaty boundaries, were never disestablished by Congress. This is noted in *McGirt* where the Supreme Court wrote,

> Things only get worse from there. Why did Oklahoma historically think it could try Native Americans for any crime committed on restricted allotments or anywhere else? Part of the explanation, Oklahoma tells us, is that it thought the eastern half of the State was always categorically exempt from the terms of the federal MCA. So whether a crime was committed on a restricted allotment, a reservation, or land that wasn't Indian country at all, to Oklahoma it just didn't matter. In the State's view, when Congress adopted the Oklahoma Enabling Act that paved the way for its admission to the Union, it carved out a special exception to the MCA for the eastern half of the State where the Creek lands can be found. By Oklahoma's own admission, then, for decades its historical practices in the area in question didn't even try to conform to the MCA, all of which makes the State's past prosecutions a meaningless guide for determining what counted as Indian country. As it turns out, too, Oklahoma's claim to a special exemption was itself mistaken, yet one more error in historical practice that even the dissent does not attempt to defend. See Part V, *infra*.

Id., at 140 S.Ct. 2471.

The Supreme Court already ruled the Creek boundaries were never disestablished and there is no question it ruled the Cherokee boundaries were never disestablished either, though that issue was not the core of the dispute. The Plaintiffs merely ask this Court to look at the same statutes and

evidence regarding the Cherokee Indians explained in *McGirt* and similarly find the Cherokee boundaries were never disestablished by Congress.

A federal court is required in this case so only one decision can be rendered instead of having every one of the 48 Defendants separately rule and there be potentially 48 separate appeals either by the Defendants or the Plaintiffs, depending on the rulings. The City of Owasso, and virtually every other municipality defendant, has part time municipal judges. It is doubted (though not known for a fact), these judges are federal Indian law experts. That is a highly specialized area. There is no reason this Court, with 10th Circuit and United States Supreme Court precedent it will surely follow, can't decide the issues in this case. This Court is the best suited to decide this case when considering the history of Oklahoma courts either being ignorant of Indian law, or indifferent to correctly analyzing and following the law.

Furthermore, Owasso is wrong to say *McGirt* was limited to the Major Crimes Act applied to the Muscogee Creek Nation. *McGirt* stands for the more fundamental principle that treaty signed, Congressionally approved, reservation boundaries deprives the State of criminal law jurisdiction over a member of an Indian tribe in "Indian County". The degree and nature of the crime is immaterial. It is the absence of any jurisdiction that is important. That is best expressed by that part of *McGirt* that reads, "If Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe." 140 S.Ct. at 2460. This analysis is even found in the State court case of *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, where the Oklahoma Court of Criminal Appeals found only two elements of proof were needed to show the State of Oklahoma had no jurisdiction over an Indian in a criminal case ;

a crime committed in Indian country and the Defendant's status as a member of an Indian tribe. "Proof of one's status as an Indian under federal Indian law is necessary before one can claim exemption from prosecution under state law. *Goforth v. State*, 644 P.2d 114 (Okl.Cr. 1982). This is necessary because federal jurisdiction over crimes committed in Indian Country does not extend to crimes committed by non-Indians against non-Indians. *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882); *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)." *Id*., at ¶ 5. The Major Crimes Act is never mentioned in *Klindt*.

The City of Owasso does 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 City of Owasso, with the direct participation of its court clerks, has 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, for this Court to rule the State of Oklahoma, and any political subdivision thereof, was without subject matter or personal jurisdiction to prosecute

Indians, for crimes alleged to have been committed in Indian County, and to disgorge the State and its political subdivisions of their ill-gotten gains.

The U.S. Supreme Court has ruled that Indian reservations are presumed to continue and exist until and unless proven that Congress disestablished them. See *Solem v. Bartlett*, 465 U.S. 463, 481, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984). "Neither the Act of May 29, 1908, the circumstances surrounding its passage, nor subsequent events clearly establish that the Act diminished the Cheyenne River Sioux Reservation. The presumption that Congress did not intend to diminish the reservation therefore stands, and the judgment of the Eighth Circuit is Affirmed." See also *Murphy v. Royal*, 875 F.3d 896, 926-27 (10th Cir., 2017), which held that the Oklahoma Court of Criminal Appeals failed in its review of Mr. Murphy's state court appeal because when it did not consider any Supreme Court Indian reservation disestablishment cases when it denied him relief and should have applied the *Solem* presumption.[1]

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 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,

[1] "Nowhere in its discussion of the reservation issue—nor anywhere else in its opinion—did the OCCA cite *Solem, Hagen, Yankton Sioux Tribe*, or any of the Supreme Court's other Indian reservation disestablishment precedent." *Id.*, at p. 926. "Here, the OCCA did not merely fail to cite controlling Supreme Court authority, it failed to apply it, and in deviating from Solem, the OCCA's reasoning contradicted clearly established law." *Id.*

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 Defendant to the contrary, the purpose of this action is to require the Defendant to disgorge its ill gotten and wrongly obtained monies paid to the Defendant 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.

In response, the City of Owasso is making every argument to avoid paying this refund, including invoking equity to defend its inequitable and illegal conduct. The City of Owasso invokes equity to justify keeping its illegally obtained gains while claiming that it is the Plaintiffs that are seeking to obtain a benefit from their behavior. The City of Owasso claims that the fact that the Plaintiffs cannot identify who has the money now and where it was sent after the State's agents took it. They further seek to avoid further payment asserting that the exact amount is not known at this time - ignoring the fact that once the class is completely identified, this number is easily determinable.

ARGUMENT & AUTHORITIES

I. STANDARD OF REVIEW.

"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).

II. PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION.

The Defendant Owasso makes the inaccurate argument the Plaintiffs have no standing to sue the City of Owasso as none of the named Plaintiffs allege they were prosecuted by it. It is important to remember that 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, supra*, 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. 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, including the City of Owasso, by a member of the class would be a reason that the Plaintiffs and the Plaintiff Class have standing to proceed with this case.

In the event this Court believes it is required for this case against Owasso to continue that a member of an Indian tribe prosecuted for a crime in the City of Owasso be named as a Plaintiff, the Plaintiffs ask that they be allowed time to amend to add such a party.

III. THE FEDERAL DISTRICT COURT DOES HAVE SUBJECT MATTER JURISDICTION TO DECLARE PLAINTIFFS' FINAL STATE COURT AND MUNICIPAL JUDGMENTS VOID.

Owasso argues this Court lacks subject matter jurisdiction because of the Rooker Feldman doctrine found in *Rooker v. Fidelity Trust Co.,* 263 US 413, 68 L.Ed.2d 362, 44 S.Ct. 149 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 US 462, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983). That the argument is wrong is self-proving based on the *McGirt, supra*, decision. *McGirt* was a direct appeal on a *writ of certiorari* from the Oklahoma Court of Criminal Appeals. See *McGirt v. Oklahoma*, 140 S. Ct. 659, 205 L. Ed. 2d 417, 2019 U.S. LEXIS 7526 (U.S., Dec. 13, 2019). Never once in the Supreme Court opinion was the *Rooker-Feldman* doctrine ever raised, argued, nor mentioned. Yet the Supreme Court reversed the Oklahoma Court of Criminal Appeals decision and Mr. McGirt's decision was nullified. 140 S.Ct. at 2482.

The same conclusion is true for the earlier 10th Circuit decision of *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). There were ten separate either direct appeals, post conviction relief applications, federal court habeas corpus action and appeals before the 10th Circuit finally ruled in the applicant's favor and found he was an Indian who was convicted of murder in Indian country. Therefore the State did not have jurisdiction.[2] A long part of the opinion deals with how and whether or not the

[2]"Patrick Dwayne Murphy asserts he was tried in the wrong court. He challenges the jurisdiction of the Oklahoma state court in which he was convicted of murder and sentenced to death. He contends he should have been tried in federal court because he is an Indian and the offense occurred in Indian country. We agree and remand to the district court to issue a writ of habeas corpus vacating his conviction and sentence." 875 F.3d at 903.

federal courts should accept jurisdiction and hear a case in lieu of the statutory constraints in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), *et. seq.* This act "provides that a state prisoner can qualify for habeas relief by showing a state court decision was (1) 'contrary to' or (2) 'involved an unreasonable application of' federal law that was clearly established by the Supreme Court. 28 U.S.C. § 2254(d)(1)." *Id*., at p. 913. In spite of this high impediment, the 10th Circuit granted the Petitioner relief and set aside his conviction based on the findings the crime occurred in Indian country by a member of an Indian tribe and in doing so, reversed decisions of the Oklahoma Court of Criminal Appeals on a direct appeal, two post conviction relief claims and another appeal of an evidentiary hearing. The opinion was analytically different from that of *McGirt*, but it still reversed at least three state court final judgments. Using Defendant Owasso's *Rooker Feldman* analysis, the reversal should have never happened. And the *Murphy* opinion never once mentions *Rooker Feldman*.

Secondly, this Court is not asked to void state court judgments. This Court is asked to determine the federal question of whether the Cherokee Nation boundaries were disestablished by Congress. If not, the rest of the issues are legal and equitable remedies allowed under federal civil rights law. The motion to dismiss argued pursuant to the *Rooker Feldman* doctrine should be denied.

IV. THIS COURT HAS SUBJECT MATTER JURISDICTION FOR 42 U.S.C. §1983 CLAIMS and THE MOTION TO DISMISS SHOULD NOT BE GRANTED

The Defendant City of Owasso makes another argument which continues to reinforce just exactly why this court, and not a state court, should assume jurisdiction and decide this case. It argues that *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) prohibits a federal court lawsuit for a §1983 unlawful confinement claim / federal habeas corpus action, prior

to a judgment on the merits in state court. This was a *pro se* complaint filed by a prisoner in custody. It was not an absence of jurisdiction claim as in the instant case. Since the *pro se* prisoner was not seeking immediate release (requiring an exhaustion of state remedies first) but monetary damages, this case fell between the then existent §1983 case law (no exhaustion of state remedies required) and federal habeas corpus case law. Because the prisoner was necessarily required to prove he was illegally arrested and convicted as a predicate to the tort requirements of §1983 claims as a predicate to his damage claims, the Supreme Court ruled he had to prove the convictions had been set aside.

In this case, the Defendant is trying to put the cart before the horse and have all the various State district courts and municipal defendants to decide the **federal question** of whether Congress disestablished the Cherokee Nation boundaries before the damage claims can be considered. That is not a basis to deny this Court jurisdiction and grant a motion to dismiss. This Court clearly has the jurisdiction to decide whether Congress has ever disestablished the Cherokee Nation boundaries and then to decide whether or not disgorgement is an appropriate remedy.

This is not a damages lawsuit, but a claim for equitable disgorgement of ill-gotten gains. The rationale of *Heck* does not apply. Besides, *Heck* never decided the case on subject matter jurisdiction grounds. That phrase cannot be found in a word search of the opinion. The denial was based on procedural grounds. The motion to dismiss for lack of subject matter jurisdiction should be denied.

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

The Defendant further claims 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).

VI. THE CURTIS ACT DOES NOT PREVENT THE PLAINTIFFS' RECOVERY.

The Defendant overstates the applicability and meaning of the Curtis Act and that the Act's claimed grant of jurisdiction for municipal criminal violations over Indians. Notably, the Defendant has no case law supporting its interpretation of the Act.[3] 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.[4] An author for the Oklahoma Historical has written the Act subjected everyone in the Territory

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[3] 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.

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

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. "[5]

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 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

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

> 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 Defendant, one would have to conclude that as a result of the Curtis Act, a patchwork of areas exist 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.

VII. 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.

VIII. 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

IX. THE CITY OF OWASSO 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.

X. 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 City of Owasso has 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 City of Owasso 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,

/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 12th day of November, 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