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

ANTHONY COOK,
Petitioner,

vs.

SCOTT NUNN,
Respondent.

Case Number: 21-CV-0461-JFH-SH

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Comes Now, Petitioner, Pro Se, replying to State's Response to his Petition for Writ of Habeas Corpus, alleges and states:

1. Petitioner's claim is not a claim based on ***McGirt v. Oklahoma***. Rather, Petitioner's claim is based on treaty provisions and reservation status. However, in ***McGirt*** the US Supreme Court demonstrates the proper process and law the State of Oklahoma should have followed to resolve Petitioner's claim.
2. The state courts' adjudication of Petitioner's claim, i.e. "The trial court lacked jurisdiction to prosecute Petitioner due to provision of treaties between U.S. and Cherokee Nation, reserving jurisdiction to the Tribe," is contrary to clearly established federal law, as determined by the Supreme Court of the United States, to wit: the rule in Solem v. Helm, 465 US 463 (1984); provisions in 1835 Treaty of New Echota, 7 Stat 478 and 1866 Treaty of Washington, 14 Stat 799
3. To resolve Petitioner's claim, the state courts should have determined (a) whether a reservation was ever established by Congress, (b) if so, then, whether that reservation

had been diminished or disestablished, and (c) if not, then, which government, according to treaties or acts of Congress, was granted jurisdiction over criminal cases arising within the reservation boundaries. As discussed below, only the United States or Cherokee Nation enjoys jurisdiction over crimes occurring within the boundaries of the Cherokee Nation reservation.

OKLAHOMA DOES NOT HAVE JURISDICTION

According to the United States Constitution, Congress has exclusive and plenary power to confer jurisdiction to a government over an Indian reservation. (US Const., art. I § 8) (***Ex parte Wilson***, 140 US 575, 577 (1891)(Only Congress has "power… to provide for the punishment of all offenses committed [on Indian reservations], by whomsoever committed.") Congress exercises this power through treaty ratification or enactment of federal statute.

A. Treaties

The United States Constitution declares that a federal treaty, including an Indian treaty, and just like a federal statute, is "the supreme law of the land." (US Const., art. VI § 2) Treaties, therefore are superior to state constitutions and state statute. (***Id***) If a state law conflicts with the provisions of a treaty, the treaty prevails.

Additionally, ambiguities in treaties must be resolved in favor of the Indians. (***Bryan v. Itasca County, Minnesota***, 426 U.S. 373, 392 (1976)) Treaties must be interpreted, as the Indians would have understood them at the time the treaty was signed. (***Choctaw Nation v. Oklahoma***, 397 U.S. 620, 631 (1970)). Finally, treaties must be construed liberally in favor of the Indians. (***Oneida County v. Oneida Indian Nation***, 470 U.S. 226, 247 (1985).

With these legal standards in mind, the Treaty of Cherokee Nations states in relevant part:

> "The United States hereby covenant and agree that the lands ceded to the Cherokee Nation … shall, ***in no future time***, without their consent, be included, within the territorial limits or ***jurisdiction*** of any State or Territory." [Article 5, Treaty of New Echota, 7 Stat. 478 (1835))]
>
> "That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country … ***where the cause of action shall arise in Cherokee Nation…***" [Article 13, Treaty of Washington, 14 Stat. 799 (1866)]

In the 1866 Treaty of Washington, which affirmed the treaty provisions, provided for tribal membership for former Cherokee Nation slaves and others of African descent living in Cherokee Nation (Article 2, Treaty of Washington, *supra*) and provides for the authority of a general council of the so-called Five Civilized Tribes for "the administration of justice" among tribal members, members from other tribes and "person other than Indian."

Both Treaties were signed long before Oklahoma statehood. So, the only understanding the Cherokee Indians could have had with respect to the meaning of these treaties at the time of their signing is that jurisdiction, whether in civil or criminal cases, regardless of the victim or perpetrator, that arise within the boundaries of Cherokee Nation reservation, rests exclusively with the Tribe, with some oversight from the United States. Additionally, Cherokee tribal members were protected from state law even when they are accused of crimes committed outside reservation boundaries. Clearly, the treaties make no provision for Oklahoma or any other State to exercise jurisdiction over crimes committed within Cherokee Nation boundaries.

B. Federal Statutes

As stated above, the Supremacy Clause of the Constitution (US Const., art. VI § 2) states that federal treaties and federal statutes are the supreme law of the land. Acts of Congress may prescribe or limit a government's jurisdiction over crimes committed on an Indian reservation. With respect to jurisdiction over the Cherokee Nation reservation, Congress has acted a number of times. First, Congress declared that major crimes committed by or any crime committed against Indians on the reservation must be tried by the federal government exclusively. (See 18 USC § 1152-1153) Second, non-major crimes committed and domestic violence crimes occurring on the reservation may be tried by either the Tribe or the United States, but exclusive of state jurisdiction. (25 USC § 1301, 1304) Third, in the Oklahoma Enabling Act, 34 stat 267, Congress reserved jurisdiction over Indian reservations to the United States. Fourth, Congress passed the Oklahoma Indian Welfare Act, which provides for the full restoration of tribal government for tribes in Oklahoma.[1] Fifth, in 1953, Congress passed Public Law 280, which authorizes a pathway for States to acquire jurisdiction over Indian reservations within the State's borders. However, Oklahoma never avails itself of this opportunity.

Neither the State, the Supreme Court held in ***Worcester v. Georgia***, 31 US 515 (1832), nor federal government, the Court held in Ex parte Crow Dog, 109 US 556 (1883), may exercise criminal jurisdiction over crimes committed on the reservation unless Congress has expressly conferred that power. Nothing in these acts confers jurisdiction to Oklahoma over any Indian reservation or crimes committed therein, as in the instant case.

However, a State may exercise criminal jurisdiction over non-Indians who commit crimes against other non-Indians on the reservation, provided no treaty stipulation or federal statute

[1] "It will be observed that its 1st section provides that nothing in the constitution of the new state shall be construed ' to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.'" ***Ex parte Webb***, 225 US 663 (1912)

declares otherwise. (***US v. McBratney***, 104 US 621 (1881)) Oklahoma could not have acquired jurisdiction over non-Indian-against-non-Indian crimes on the Cherokee Nation reservation because the Oklahoma Enabling Act reserved such jurisdiction to the United States (***McGirt v. Oklahoma***, 140 S. Ct. 2452 (2020) and the treaties between the United States and Cherokee Nation reserve jurisdiction to the Tribe and/or the United States. Oklahoma's constitution itself cedes such jurisdiction to the United States. (OK Const, art I § 3)

Therefore, the only conclusion is that Oklahoma and her courts are without jurisdiction to prosecute criminal cases regarding alleged crimes occurring on an Indian reservation. As the Tenth Circuit said in ***US v. Magnan***, 622 Fed Appx 719 (2015), "accordingly, when a court 'assume[s] a jurisdiction which in fact it could not take…all the proceedings in that court must go for naught' ***Riverdale Cotton Mills v. Ala & Ga Mfg Co,*** 198 US 188, 195 (1905)." In other words, any conviction pronounced by an Oklahoma court regarding a crime alleged to have occurred at a location within the boundaries of the Cherokee Nation are *void ab initio* as a matter of law and are of no legal effect. (***Johnson v. Zerbst***, 304 US 458, 468 (1938) ("The judgment of conviction pronounced by a court without jurisdiction is void"); See also Lumpkin, J concurring, ***State ex rel Matloff v. Wallace***, 497 P3d 686 (2021)("When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered.")

The Effect of Matloff

The Oklahoma Court of Criminal Appeals held in ***Matloff v. Wallace***, 2021 OK CR 23, that ***McGirt*** may not be applied through a post-conviction proceeding to void a conviction that is final, i.e. exhausted the direct appeal process. However, ***Matloff*** should not be applied to post-

conviction proceedings involving a claim of lack of jurisdiction due to treaty provision or federal statutes for three primary reasons: (1) such a conviction is not final within the meaning of the law, (2) ***Matloff*** contradicts US Supreme Court precedent and, (3) ***Matloff*** must operate prospectively only.

First, as described above, the state district court is without jurisdiction in cases that occur within the boundaries of the Cherokee Nation reservation; a fact that would clearly appear on the face of the record of the case. Accordingly, any conviction pronounced by a state court regarding such a criminal case would be void ab initio and therefore not a conviction under law. Such "conviction" then could never be final under ***Matloff*** since the conviction does not actually exist.

Second, the US Supreme Court held in ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), "where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." No constitutional right is substantive and fundamental than the right to be tried in a court of competent jurisdiction. As early as 1816, the High Court said, "States may not disregard a controlling constitutional command in their own courts." ***Martin v. Hunter's Lessee***, 1 Wheat 304, 340-41; *See also* ***Yates v. Aiken***, 484 US 211, 218 (1988)

McGirt asked and answered only one substantive fact question: Does the Muscogee (Creek) Nation reservation continue to exist? Using a procedural rule established in ***Solem v. Bartlett***, 465 US 463 (1984), the US Supreme Court determined, yes, the reservation continues to exist and had not been disestablished by Congress. The OCCA made to same determination using the same 1984 procedural rule with respect to the Cherokee Nation reservation. (***Hogner v. State***), 2021 OK CR 4) No law changed. How the law is to be applied was not changed. The only thing that ***McGirt*** and ***Hogner*** changed was a substantive fact: the reservation continues to exist. This leads to a different outcome when clearly established law is applied to it.

Third, ***Matloff*** itself should only be applied, if at all, prospectively to post-conviction proceedings filed after the OCCA decision was handed down and the mandate issued. Matloff applied retroactively would be tantamount to an ex post facto law constitutional violation. (US Const., art. I § 10)

4. According to the OCCA's own precedent, ***Matloff*** should be applied prospectively only. (***Ferrell v. State***, 902 P2d 1113) Petitioner's application for post-conviction relief in state court was filed several months prior to the OCCA decision in ***Matloff***.

CONCLUSION

According to US Supreme Court precedent, the treaties between the Cherokee Nation and the United States deprive Oklahoma of criminal jurisdiction for crimes, which occur on the reservation. Congress has never enacted a federal statute that authorized Oklahoma to exercise jurisdiction on the reservation. Moreover, for the reasons describe above, ***Matloff*** is inapplicable. Therefore, Petitioner prays for this Court to reverse and remand with instructions to dismiss.

Respectfully submitted,

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I declare under penalty of perjury that I placed a true and correct copy of the foregoing Reply to State's Response in the prison mailing system, addressed to Caroline Hunt, Asst. Atty Gen, 313 NE 21st Street, Oklahoma City, OK 73105, on February 16, 2022 by USPS postage prepaid.

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