UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS ROYE WAHPEKECHE, Petitioner - Appellant v. LUKE PETTIGREW, Warden, Respondent - Appellee.	No. 23-6176 (D.C. No. 5:21-CV01106-PRW) (W.D. Okla.)

SUPPLEMENTAL OPENING BRIEF OF PETITIONER-APPELLANT

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Oral Argument is Requested

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5. U.S. District Court, Western District of Oklahoma, Case No. 5:21-cv-01106-PRW (Petition of Writ of Habeas Corpus)

II. STATEMENT OF JURISDICTION

Mr. Wahpekeche's 28 U.S.C. § 2254 Petition for a Writ of Habeas Corpus in the Western District of Oklahoma, which he filed *pro se*, set forth nine grounds challenging the constitutionality of his state court conviction. Vol. I at 7-113. The magistrate judge recommended the district court deny all grounds for relief. *See* Vol. IV at 221-247. Mr. Wahpekeche filed an objection to the recommendation. *Id.* 222-290. The

district court denied Mr. Wahpekeche's habeas petition. *Id.* 293-300. Mr. Wahpekeche filed a notice of appeal, *id.* 301-302, which the district court construed as a request for certificate of appealability (COA) that was denied, *id.* 304-305. Mr. Wahpekeche then filed a notice of appeal with this Court on October 27, 2023, which this Court construed as a request for a COA. On November 20, 2023, Mr. Wahpekeche also filed a motion to alter the judgment of the district court in the district court. *Id.* 349-356. This Court abated the case until the motion to alter the judgment was ruled on by the district court. The district court denied the motion to alter on January 25, 2024. *Id.* 373-376. Mr. Wahpekeche filed a notice of appeal related to the denial of his motion to alter on February 5, 2024. *Id.* 379. Mr. Wahpekeche filed his opening brief and application for COA on March 4, 2024. ECF 34. This Court granted the COA "on all issues". ECF 61. The jurisdiction of this Court is therefore invoked pursuant to 28 U.S.C. §§ 2241 and 2254.

III. STATEMENT OF THE ISSUES

1. Whether the State of Oklahoma had jurisdiction to investigate, arrest, and convict Mr. Wahpekeche for crimes allegedly

committed by Mr. Wahpekeche on Indian Country within the exclusive federal jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. § 1153.

2. Whether Mr. Wahpekeche, who proceeded *pro se* in appealing the constitutionality of his conviction in state court, properly exhausted his evidentiary arguments and habeas relief is warranted.

IV. STATEMENT OF FACTS

Mr. Wahpekeche was tried in Oklahoma state court for various sexual crimes involving a minor victim at his home. Rec. Vol. II p.22-23.[1] The State called Mr. Wahpekeche's biological son, O.R., as a witness against Mr. Wahpekeche. Rec. Vol. I pp.245-252. The jury convicted Mr. Wahpekeche on all counts. Rec. Vol. II p.22-23. Before sentencing, he filed a motion to dismiss based on jurisdiction and provided the court with various deeds and documents to prove the land upon which the crimes were committed was Indian country. *See* Conventionally Filed Materials,

[1] The record will be referred to by the volume and page, *e.g.*, Rec. Vol. I p.1. Where the conventionally filed record is referenced, it will be referred to as the "Conventionally Filed Materials." The document will be referenced along with specific page numbers. If it is a transcript, only the date of the transcript and page and (if applicable) line numbers, *e.g.,* Tr. 1/1/2001 45:1, will be referred.

Docket pp.210-266. The motion was denied, and he was sentenced to life as well as additional prison time; he appealed, submitting a 50-page opening brief. Rec. Vol. II pp.156-209. The conviction and sentence were confirmed, so Mr. Wahpekeche filed a habeas petition. *See id.* at 351-373. The habeas petition included information supporting his argument that Oklahoma lacked jurisdiction as well as an affidavit from O.R., who testified against Mr. Wahpekeche at trial, that recanted trial testimony. *Id.* The petition was denied. *Id.* at 389-393. As set forth below in the procedural history section, the road to this Court was a bit windy.

V. INTRODUCTION

Oklahoma investigated, arrested, and convicted Mr. Wahpekeche without jurisdiction. Mr. Wahpekeche is an Indian, and the alleged crimes conclusively occurred on Indian country, as defined by 18 U.S.C. § 1151. Despite Mr. Wahpekeche raising this jurisdictional issue since the middle of his trial in 2015, the State of Oklahoma has doggedly refused to acknowledge that which is inescapably clear: the property at which the crimes occurred is restricted land allotted to an Indian in 1891, and the restrictions were never extinguished. The documents and deeds

related to this property, including the "Indian Deed Inherited Lands" document that evidences a 1911 sale of the land, show the land is within the historical boundaries of a Reservation and was allotted to an Indian with restrictions that were never extinguished. The various state courts' refusal to bother to conduct the requisite analysis under Supreme Court precedent like *Solem v. Barlett* to determine the issue resulted in the courts acting contrary to clearly established federal law, unreasonably applying of federal law, and unreasonably determining facts that requires this Court grant habeas relief. 465 U.S. 463 (1984).

In addition to this glaring jurisdictional issue, there are various evidentiary problems that tainted the trial, including using evidence obtained in violation of *Miranda*. Also, the trial court precluded critical evidence about the alleged victim that was admissible under the Rape Shield Act. Post-conviction, Mr. Wahpekeche presented evidence of actual innocence not previously available in the form of an Affidavit from the only witness that corroborated the alleged victim's testimony – her step-brother, Mr. Wahpekeche's biological son. Once the step-brother (referred to as "O.R.") became an adult, he submitted an Affidavit. In the

Affidavit, O.R. effectively recanted his trial testimony (given years earlier as a minor), describing how he and the alleged victim were coached by his step-mother to testify a certain way and stating that he never heard Mr. Wahpekeche sexually abusing the alleged victim, despite O.R. frequently listening at the bedroom door where the alleged crimes occurred. This Court should grant habeas relief.

VI. PROCEDURAL BACKGROUND

Mr. Wahpekeche was tried for several sexual crimes involving a minor under the age of 14 in Oklahoma state court. In the middle of that trial, a snap hearing was held to address jurisdiction because evidence demonstrated Oklahoma lacked jurisdiction since Mr. Wahpekeche is an Indian, and the alleged crimes were committed on Indian land. Rec. Vol. I pp.271-291. He was ultimately convicted in January 2015 and sentenced to several life sentences and additional prison time in December 2015. *See* Rec Vol. I p.7; Vol. II p.389-90. Mr. Wahpekeche filed a direct appeal, arguing, *inter alia*, that the trial court lacked jurisdiction, but the OCCA affirmed on April 27, 2017. Rec. Vol. I p.149-156.

Mr. Wahpekeche filed various post-conviction motions and appeals, which are decently summarized by the District Court at Rec. Vol. IV pp. 222-224. All of his efforts were denied, dismissed, or refused. In one instance, the OCCA erroneously dismissed his post-conviction appeal because the Clerk failed to inform Mr. Wahpekeche of a critical order "in a timely manner." *See* Rec. Vol. II p.529. He was granted an appeal out of time. *Id.* p.530. Mr. Wahpekeche timely filed his federal habeas petition in the Western District of Oklahoma, which was denied, largely based on the Magistrate Judge's recommendation, on October 20, 2023. Rec. Vol IV pp.221-247, 293-300. As set forth below in Section IX(B), Mr. Wahpekeche exhausted his evidentiary arguments and issues.

VII. SUMMARY OF THE ARGUMENT[2]

Long before the Supreme Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Mr. Wahpekeche asserted that Oklahoma lacked jurisdiction to arrest and prosecute him for alleged crimes because the

[2] Due to the number of issues on appeal, where necessary, this brief refers to the issues as Ground 1, Ground 2, etc. set forth in the Habeas Petition. The various grounds are succinctly identified and set forth in ECF 71, Appellant's Response to Motion for Reconsideration.

crimes were committed on Indian land, and he is an Indian. The land on which Mr. Wahpekeche allegedly committed crimes is, in fact, Indian Country under 18 U.S.C. § 1151 because the land is within the historical boundaries of the Citizen Potawatomi Nation[3] (CPN)'s Reservation ("CPN Reservation" or "Reservation") and the land was allotted to an Indian under the General Allotment Act, 25 U.S.C. § 331. Nothing subsequent to the establishment of the reservation or allotment ceded the land on which the crimes were allegedly committed or removed the restrictions when the land was allotted.

The State of Oklahoma lacked jurisdiction over this case and the investigation, arrest, and conviction were unconstitutional. "Only Congress has the power to diminish [or disestablish] a reservation." *Nebraska v. Parker*, 136 S. Ct. at 1082 (2016). "It is not for the courts to complete a task that Congress chose not to finish." *Indian Country, U.S.A., Inc. v. Oklahoma Tax Com'n*, 829 F.2d 967, 981 (10th Cir. 1987). Pursuant to the statutory text used by Congress, and in the

[3] Citizen Potawatomi Nation, or CPN, has been colloquially referred to as "Citizen Band of Pottawatomie" and "Citizen Band Potawatomi Nation."

contemporaneous understanding of the federal courts and executive branch officials, including the President and the Secretary of the Interior, there is clear and plain evidence of the land at issue being on a Reservation and allotted and held in trust, with the restrictions on the allotment never having been removed or extinguished. Well-established federal law states that land which has been allotted and held in trust is considered Indian country. Because jurisdiction over Mr. Wahpekeche rests exclusively with the United States, he is "in custody in violation of the … laws … of the United States." 28 U.S.C. § 2254(a). Habeas relief is proper on Grounds 1, 2, 3, 5, 8, 10.

VIII. STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision about whether the state court acted contrary to clearly established federal law, unreasonably applied federal law, or made an unreasonable determination of fact when it exercised subject matter jurisdiction. *See Hanson v. Sherrod*, 797 F.3d 810, 814 (10th Cir. 2015) (referencing the Antiterrorism and Effective Death Penalty Act ("AEDPA"), § 2254(d)). Under the AEDPA, "a state court's decision is 'contrary to' clearly

established federal law 'if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts.'" 797 F.3d at 814 (citations omitted). A state court's application of established law is unreasonable if the state court fails to "identif[y] the correct governing legal principle from Supreme Court decisions" or if it identifies the correct principle, "but unreasonably applied that principle to the facts of the prisoner's case." *Id.* (citations and internal brackets omitted). "[T]he relevant inquiry is not whether the state court's application of federal law was incorrect, but whether it was 'objectively unreasonable.'" *Id.* (citations omitted).

This Court should review the question of whether Oklahoma has jurisdiction without any deference to the state courts' determinations pursuant to the AEDPA for two reasons. First, there was never an adjudication on the merits. In the middle of trial, a snap hearing was held to address subject matter jurisdiction, with no time for Mr. Wahpekeche to prepare, muster evidence, or subpoena witnesses. The "evidence" presented by the State to the trial court was one-sided and patently

inaccurate. Indeed, one of the State's witnesses, Chief of the Cleveland County Sheriff's Office, Jose Chavez, admitted that "this home is on Indian land, tribal land." *See* Tr. 1/28/2015 at 141:6-18, 151:15-23. When the State presented further evidence during, what was in effect and emergency hearing on jurisdiction, it presented testimony from an Absentee Shawnee police Chief. Tr. 1/29/2105 at 5:5-6:11. As explained below, the Absentee Shawnee is the wrong Tribe because it never had a reservation on the subject land; it was the CPN that was granted a Reservation pursuant to an 1867 treaty. *See, e.g., Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 142 F.3d 1325 (10th Cir. 1998) (discussing in detail the relationship between the CPN and Absentee Shawnee and recognizing the Absentee Shawnee settled on CPN's reservation). Moreover, the trial court affirmatively represented that Mr. Wahpekeche could raise the jurisdiction issue at any point in the future. Rec. Vol. II p.48.

Second, subject matter jurisdiction is never waived and can be raised at any time. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Deferring to a state court on whether federal courts have exclusive

jurisdiction would require federal courts to bow to state courts on questions of federal jurisdiction, which is the inverse of federalism and allows the states to dictate what jurisdiction the federal judiciary has. See *Murphy v. Royal,* 875 F.3d 896, 911 (10th Cir. 2017)*, aff'd sub nom. Sharp v. Murphy*, 591 U.S. 977 (2020).[4]

If AEDPA deference applies, habeas relief is warranted because the state courts' decision that Oklahoma had jurisdiction is contrary to clearly established federal law, involved unreasonable application of federal law, and/or the state court decision was based on an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(2). Here, all three apply to overcome AEDPA deference. The Supreme Court's decisions in *Solem* and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); federal statutes § 1151 (defining Indian country) and § 1153 (MCA); and this Court's holdings in *Indian Country,*

[4] This Court in *Murphy* did not decide whether AEDPA deference was required on this exact issue because the Court found that even applying AEDPA deference, Mr. Murphy prevailed because there was no state jurisdiction over his crimes since they were committed by an Indian on Indian land. 875 F.3d at 912. The same is true here.

U.S.A., 829 F.2d at 975 are clearly established federal law the state courts ignored.

IX. ARGUMENT

A. Reversal Is Required Because Oklahoma Lacked Jurisdiction.

1. Preservation

Mr. Wahpekeche argued Oklahoma lacked jurisdiction during trial on January 29, 2015. Rec Vol. II p.935. He reiterated this issue at every stage of his direct and habeas appeals. Rec. Vol. IV p.295-296.

The state court's application of federal law was unreasonable because it ignored the undisputed fact that the land upon which the crimes were committed was on the Reservation and was allocated to an Indian, which indisputably renders the land "Indian country" under § 1151, which status does not disappear absent congressional action. Also, the state trial court's reliance on a single witness who lacked the qualifications and presented inaccurate (if not false) information to the court was unreasonable as was the Oklahoma Court of Criminal Appeals ("OCCA")'s failure to examine in detail documents and evidence presented by Mr. Wahpekeche that clearly established the alleged crimes

were committed on Indian country and that the Reservation was not disestablished, or, at the very least, the land on which the crimes were committed was within the Reservation and/or Indian country because it was restricted allotted land.

2. Federal Courts Have Jurisdiction over Indian Country.

The MCA gives the federal government exclusive jurisdiction to prosecute certain felonies committed by Indians within Indian country. 18 U.S.C. § 1153(a); *United States v. John,* 437 U.S. 634, 651 (1978). Indian Country includes "all Indian allotments, the Indian titles to which have not been extinguished." § 1151(c) "[T]he States have jurisdiction over **unallotted** opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries." *Solem*, 465 U.S. at 467 (emphasis added). "It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities." *DeCoteau v. District County Court*, 420 U.S. 425, 428 (1975). *See also Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App.

1992) ("[Q]uite simply the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.").

"Federal and tribal courts have exclusive jurisdiction over those portions of the opened [Indian reservation] lands that were and have remained Indian allotments." *Solem,* 465 U.S. at 467 n.8. The Court has also held that "federal jurisdiction over the offenses covered by the Indian Major Crimes Act, [which include murder and assault with intent to commit murder,] is 'exclusive' of state jurisdiction." *Negonsott v. Samuels,* 507 U.S. 99, 103 (1993).

3. The Land is Indian Country and Mr. Wahpekeche is an Indian.

The State of Oklahoma has not and cannot dispute Mr. Wahpekeche is an Indian. *See* Rec. Vol. II p.41. *See also id.* pp.805-806 (certifications of tribal membership and Indian blood).

"Indian country" is defined in § 1151 as: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof,

and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

The land at issue is located at 16803 Creek Valley Lane, Newalla, Cleveland County, Oklahoma ("Land"). Pursuant to the 1867 Treaty with the Potawatomi, the Land is within the boundaries of the CPN Reservation. Feb. 27, 1867, 15 Stats., 531. The State of Oklahoma concedes the same. Rec. Vol. II p.41. The Tenth Circuit has recognized that the Absentee Shawnee settled on the land of the CPN, making the Land a part of the CPN Reservation. See *Collier*, 142 F.3d at 1325.

In 1887, Congress passed the General Allotment Act[5]. The Secretary of the Interior determined that the Act applied to the Reservation and authorized allotments of land within the Reservation to

[5] Section 8 of the General Allotment Act specified groups that were to be exempt from the law, stating that "the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south."

both CPN and Absentee Shawnee Tribe members. Once all allotments were established, the government entered into an agreement with the CPN on June 25, 1890, and with the Absentee Shawnee the next day, under which approximately 575,870.42 acres of **excess lands** of the Reservation (*i.e.,* non-allotted) were ceded to the government. Congress passed the 1891 Act setting out those agreements. *See* Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1016-22. Though § 8, Article I of the 1891 Act states that CPN "hereby cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to" certain land, *id*. at 1016, it cannot be read in isolation when determining the status of *all* lands within the Reservation. Section 8, Article II addresses lands that were allotted within the Reservation. Article II states:

> Whereas certain allotments of land have been heretofore made, and are now being made to members of said Citizen Band of Pottawatomie Indians, according to instructions from the Department of the Interior at Washington, under the act of Congress entitled, 'An act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend-the protection of the laws of the United States and the Territories over the Indians, and for other purposes,'. Approved February [8, 1887], and according to said instructions other allotments are to be made, it is further

> agreed that all such allotments so made shall be confirmed-all in process of being made shall be completed and confirmed.

Id. at 1017.[6] The Land is one of the allotments contemplated in Article II and thereby exempt from the cession language in Article I. This principle was made clear by President Harrison in Proclamation 311 which addressed the 1891 Act (among other agreements with various tribes):

> I, Benjamin Harrison, … do hereby declare and make known that all of the lands acquired from the Sac and Fox Nation of Indians, the Iowa tribe of Indians, the Citizen band of Pottawatomie Indians, and the Absentee Shawnee Indians by the four several agreements aforesaid, **saving and excepting the lands allotted to the Indians as in said agreements provided**, or otherwise reserved in pursuance of the provisions of said agreements and the said acts of Congress ratifying the same and other the laws relating thereto, will, … be opened to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, and the laws of the United States applicable thereto.[7]

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[6] The exact same language appears in the Act that confirmed the agreement with the Absentee Shawnee.

[7] Benjamin Harrison, Proclamation 311—Opening to Settlement Lands Acquired from the Sac and Fox Nation of Indians, Oklahoma Territory Online by Gerhard Peters and John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/205645 (visited March 28, 2025) (emphasis added).

President Harrison, in contemplation of the 1891 Act, issued the U.S. Homestead Deed dated August 7, 1891 for the allotted Land to John Sloan, an "Indian of the Absentee Shawnee tribe". *See* Rec. Vol. IV p.180; *compare id.* (describing the allotted land as "The Eastern half of section thirty five in Township Ten North of Range One East of the Indian Meridian, Oklahoma, Territory, containing three hundred and twenty acres") *with id.* at 176 (deed from Housing Authority of the Absentee Shawnee to Mr. Wahpekeche for the Land, described as "being a part of Section 35, Township 10 North, Range 1, East of the Indian Meridian, Cleveland County, Oklahoma").

The State of Oklahoma will surely argue that the General Allotment Act combined with the 1891 Act disestablished the CPN Reservation. *See* Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1016–22. But this argument ignores several cases in the Supreme Court and this Court, which state otherwise.[8]

[8] Also, pursuant to *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025), the State knew that such arguments were incorrect; its' attempt to present evidence in support of the arguments violates the edict in *Glossip* that the prosecution should not knowingly present incorrect evidence. In

To begin with, such an argument is contrary to *McGirt* because, just like the Creek Indians, the CPN "ceded and conveyed a portion of" their Oklahoma reservation to the United States. 140 S. Ct. at 2464. But "because there is no equivalent law terminating what remained, the Reservation survived allotment." *Id.* Indeed, "[i]n light of *McGirt* and the follow-on cases, the eastern part of Oklahoma, including Tulsa, is now recognized as Indian country." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 634 (2022); *see also In the Matter of Guardianship of K.D.B.*, 564 P.3d 83, 91 (Okla. 2025). The Land is in the eastern part of Oklahoma. *See* Rec. Vol. IV p.176.

The Supreme Court previously rejected an argument by Oklahoma that the CPN Reservation is not a reservation, and the State has jurisdiction over it to tax cigarette sales. *Oklahoma Tax Comm'n*, 498 U.S. at 511. Because the CPN Reservation was "validly set apart for the use of the Indians as such, under the superintendence of the

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Oklahoma Tax Comm'n, 498 U.S. at 511, the Court found Oklahoma lacked jurisdiction in the CPN Reservation. When the State presented evidence, including a map from the Oklahoma office of research and planning showing that that area is not within tribal jurisdiction, the State knew that information was incorrect.

Government," it was a Reservation, which means it is Indian country under § 1151. *Id.* It would be absurd to interpret this case to mean that the store in question is on the CPN Reservation while the Land is not, despite it clearly being within the boundaries of the Reservation.

Similarly, in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court explicitly recognized that the CPN had a Reservation because the building at issue in that case was "not on the Tribe's reservation." 532 U.S. 411, 415 (2001). It defies logic that the CPN has a reservation recognized by the Supreme Court but the Land, which is on the Reservation, is not Indian country under § 1151.

This Court's prior decision in *Collier*, found that the CPN's agreement to cede their interest in the reservation in exchange for payment was "not an unambiguous expression of an intent to abrogate the CPN's pre-existing treaty rights to the land." 142 F.3d at 1328. The "language, legislative history, and historical circumstances of the 1891 Act do not evince a sufficiently clear congressional intent to abrogate the Potawatomi Tribe's treaty right to the exclusive use and occupancy of its [] reservation." *Id.* at 1325. Instead, these provisions are consistent with

congressional intent to clearly recognize the CPN's exclusive reservation rights. Such a view is confirmed by the legislative history of the Act, which states that the CPN "are now, and for more than twenty years have been, occupying a reservation in the Indian Territory … about 30 miles square, and containing an area of 575,870.42 acres." *Id.* at 1333 (citing H.R. Rep. No. 51–3481, at 1 (1891)). This Court, thus, has explicitly recognized the CPN's Reservation.

Nothing in the 1891 Act explicitly expresses congressional intent to disestablish the Reservation. Because the CPN's treaty rights were not abrogated in 1891, more than a century later, the Secretary of the Interior had to obtain the CPN's consent to acquire land within the Reservation boundary in trust for the Absentee Shawnee. *Id.* at 1334.[9] If the Reservation was disestablished in 1891, the CPN's consent would not

[9] Any argument by the State of Oklahoma that the Court's use of the phrase "former reservation" in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier* is somehow determinative is simply wrong. See *City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109, 1112 (D. Or. 2002) (noting that in the *Collier* case, "former reservation" was defined by reference to 25 U.S.C. § 461, which "implicitly but clearly defines an Indian reservation as an area of land created or set apart by treaty or agreement with the Indians, Act of Congress, Executive Order, purchase or otherwise.").

have been required. Indeed, "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. At most, then, the 1891 Act diminished the CPN Reservation, but that is not the same as disestablishment, particularly where the allotments are concerned.

And since "historical context surrounding the [1891 Act's] passage" must be considered, *e.g.* the General Allotment Act and the Homestead Deed, it is even less probable that Congress intended to disestablish the Land. "In the absence of any clear congressional intent to divest allotted lands … of their reservation status, those lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a)." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1017 (8th Cir. 2010). Thus, "Tribal lands, trust lands, and certain allotted lands [including the Land] generally remain Indian country despite disestablishment." *Indian Country, U.S.A.*, 829 F.2d at 975.

Relatedly, the way in which the Land is held (trust or fee) neither determines whether the Land is Indian Country nor whether Indian title to the Land has been extinguished. "As long as 120 years ago, the federal court for the Indian Territory recognized all this and rightly rejected the notion that fee title is somehow inherently incompatible with reservation status." *McGirt*, 140 S. Ct. 2452. "[N]or can it be successfully maintained that because the United States at one time bought from" the CPN certain land and thereafter gave allotments or otherwise gave title in fee-simple does not mean that land is not an Indian reservation. *Maxey v. Wright*, 3 Ind. T. 243, 54 S.W. 807, 810 (Indian Terr. 1900). Indeed, after a "fee patent is issued, the Indian has the same property he had before, the only material difference being that he now has the legal title, where during the period of the trust allotment he had the beneficial ownership only." *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942).

Nothing in the deeds associated with the Land extinguished Indian title. The original allotment to John Sloan states the allotment, which includes the Land, is held in trust by the United States and at the expiration of the trust period, "all charge or incumberance [sic]

whatsoever" would be lifted. Rec. Vol. IV p.180. A subsequent "Indian Deed Inherited Lands" from John Sloan's heirs to John W. Wilson does not clearly or explicitly extinguish the encumbrances from the original allotment. *Id.* p.181. Moreover, the proceeds of the sale were "deposited to the credit of the heirs." *Id.* p.184. The "Indian Deed Inherited Lands" document further demonstrates the Indian title was not extinguished: it is an Indian Deed and does not extinguish any of the encumbrances that came with the original allotment. *Id.* pp.186-187.

To drive the point even further, when Congress extended the trust period (which was before the 1911 sale from Sloan's heirs to Wilson) via the Act of May 8, 1906, ch. 2348 (34 Stat. at L. 182), Congress stated: "That until the issuance of **fee-simple patents** all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." No fee simple patent was issued for the Land – the Deed is not unrestricted. It is clear, then that the Land is

Indian country pursuant to § 1151. *See United States v. Pelican*, 232 U.S. 442, 450–51 (1914).[10]

The State has not identified in the transactional history of the Land where anyone or any conveyance "used the phrase 'removal or restrictions,' nor did [the conveyances] ask the [Secretary of Interior] to remove all restrictions form the tract." *Magnan v. Trammell*, 719 F.3d 1159, 1174 (10th Cir. 2013). The "Indian Deed Inherited Lands" shows that the statutory requirements "with respect to the restricted inherited interests" were followed. *Id.* Any finding to the contrary is an unreasonable determination of the facts and evidence. *Id.*

And neither *Indian Country, U.S.A.* nor any other case suggests that "reservation" or "Indian country" status under § 1151 is contingent

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[10] Even if the Court is still not convinced that the Land is Indian country because it is an allotment, the Supreme Court has held that in a case where an entire reservation was disestablished, "federal jurisdiction is limited to the retained allotments." *DeCoteau*, 420 U.S. at 446. The Land is unquestionably part of a retained allotment. Also, the IBIA has previously determined that Absentee Shawnee "allotments were Indian country" even if they are not part of "a 'reservation' set aside for CPN or its members" or the CPN does not "have jurisdiction over the AST allotments." *In Re Estates of Wallace J. Cook, Et Al.* (tribal Heirship of Interests In Absentee Shawnee Allotments), 58 IBIA 87, 102, 2013 WL 6211799, at *12.

upon current Indian title or trust status. Nor does it suggest that once Indian trust land acquires "Indian country" status under § 1151, that a subsequent transaction somehow divests the lands of "Indian country" status, particularly where nothing in the deeds eliminates the status of the land as "Indian country." Even if it were unclear whether the Land was Indian country, ambiguities must be resolved in favor of the Indians, particularly given the Supreme Court's consistent recognition of the CPN's rights in light of the 1891 Act. *Murphy*, 875 F.3d at 921.

4. Habeas relief is warranted because Oklahoma lacked jurisdiction.

As set forth *supra,* Mr. Wahpekeche is an Indian and the Land on which alleged crimes were committed is Indian country under § 1151. Also as set forth *supra,* clearly established federal law is that only federal courts have jurisdiction over crimes committed by an Indian on Indian land. Oklahoma investigated, issued warrants for, arrested, interviewed, and prosecuted Mr. Wahpekeche. It did so in violation of 18 U.S.C §§ 1151 and 1153. Like in *Murphy*, the OCCA in Mr. Wahpekeche's case "fail[ed] to cite controlling Supreme Court authority, it failed to apply it, and in

deviating from *Solem* , the OCCA's reasoning contradicted clearly established law." 875 F.3d at 926.

The OCCA's April 17, 2017 decision (direct appeal) addressed the jurisdictional issue Mr. Wahpekeche raised, but failed to cite *Solem*, § 1151, the MCA, or any relevant Supreme Court case addressing the issue of disestablishment, including cases in which courts have recognized the CPN's Reservation. *See* Rec. Vol. II pp.152-153. The OCCA's opinion addressed the issue of whether the Land was allotted, dependent Indian community, or a reservation. *Id.* Thus, all arguments under § 1151 were raised and exhausted.

In post-conviction state proceedings, Mr. Wahpekeche again raised the jurisdictional issue, but the state courts summarily dismissed the arguments without citing to or addressing the aforementioned relevant clearly established federal authority, case law, and statutes. *See* Rec. Vol. II p.393 (state district court opinion denying post-conviction relief on jurisdiction argument); *id.* p.530-532 (state district court again denying post-conviction relief on jurisdictional issue); *id.* pp.823-824 (OCCA order denying post-conviction relief with zero analysis other than to say *McGirt*

is not retroactive). The state court's failure to cite or apply clearly established controlling Supreme Court authority requires the habeas petition be granted.

The state court's reasoning for finding Oklahoma had jurisdiction and for denying habeas relief contradicted clearly established law. As set forth in detail *supra*, myriad well-established Supreme Court cases – as well as cases from this Court – have established the CPN Reservation and allotments are Indian county. *See, e.g., Oklahoma Tax Comm'n*, 498 U.S. at 511 (CPN Reservation was "validly set apart for the use of the Indians as such, under the superintendence of the Government" and was thus a Reservation); *C & L Enterprises, Inc.*, 532 U.S. at 415 (recognizing CPN had a Reservation because the building at issue in that case was "not on the Tribe's reservation."); *Collier*, 142 F.3d at 1328 (CPN's agreement to cede their interest in the reservation in exchange for payment was "not an unambiguous expression of an intent to abrogate the CPN's pre-existing treaty rights to the land" and requiring Secretary of the Interior to obtain the CPN's consent to acquire land within the Reservation boundary in trust for the Absentee Shawnee); *Indian*

Country, U.S.A., 829 F.2d at 975 ("certain allotted lands generally remain Indian country despite disestablishment."). The OCCA failed to cite or apply *Solem* or any of these instructive cases. Thus, the decision was contrary to clearly established federal law. *See Murphy*, 875 F.3d 926-928 ("The OCCA failed to articulate or apply the proper legal framework anywhere in its opinion, and its analysis is incompatible with the *Solem* framework.").

To the extent the state courts made a factual determination that the Land was not Indian country, it was unreasonable.[11] The State, in support of its position that the state court had jurisdiction, called Bradley Jackson, Chief of Police for the Absentee Shawnee Tribal Police, and Chief Detective Jose Chavez. *See* Tr. 1/29/2015 beginning at p.6. Neither Chief Jackson nor Chief Chavez are experts in Indian Real Estate nor in Tribal law. Moreover, Chief Jackson is with the Absentee Shawnee, not the CPN, thus he has no factual basis to assert the CPN lacks jurisdiction

[11] Mr. Wahpekeche agrees with United States District Court Judge Wyrick that the OCCA's determinations were not factual because it was based merely on statutory interpretation. *See* Rec. Vol. IV p.297 (fn.11).

because the Land is part of the CPN Reservation, not the Absentee Shawnee.[12] On cross examination, Chief Jackson testified that he had no record to determine whether the Land was "trust land" or a "dependent Indian Community". *Id.* at 12. The trial court and OCCA had deeds, testimony, and an inaccurate map that did not provide sufficient detail to evidence whether the Land was Indian country or not.

The original allotment deed was restricted. Rec. Vol. IV p.180. The 1911 "Indian Deed Inherited Lands" between the original allottee's heirs and John Wilson did not remove restrictions on the allotted land. *See id.* pp.181-182. The patent issued as a result of the sale and the approval of the sale by the Secretary of Interior did not remove the restrictions. *Id.* pp.183-187. Any assertion by the District Court, state district court, or the OCCA that the language in the Historical deed documents, "no reservations or withdrawals covering the land" somehow released restrictions plainly contained in the original allotment is absurd and

[12] As set forth in detail in *Collier*, 142 F.3d at 1328, the Absentee Shawnee were present on the CPN's land – the Reservation – with the CPN's permission. Thus, jurisdiction is based on the CPN's claim to the Land, not the Absentee Shawnee.

wrong. That language is part of the "Geological Survey" of the land which is discussing minerals, water rights, and power sites or reservoirs. *Id.* p.184. A court's reading that such language lifts the "restrictions and conditions" contained in the General Allotment Act is incorrect. *See id.* p.180; F. F. Lawrence, C. L. Nordeen, and H. L. Pumphrey, "History of Land Classification Relation to Waterpower and Storage Sites," Geological Survey Circular 400 (1957), pp.2-3,5 (describing that in 1909 the Secretary of Interior directed the Director of the Geological Survey to investigate water power sites and describing how, by 1910, 1.5 million acres were included in a power site **withdrawal** sites and identified as sites to be **reserved**).[13] The 1911 deed did not lift the allotment restrictions, and the Land is Indian country. As a result, Oklahoma lacked jurisdiction, the OCCA's decisions were contrary to clearly established federal law, and habeas relief is warranted.

[13] Available at https://pubs.usgs.gov/circ/1957/0400/report.pdf (visited March 29, 2025).

B. Mr. Wahpekeche Properly Exhausted His Evidentiary Arguments Regarding *Miranda* Evidence and Rape Shield Evidence.

"The exhaustion of available administrative remedies is a prerequisite for § 2241 habeas relief." *Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010). Exhaustion "means using all steps that the agency holds out and doing so properly (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotation marks and citation omitted). This Court should find that Mr. Wahpekeche's arguments regarding the Rape Shield Act, ineffective assistance of counsel, and violation of his *Miranda* rights were not procedurally barred from federal habeas review as they have been properly exhausted.

Mr. Wahpekeche included the in effective assistance and *Miranda* issues in his initial appeal. *See* Rec. Vol. IV pp.239, 242. But because of "an error by the Clerk in providing Defendant" with a critical order "in a timely manner," Mr. Wahpekeche's initial appeal was erroneously dismissed as untimely. *See* Rec. Vol. II p.529. He was thus granted an appeal out of time. *Id.* p.530. The State claims that even though issues

were included in his appeal, which was timely but erroneously dismissed as untimely, he had to re-raise them in the appeal that he was allowed to file "out of time." *See* Rec. Vol. IV p.239. This is an absurd view of a *pro se* litigant's burden and foists the effects of the OCCA's errors on Mr. Wahpekeche and blames him for the OCCA not reviewing and considering **all** issues Mr. Wahpekeche properly raised in his erroneously rejected brief and the brief the OCCA accepted after realizing its error. Nothing in the OCCA's granting of Mr. Wahpekeche's request for an appeal out of time identifies that he must reassert every argument previously asserted in his erroneously dismissed appeal. *See* Rec. Vol. II pp.532, 765-766. It was reasonable for Mr. Wahpekeche to expect the OCCA to consider **all** of his arguments and it was impossible for him to know that the OCCA did not consider all arguments based on its two-page, curt, dismissive, and wholly inadequate order denying post-conviction relief. *See* Rec. Vol. II pp.823-824. In fact, the OCCA order denying post-conviction relief does not state whether or not it considered arguments in the improperly denied appellate brief. *Id.*

Had the OCCA analyzed any of the issues he presented, it would have been clear to Mr. Wahpekeche that the OCCA refused to consider everything he raised in his initial appeal that was erroneously dismissed, and he could have sought relief from the OCCA via petition for rehearing. It was not until the federal habeas petition was filed that he would be made aware of this failure-to-exhaust argument that makes him responsible for court errors. Thus, the *Miranda* and ineffective assistance arguments were exhausted.

Even if this Court finds that claims are unexhausted, Mr. Wahpekeche is still entitled to relief as he can overcome any anticipatory procedural bar by demonstrating: (1) "cause and prejudice" for the default, or (2) that a fundamental miscarriage of justice has occurred. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Ineffective assistance of counsel is cause justifying procedural default under the cause and prejudice standard. *See id.* at 754. Trial counsel's failure to notify the court of the State's violations needlessly prejudiced Mr. Wahpekeche, as demonstrated more fully below. Any critical statements made or information obtained in the interview

rendered Mr. Wahpekeche powerless in preventing the State from uncovering any evidence to which his inadmissible statement or information may have led. Thus, the ineffective assistance of counsel claim is not procedurally barred and is ripe for habeas review and decision.

Mr. Wahpekeche raised his Rape Shield Act argument in his direct appeal. *See* Rec Vol. IV p.244. The argument raised on direct appeal and in his post-conviction proceedings were substantially similar. The argument on direct appeal was that the alleged victim and her mother were familiar with how to accuse someone of sexual abuse because they previously did it to a family member; the motive to do the same in this case was to help the mother obtain custody over the alleged victim; other witnesses could present evidence regarding the alleged victim's sexual behavior and how that behavior had nothing to do with Mr. Wahpekeche; and that evidence of the alleged victim's online and other written descriptions of sexual conduct should have been admitted to demonstrate her testimony – how she described sexual acts and what she knew – was

wholly inconsistent with her actual understanding and knowledge. *See* Rec. Vol. II pp. 183-187.

The same arguments were made in post-conviction proceedings. In his initial post-conviction brief, Mr. Wahpekeche argued the testimony by the alleged victim was inconsistent with her online chats and that she was coached by her mother on how to testify so the mother could obtain full custody. *Id.* pp.451-452. In his habeas petition with the United States District Court, Mr. Wahpekeche reasserted that he was prevented from presenting evidence that the alleged victim previously made unsubstantiated claims of sexual abuse and that she had previously demonstrated sexual behavior that was inconsistent with her testimony. Rec. Vol. I pp.55-57. Thus, the rape shield argument was exhausted and is ripe for habeas review and decision.

C. The *Miranda* Evidence and Rape Shield Evidence Warrant Habeas Relief.

1. Trial counsel failed to object to inadmissible evidence obtained as a result of the State's Miranda violations.

A challenge to a state's conviction based on ineffective assistance of counsel is a mixed question of fact and law and therefore subject to *de*

novo review, though a state court's factual findings made in course of its determination are subject to a presumption of correctness. *See Dever v. Kansas State Penitentiary*, 36 F.3d 1531 (10th Cir. 1994) (referencing 28 U.S.C.A. § 2254(d)).

This Court reviews a claim of ineffective assistance of counsel under the framework set forth in *Strickland v. Washington* which requires that trial counsel's performance "fell below an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." 466 U.S. 668 (1984); *see also Byrd v. Workman*, 645 F.3d 1159, 1167–68 (10th Cir. 2011) (internal quotation marks and citations omitted)). In determining whether counsel was ineffective, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged". *Strickland, supra.*

The right against self-incrimination guaranteed by the Fifth and Fourteenth Amendment entitles a suspect to consult with an attorney and to have assistance of counsel during custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 469, 473 (1966). It also requires officers to explain this right before questioning begins. *Id.* Officers may

question a suspect only after the suspect receives his *Miranda* warning and knowingly and intelligently waives his rights to counsel. *See Edwards v. Arizona*, 451 U.S. 483 (1981). If a suspect requests counsel at any point during the interview, police must immediately stop questioning until a lawyer has been made available or the suspect reinitiates conversation. *See id.*, at 434-85.

Detective Kris Albertson of the Cleveland County Sheriff's Office was the lead detective of the State's case. She interviewed Mr. Wahpekeche after failing to issue *Miranda* warnings and refused to honor his request for an attorney. At the end of the improper interview, Mr. Wahpekeche was told by the Sheriff that he was a suspect. Rec. Vol. III p.46-47; Rec. Vol. II pp.369. Though Detective Albertson was made to resign because her "cases weren't to the standards that [the Sheriff's Office] require", Tr. 1/28/2015 pp.186-188, the damage was already done.

The State used information and statements in the interview to arrest and convict Mr. Wahpekeche. Chief Chavez was able to obtain a search warrant for Mr. Wahpekeche's property where numerous photographs were taken and a chair was retrieved which proved to be

vital to the State's case. *Id*. at 150-151. In the Affidavit used to support the arrest warrant, the affiant (Chief Chavez), stated Mr. Wahpekeche was "interviewed" on September 12, 2012, after the police had already extensively interviewed the alleged victim and Mr. Wahpekeche's son, O.R. *See* Conventionally Filed Materials, Docket at p.5.

Trial counsel's failure to notify the court of the State's *Miranda* violations prior to or during the trial was not reasonable[14] and likely prejudiced Mr. Wahpekeche, because, but for the failure, the result would have been different. *See Strickland*, 466 U.S. at 694 (a reasonable probability of prejudice is one that is "sufficient to undermine confidence in the outcome."). The inadmissible statements and information provided to and used by the State in preparation and presentation of its case-in-chief surely contributed to the jury's verdict of guilt and the subsequent

[14] The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citation and internal quotation marks omitted).

affirmations by the district court and OCCA. Mr. Wahpekeche's ineffective assistance of counsel claim therefore warrants habeas relief.

2. Evidence of the alleged victim's conduct and motive should have been admitted.

While the Sixth Amendment guarantees a criminal defendant to confront witnesses against him, rape shield statutes serve legitimate state interests, and evidence related to rape victims may be excluded or limited. *See Richmond* v. *Embry,* 122 F.3d 866, 870-71 (10th. Cir. 1997). But witness partiality is subject to cross-examination and is "always relevant." *Woods v. State*, 657 P.2d 180, 181 (Okla. 1983). *See also* 12 O.S. § 2403 (stating that evidence against a sexual abuse or rape victim may be admissible for "proof of motive"); 12 O.S. § 2608 (such evidence may be admissible to prove "untruthfulness").

Mr. Wahpekeche sought to present evidence related to the alleged victim's motive, false allegations, and sexualization that the court precluded. *See* Rec. Vol. IV pp.166-169; Rec. Vol. II pp.174-176 (testimony excerpts); Tr. 1/26/2015 3:5-20:21. Counsel sought to demonstrate that the alleged victim got in trouble from her mom for sexually related chats and drawings and that the motive for accusing Mr. Wahpekeche was to

avoid getting in trouble. Tr. 1/26/2015 8:12-9:14, 10:25-11:9. Further, the alleged victim had previously (and falsely) accused another family member of sexual abuse before she accused Mr. Wahpekeche. *Id.* 9:15-10:24, 17:6-18:16.

Precluding this evidence hamstrung the defense. Inquiry into this testimony is proper. *See Woods*, 657 P.2d at 181. This is particularly true when coupled with the affidavit, discussed *infra*, that shows the motive to accuse Mr. Wahpekeche was real, and that the alleged victim's mother was the force behind the accusations. The refusal to allow Mr. Wahpekeche to inquire into these issues violated the Sixth Amendment's confrontation clause and merits habeas relief.

D. An Affidavit from One of the State's Main Witnesses Demonstrates He Recanted His Trial Testimony, Demonstrating Proof of Actual Innocence.

In this case, as with many cases, credibility of witnesses was key, particularly because the alleged crimes involved only Mr. Wahpekeche and S.R. In other words, much of the came down to he-said-she-said. Indeed, there was no DNA evidence in this case connecting Mr. Wahpekeche to the alleged crimes. Thus, any corroborating witness was

critical; the only corroborating witness was O.R., Mr. Wahpekeche's biological son. At trial, when O.R. was a minor, he testified against his father. *See generally* Tr. 1/28/2015 at pp.67-131.

Post-conviction, however, after O.R. became an adult, he freely provided an affidavit that effectively recanted his trial testimony. O.R., who is the alleged victim's half-brother and the only witness, other than the alleged victim, who corroborated alleged abusive events at trial, provided an affidavit that he was instructed by the alleged victim's mother on what to say and not say and that the mother coached both him and the alleged victim; in exchange for doing what his step-mother said, O.R. was promised a better homelife. Rec. Vol. II p.450 (brief arguing about affidavit), Rec. Vol. I p. 68 (affidavit of O.R.). The affidavit is clear: "I believe that at no time was there ever any inappropriate behavior between [S.R.] and my father, Thomas Wahpekeche." *Id.* This was not hearsay – it was based on O.R.'s actual observations because he "listened at the door" where the alleged crimes took place. *Id.*

The court's Sixth Amendment violation that precluded evidence regarding S.R.'s motive, prior false allegations, and other evidence under

the guise of the Rape Shield Act (*see supra* Section IX B and C), coupled with the newly obtained evidence of O.R.'s affidavit, demonstrates that there was a fundamental miscarriage of justice that overcomes any procedural bar to Mr. Wahpekeche's assertion of these arguments at this stage. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995). Due to the lack of any direct evidence in this case such as forensic evidence, DNA, video, audio, or eye-witness testimony (*see* Rec. Vol. II p.177), it is more likely than not that reasonable jurors would not have convicted him. *Schlup*, 513 U.S. at 327. Indeed, Mr. Wahpekeche has consistently maintained his innocence and asserted the claims against him were false, having been pushed and pursued by the alleged victim's mother, Mr. Wahpekeche's ex with whom he was engaged in a "lengthy and highly contested custody battle." Rec. Vol. II p.174.

X. CONCLUSION

Oklahoma lacked jurisdiction over Mr. Wahpekeche because he is an Indian and the alleged crimes were committed on Indian country pursuant to 18 U.S.C. § 1151. Thus, the Petition should be granted. Further, the evidentiary issues and newly obtained evidence

demonstrate there was a miscarriage of justice such that the Petition should be granted.

XI. STATEMENT REGARDING ORAL ARUGMENT

Oral argument is requested because it will assist the Court in determining the complex constitutional issues in this case, particularly the jurisdictional issues related to Indian allotments. *McGirt* and its progeny – and the myriad cases decided since and that will continue to be decided – present issues that can be further explored through oral argument.

Respectfully submitted this 3rd day of April 2025.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that: 1) all required privacy redactions have been made; 2) the ECF submission is an exact copy of any hard copies that were filed (if any); and 3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sentinel One, Version 24.1.4.257, most recently updated on April 3, 2025, and according to the program are free of viruses. I further certify that the information on this form is true and correct to the best of my ability and belief formed after a reasonable inquiry.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Supplemental Opening Brief complies with the word limitation set forth in Rule 32(a)(7)(B)(i). According to the word-processing system used to prepare this brief, the word count for this brief, excluding the Corporate Disclosure Statement, the Table of Contents, the Table of Authorities, and the certificates of counsel (*See* Fed. R. App. P. 32(a)(7)(iii)) is 8,676.

s/ Jason Wesoky
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April 2025, a true and correct copy of the foregoing was filed with the Court and served via CM/ECF on the following:

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

THOMAS ROYE WAHPEKECHE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-21-1106-PRW**
	)	
LUKE PETTIGREW,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner Thomas Roye Wahpekeche, a state prisoner, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and Brief in Support, challenging the constitutionality of his state court conviction. (ECF Nos. 1 & 2). Respondent has filed his Response to Petition for Writ of Habeas Corpus (ECF No. 14) and Mr. Wahpekeche has filed a Reply. (ECF No. 23). For the reasons set forth below, it is recommended that the Court **DENY** the Petition.

I. PROCEDURAL BACKGROUND

In Case No. CF-2013-236, a Cleveland County jury convicted Petitioner of: (1) four counts of first-degree rape (victim under age 14); (2) two counts of forcible sodomy; (3) three counts of lewd or indecent acts to a child under 16; (4) one count of rape by instrumentation; and (4) one count of performing a lewd act in the presence of a minor. (ECF Nos. 1:1; 14-1:1). Petitioner filed a direct appeal, arguing, in part, that the trial court lacked jurisdiction over the criminal matter based on the fact that the alleged crimes

occurred in "Indian Country" as that term is defined under the Major Crimes Act (MCA).[1] (ECF No. 14-2:43-46). The Oklahoma Court of Criminal Appeals (OCCA) denied the appeal and affirmed the conviction. (ECF No. 14-1). Beyond Petitioner's direct appeal, his pathway through state court is convoluted to say the least.

On February 16, 2018, Petitioner filed an Application for Post-Conviction Relief in the Cleveland County District Court. (ECF No. 14-6). In the Application, Petitioner again challenged the trial court's jurisdiction, expounding his argument that the alleged crimes had occurred in "Indian Country" for purposes of the MCA. (ECF No. 14-6). Specifically, Mr. Wahpekeche argued ineffective assistance of appellate counsel for failure to argue a lack of jurisdiction in the trial court/that the crimes allegedly occurred in "Indian Country" based on:

- An 1867 treaty between the federal government and Pottawatomie Nation,
- The Organic Act of 1890,
- The Enabling Act,
- The Oklahoma Constitution, and
- The fact that the title to the residence where the alleged crimes occurred was held by the Absentee Shawnee Tribal Housing Authority, rendering it an Indian allotment under the MCA.

(ECF No. 14-6).

[1] The Major Crimes Act provides, in relevant part, that when certain enumerated crimes, including an assault against an individual under 16 years old, are committed by an Indian "within Indian country," he shall be subject exclusively to federal, rather than state, jurisdiction. 18 U.S.C. § 1153(a).

On June 18, 2018, the district court denied post-conviction relief, finding that the issues were procedurally barred under a theory of res judicata—the issues had been previously raised and denied on direct appeal. (ECF No. 14-9).[2] Petitioner filed an appeal, but on September 19, 2018, the OCCA dismissed the appeal as untimely. (ECF No. 14-12). As a result, on October 3, 2018, Mr. Wahpekeche filed an Application for Out-of-Time Post-Conviction Appeal. (ECF No. 14-13).[3] On July 31, 2020, the Cleveland County District Court recommended Petitioner be granted an appeal out-of-time and on September 11, 2020, the OCCA granted the same.[4] (ECF Nos. 14-23 & 14-29). On October 16, 2020, in OCCA Case No. PC-2020-717, Petitioner appealed the Cleveland County

[2] To be sure, an inmate's first opportunity to assert a claim of ineffective assistance of appellate counsel is in a post-conviction proceeding, which technically renders the district court's finding of res judicata incorrect. However, when considering a claim of ineffective assistance of appellate counsel for failure to raise an issue, the court looks to the merits of the omitted issue. *See Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001). Here, the underlying/omitted issue involved whether the site of the alleged crime qualified as "Indian Country" for purposes of the MCA. *See* ECF No. 14-6. And, as stated by the district court in denying post-conviction relief, this issue had been previously decided on direct appeal. *See* ECF No. 14-1.

[3] While waiting for a ruling on his application to file an out-of-time appeal, Mr. Wahpekeche filed a Motion to Dismiss based on lack of jurisdiction in the Cleveland County District Court, which the court construed as a second Application for Post-Conviction Relief. *See* ECF Nos. 14-17 & 14-29. The district court denied relief, but Petitioner did not thereafter appeal. (ECF No. 14-23).

[4] In an attempt to obtain a ruling on his application to file an out-of-time post-conviction appeal, Mr. Wahpekeche filed a Motion to Dismiss and Petition for Writ of Mandamus. *See* ECF Nos. 14-17 & 14-20. The Cleveland County District Court denied the Motion to Dismiss, after construing the pleading as a second Application for Post-Conviction Relief. (ECF No. 14-23). In the same order, the Cleveland County District Court recommended Petitioner be granted a post-conviction appeal out-of-time. (ECF No. 14-23). As a result of the District Court's ruling, the OCCA dismissed the mandamus petition as moot. (ECF No. 14-24).

District Court's denial of his Application for Post-Conviction Relief. (ECF No. 14-30).[5] On appeal, Petitioner presented additional theories that the alleged crime occurred in "Indian Country," arguing that:

- The land was considered an Indian reservation for purposes of the MCA, 18 U.S.C. § 1151(a) and
- The Court should have applied the multi-factor test set forth in *Solem v. Bartlett*, 465 U.S 463 (1984) to determine whether the residence at issue qualified as "Indian Country" for purposes of the MCA.

(ECF No. 14-30). Petitioner also argued that because the land was "Indian Country," the Cleveland Country Sherriff's Office did not have jurisdiction to conduct an "out-of-jurisdiction" search warrant on his residence, which resulted in evidence being seized. (ECF No. 14-30). On September 30, 2021, the OCCA affirmed the Cleveland County District Court's June 18, 2018 denial of Petitioner's Application for Post-Conviction Relief. (ECF No. 14-36).

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") governs this Court's power to grant habeas corpus relief. Under the AEDPA, the standard of review applicable to each claim depends upon how that claim was resolved by the state courts. *Alverson v. Workman,* 595 F.3d 1142, 1146 (10th Cir. 2010). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed

[5] In an attempt to obtain a ruling on his post-conviction appeal, Mr. Wahpekeche filed two Petitions for Mandamus in the Oklahoma Supreme Court. *See* ECF Nos. 14-31 & 14-32. The Oklahoma Supreme Court: (1) dismissed the first Petition for lack of jurisdiction and (2) transferred the second Petition to the OCCA where it was docketed as MA-2021-581 and ruled on in the same Order denying post-conviction relief. (ECF Nos. 14-33, 14-34, 14-35, 14-36).

that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

For claims adjudicated on the merits, "this [C]ourt may grant … habeas [relief] only if the [OCCA's] decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Hanson v. Sherrod*, 797 F.3d 810, 814 (10th Cir. 2015) (citation omitted). "It is the petitioner's burden to make this showing and it is a burden intentionally designed to be 'difficult to meet.' " *Owens v. Trammell*, 792 F.3d 1234, 1242 (10th Cir. 2015) (citation omitted). The deference embodied in § 2254(d) "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington*, 562 F.3d at 102-103 (citation omitted).

On review of such claims, this Court first determines "whether the petitioner's claim is based on clearly established federal law, focusing exclusively on Supreme Court decisions." *Hanson v. Sherrod*, 797 F.3d at 824. "A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of [the United States Supreme Court.]" *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). If clearly established federal law exists, this Court then considers whether the state court decision was contrary to or an unreasonable application of clearly established federal law. *See Owens,* 792 F.3d at 1242.

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"A state court's decision is 'contrary to' clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts.' " *Id.* (citations omitted). Notably, "[i]t is not enough that the state court decided an issue contrary to a lower federal court's conception of how the rule should be applied; the state court decision must be 'diametrically different' and 'mutually opposed' to the Supreme Court decision itself." *Id.* (citation omitted).

The " 'unreasonable application' prong requires [the petitioner to prove] that the state court 'identified the correct governing legal principle from Supreme Court decisions but unreasonably applied that principle to the facts of the prisoner's case.' " *Id.* (citations and internal brackets omitted). On this point, "the relevant inquiry is not whether the state court's application of federal law was *incorrect*, but whether it was 'objectively unreasonable.' " *Id.* (citations omitted). So, to qualify for habeas relief on this prong, a petitioner must show "there was no reasonable basis for the state court's determination." *Id.* at 1242-43 (citation omitted). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007).

In sum, "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported … the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington,* 562 U.S. at 101–02.

Relief is warranted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.* at 102.

Finally, a federal habeas court must "accept a state-court [factual] finding unless it was based on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015). In other words, when the state appellate court makes a factual finding, the Court presumes the determination to be correct; a petitioner can only rebut this presumption with clear and convincing evidence. *See id.* at 2199-2200; *see also* 28 U.S.C. § 2254(e)(1).

If the state appellate court has not addressed the merits of a claim, the Court exercises its independent judgment. *See Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013) ("For federal habeas claims not adjudicated on the merits in state-court proceedings, we exercise our 'independent judgment[.]' " (citation omitted). "And, even in the setting where we lack a state court merits determination, '[a]ny state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence.' " *Grant v. Royal*, 886 F.3d 874, 889 (10th Cir. 2018) (quoting 28 U.S.C. § 2254(e)(1)) (citation omitted).

III. PETITIONER'S HABEAS CLAIMS

On November 18, 2021, Mr. Wahpekeche filed a habeas Petition under 28 U.S.C. § 2254, seeking relief on the following eleven grounds:

> Ground One: Petitioner's state conviction was in violation of Article 6, Clause 2 of the United States Constitution due to a treaty in 1867 which exempted

the Citizen Potawatomi Nation (CPN) reservation (where the crimes allegedly occurred) from state prosecutorial authority;[6]

Ground Two: His state conviction was obtained in violation of the Major Crimes Act (MCA) which mandates exclusive jurisdiction in federal court under 18 U.S.C. § 1153 for certain enumerated crimes which occurred on "Indian land;"

Ground Three: Petitioner's state conviction was obtained in violation of the Enabling Act, the Organic Act, and the Oklahoma Constitution which specifically disavow jurisdiction by the State of Oklahoma over "Indian land," where the crimes allegedly occurred;

Ground Four: A violation of the Indian Child Welfare Act (ICWA) occurred during the questioning of Indian children by the State without a tribal representative present;

Ground Five: Petitioner's state conviction was obtained in violation of various "Federal Judicial Decisions regarding Indian Country," namely, that the trial court failed to apply the "*Solem* test" to determine whether the CPN reservation had been disestablished;

Ground Six: Ineffective assistance of trial counsel for failing to challenge the trial court's jurisdiction based on the aforementioned arguments;

Ground Seven: The Cleveland County Sherriff's Office interviewed Petitioner after ignoring his request for counsel, in violation of Mr. Wahpekeche's 14th Amendment rights;

Ground Eight: The Cleveland County Sherriff's Office conducted an "out-of-jurisdiction" search on Petitioner's home, which was in the exclusive jurisdiction of the CPN reservation, in violation of Mr. Wahpekeche's 14th Amendment rights;

Ground Nine: The evidence obtained from the illegal search warrant was not stored properly, in violation of rules pertaining to the chain of custody of evidence, in violation of Mr. Wahpekeche's 14th Amendment rights;

Ground Ten: The OCCA improperly applied *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, to bar Petitioner's jurisdictional challenges

[6] Petitioner actually cites Article I, Section 6 of the Unites States Constitution as the constitutional provision allegedly violated, but he quotes Article 6, Clause 2, which states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art, I, cl. 2.

when he appealed the district court's denial of his First Application for Post-Conviction Relief; and

Ground Eleven: The State filed a "Rape Shield Act" application with the district court which prevented Petitioner from presenting evidence related to "prior unsubstantiated claims by the alleged victim, and issues of behavior directly related to case filed against Petitioner."

See ECF No. 1:11-20, 22-25, 27-30, 32-34, 36-38, 40-42, 44-47, 49-51; ECF No. 2:2, 3, 4, 8, 10, 12, 13, 16, 26; ECF No. 23:37-57.

IV. GROUNDS ONE, TWO, THREE, FIVE, AND EIGHT

Grounds One, Two, Three, Five, and Eight all involve challenges to the trial court's jurisdiction over Petitioner's state criminal case. *See* ECF No. 1:11-17, 22-25, 27-30, 36-38 & ECF No. 2:2, 3, 4, 8, 10, 12, 13, 16, 26; ECF No. 23:37-57. Petitioner alleges:

Ground One: His state conviction was in violation of Article 6, Clause 2 of the United States Constitution due to a treaty in 1867 which exempted the Citizen Potawatomi Nation (CPN) reservation (where the crimes allegedly occurred) from state prosecutorial authority;

Ground Two: His state conviction was obtained in violation of the Major Crimes Act (MCA) which mandates exclusive jurisdiction in federal court under 18 U.S.C. § 1153 for certain enumerated crimes which occurred on "Indian land;"

Ground Three: His state conviction was obtained in violation of the Enabling Act, the Organic Act and the Oklahoma Constitution which specifically disavow jurisdiction by the State of Oklahoma over "Indian land," where the crimes allegedly occurred;

Ground Five: His state conviction was obtained in violation of various "Federal Judicial Decisions regarding Indian Country," namely, that the trial court failed to apply the "*Solem* test" to determine whether the CPN had been disestablished; and

Ground Eight: The Cleveland County Sherriff's Office conducted an "out-of-jurisdiction" search on Petitioner's home, which was in the exclusive jurisdiction of the CPN reservation, in violation of Mr. Wahpekeche's 14th Amendment rights.

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(ECF Nos. 1:11-17, 22-25, 36-38; 2:2, 3, 4, 8, 10, 12, 13, 16, 26; 23:37-57).

These arguments were presented to the OCCA in Petitioner's post-conviction appeal out-of-time. *See* ECF No. 14-30. The OCCA: (1) lumped the entirety of Petitioner's arguments under a sole theory—a challenge to the state court's jurisdiction pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020)[7] and (2) affirmed the district court's denial of post-conviction relief, finding that *McGirt* was not retroactive and did not void final state convictions. *See* ECF No. 14-36. In doing so, the Court stated:

> Petitioner, pro se, appealed to this Court from an order of the District Court of Cleveland County in Case No. CF-2013-236 denying his request for post-conviction relief pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ____, this Court determined that the United Stated Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff*, 2021 OK CR 21, ¶¶ 27-28, 40.
>
> The conviction in this matter was final before the July 9, 2020 decision in *McGirt*, and the United States Supreme Court's holding in McGirt does not apply, Therefore, the trial court's denial of post-conviction relief is **AFFIRMED**.

(ECF No. 14-36:1-2).

This Court's standard of review hinges on whether the OCCA had adjudicated the merits of Petitioner's claims. *See supra*. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law

[7] In *McGirt*, the United States Supreme Court held that Oklahoma lacked jurisdiction to prosecute the criminal defendant in that case because the defendant was Native American and he committed his crime within the boundaries of the Muscogee Creek Nation Reservation, a reservation that the *McGirt* Court determined was "Indian country" for purposes of the MCA, because Congress never disestablished the reservation. *McGirt*, 140 S. Ct. at 2459-60, 2474.

procedural principles to the contrary. But the petitioner may rebut the presumption that the state court adjudicated the petitioner's claim on the merits." *Smith v. Sharp*, 935 F.3d 1064, 1072 (10th Cir. 2019).

In an attempt to rebut the presumption, Petitioner states:

> [T]he Oklahoma Court of Criminal Appeals erred in applying the court's decision in state ex rel. Ma[tl]off v. Wallace 2021 OK CR 21 ___ P.3d __ to the case at bar, Petitioner did not rely on the McGirt decision as the basis for relief. **Petitioner raised original arguements [sic] that were independent of McGirt.** Petitioner was neither a co-defendant to McGirt/Ma[tl]off, nor utilized either for a collateral attack.

(ECF No. 23:2) (emphasis added).

For two reasons, the Court should conclude that Mr. Wahpekeche met his burden to rebut the presumption that the OCCA had adjudicated the post-conviction appeal claims on the merits. First, the issue in *McGirt* was whether the Creek reservation had been disestablished by Congress or was still considered "Indian Country" for purposes of the MCA. As noted by Petitioner, his arguments concerned whether the land in question qualified as "Indian Country" for purposes of the MCA under theories separate and apart from those argued in *McGirt*. This point is underscored by two facts: (1) Mr. Wahpekeche had presented his arguments years before *McGirt* was decided and (2) Petitioner insists that the theories are distinct.

Second, based on the OCCA's rationale for denying relief—that *McGirt* announced a new procedural rule that was not retroactive to void state convictions—indicates that the OCCA did not adjudicate Mr. Wahpekeche's claims on the merits. The presumption that a claim was adjudicated on the merits "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Harrington v.*

Richter, 562 U.S. 86, at 99-100 (2011). Here, instead of addressing the merits of Petitioner's jurisdictional arguments (e.g., whether the 1867 treaty with the Pottawatomie merited a finding that the land in question was "Indian Country"), the OCCA instead offered "[an]other explanation"—that being the nonretroactivity of *McGirt*. Based on the forgoing, the Court should conclude that the OCCA did not address the merits of the Grounds One, Two, Three, Five, and Eight, triggering a *de novo* review.

A. Basis of Claims

In Grounds One, Two, and Three, Petitioner alleges that the land in question where the alleged crimes occurred is considered "Indian Country" for purposes of exclusive federal jurisdiction under the MCA. *See* ECF Nos. 1, 2, 23, *passim*. In Ground Five, Petitioner argues that the court erred in failing to apply a multi-factor test set forth in *Solem v. Bartlett* (the *Solem* test) to determine whether the land in question was "Indian Country" for purposes of the MCA. *See id.* And in Ground Eight, Petitioner argues that the Cleveland County Sheriff's Office conducted an illegal "out-of-jurisdiction" search warrant on his residence because federal authorities maintained exclusive jurisdiction over the premises. *See id.* The basis of Petitioner's claims boils down to a single question—was the land in question considered "Indian Country" under the MCA which would have triggered exclusive federal jurisdiction? Petitioner answers this question affirmatively, stating that the land in question is both part of the Citizen Pottawatomie Nation reservation and was an Indian allotment to the Citizen Pottawatomie Nation and the Absentee Shawnee tribes. (ECF Nos. 1, 2, 23, passim). Petitioner's theory is two-fold. First, Mr. Wahpekeche cites various pieces of evidence—maps, land deeds, etc.—to

establish that the land in question qualifies as "Indian Country" as that term is defined in the MCA. And second, Petitioner relies on various laws—the Oklahoma Constitution, the Organic Act, the Enabling Act, the Supremacy Clause, and an 1867 treaty between the federal government and the Pottawatomie tribe—which require exclusive federal jurisdiction over anything deemed "Indian Country." The Court should reject Petitioner's arguments and find that habeas relief is not warranted on Grounds One, Two, Three, Five, and Eight.

B. State Court Factual Findings

As stated, all of Petitioner's jurisdictional arguments are based on his theory that the alleged crimes occurred in the boundaries of the historical CPN reservation and/or an allotment which was given to the CPN and Absentee Shawnee tribes. *See supra*. This issue was litigated extensively in state court, with repeated findings that jurisdiction was properly exercised by the State of Oklahoma.

On the fourth day of trial, outside the presence of the jury, the trial court heard testimony on the issue. Proceedings had on January 29th of 2015, Vol. IV, *State of Oklahoma v. Wahpekeche*, Case No. CF-2013-236 (Cleveland Co. Dist. Ct. Jan. 28, 2015) (Trial TR. Vol. IV). At that hearing, Chief of Police of the Absentee Shawnee Trial Police Department Brad Jackson testified on behalf of the State. According to Chief Jackson, he exercised tribal jurisdiction over "federal trust land" in Cleveland County, but the address of where the alleged crimes occurred was outside that jurisdiction. Trial TR. Vol. IV 6-8. Mr. Jackson also testified that the Absentee Shawnee Tribal Housing Authority's ownership of the land where the alleged crimes occurred did not mandate tribal

jurisdiction. *Id.* at 8-13. Finally, Chief Jackson testified that the land in question had never been classified by the government as a "dependent Indian community"—a fact which would also trigger tribal jurisdiction. *Id.* at 13-20.

Ultimately, the trial court stated:

> Based upon the evidence I have received, it appears that this is not land explicitly set aside for Indian use by Congress, or its designee, and that it's not federally superintendent, In addition, the title showing that it is housing authority land up until the time it passed title to Mr. Wahpekeche, it appears that it is under a 1057 state agency; and, therefore, state jurisdiction would apply. This Court is going to find that jurisdiction is proper in Cleveland County, and that the state jurisdiction prevails and it is not a federally preempted issue.

Id. at 24-25.

Following his conviction, on June 15, 2015, the trial court held a hearing on Mr. Wahpekeche's sentencing, Motion to Dismiss for Lack of Jurisdiction, and Motion for New Trial. Proceedings had on June 15th of 2015, *State of Oklahoma v. Wahpekeche*, Case No. CF-2013-236 (Cleveland Co. Dist. Ct. June 15, 2015). At that hearing, defense counsel challenged Chief Jackson's testimony, stating that he had not been authorized to testify and that "[t]he only way to truly be sure of whether or not this Court is truly vested with subject matter jurisdiction over these charges is an abstract and the proper credentialed witnesses to present that abstract to the Court." *Id.* at 6. The matter was continued to December 21, 2015.

At the December 21st hearing, the State relied on the evidence they had presented at the hearing at trial—a map from the Bureau of Indian Affairs which showed that the land in question was not under federal jurisdiction and the testimony from Chief Jackson regarding lack of jurisdiction. Proceedings had on December 21st of 2015, *State of*

Oklahoma v. Wahpekeche, Case No. CF-2013-236 (Cleveland Co. Dist. Ct. Dec. 21, 2015) at 6-7. The State also pointed out that the land itself was owned by the Absentee Shawnee Housing Authority and sold to Mr. Wahpekeche, but before that, it was bought from the county at auction, deeming it land not held by the federal government, but within the jurisdiction of Cleveland County, State of Oklahoma. *Id.* at 10.

As evidentiary support for the jurisdictional argument, the defense presented:

1. A Special Warranty Deed which showed the transfer of the land in question from the Absentee Shawnee Tribal Housing Authority to Mr. Wahpekeche;

2. Proof that the land in question was located within the historical boundaries of the CPN reservation;

3. A warranty deed showing that the land was sold to John Wilson on July 22, 1912, which did not identify that the restrictions to alienation were ever lifted;

4. A letter from President Benjamin Harrison, dated January 5, 1915 which showed that the land in issue was originally an allotment to John Sloan, a member of the Absentee Shawnee tribe; and

5. A map issued by the State of Oklahoma through the Oklahoma Department of Transportation and the Office of the Tribal Liaison which recognized the land at issue was within the jurisdiction of the Absentee Shawnee Tribe and the CPN.

(ECF No. 14-38:6-56). Following argument and the presentation of evidence, the trial court overruled the Motion to Dismiss and concluded that jurisdiction over Petitioner's residence was proper by the State of Oklahoma, Cleveland County. Proceedings had on December 21st of 2015, *State of Oklahoma v. Wahpekeche*, Case No. CF-2013-236 (Cleveland Co. Dist. Ct. Dec. 21, 2015) at 12.

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C. Habeas Relief is not Warranted for Grounds One, Two, Three, Five, and Eight

In his habeas Petition, Brief in Support, and Reply brief, Petitioner re-argues the jurisdictional issue which has already been litigated in state court, without offering any additional argument or evidence regarding why the land in question is considered "Indian Country." In fact, in his Reply Brief and in support of his jurisdictional argument before this court, Mr. Wahpekeche re-asserts his reliance on the "complete land file" which he had previously provided to the Cleveland County District Court in support of the Motion to Dismiss. *See* ECF No. 23:12.

"[E]ven in the setting where we lack a state court merits determination, '[a]ny state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence.' " *Grant v. Royal*, 886 F.3d 874, 889 (10th Cir. 2018) (quoting 28 U.S.C. § 2254(e)(1)) (citation omitted). Here, Mr. Wahpekeche has not rebutted the presumption of correctness afforded to the state-court findings on the jurisdictional issue because he has presented no additional information or argument in support of his claims. As a result, the Court should conclude that the land in question is not subject to exclusive federal jurisdiction as "Indian Country" which would trigger the MCA (Grounds One, Two, Three, and Five) and, as a result, the search warrant for Petitioner's residence was not "out-of-jurisdiction" in violation of Petitioner's Due Process rights (Ground Eight).

V. GROUNDS FOUR, SIX, SEVEN, NINE, ELEVEN

The Court should conclude that Grounds Four, Six, Seven, Nine, and Eleven are procedurally barred from federal habeas review.

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A. Exhaustion as a Preliminary Consideration

The exhaustion doctrine, a matter of comity which has long been a part of habeas corpus jurisprudence, requires the court to consider in the first instance whether petitioner has presented his grounds for relief to the OCCA. "[I]n a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *see Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 1999) ("A state prisoner generally must exhaust available state-court remedies before a federal court can consider a habeas corpus petition."); *see also* 28 U.S.C. § 2254(b)(1)(A).

"Exhaustion requires that the claim be 'fairly presented' to the state court, which means that the petitioner has raised the 'substance' of the federal claim in state court." *Fairchild v. Workman*, 579 F.3d 1134, 1151 (10th Cir. 2009) (citation omitted). This means "a federal habeas petitioner [must] provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citation omitted).

B. Procedural Bar/Anticipatory Procedural Bar

Beyond the issue of exhaustion, the Court must also examine how the OCCA adjudicated each of a petitioner's grounds for relief, i.e., whether the OCCA addressed the merits of a petitioner's grounds or declined to consider them based on a state procedural rule. "It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that 'is independent of the federal question and adequate to support

the judgment.' " *Cone v. Bell*, 556 U.S. 449, 465 (2009) (quoting *Coleman v. Thompson*, 501 U.S. at 729). "The doctrine applies to bar federal habeas [relief] when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. at 729-30; *see also Banks v. Workman*, 692 F.3d 1133, 1144 (10th Cir. 2012) ("When a state court dismisses a federal claim on the basis of noncompliance with adequate and independent state procedural rules, federal courts ordinarily consider such claims procedurally barred and refuse to consider them."). "Anticipatory procedural bar occurs when the federal courts apply a procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." *Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) (citation omitted).

C. Grounds Four, Six, Seven, Nine, and Eleven Have not Been Exhausted and are Subject to an Anticipatory Procedural Bar

The Court should find Grounds Four, Six, Seven, Nine, and Eleven procedurally barred.

1. Ground Four

In Ground Four, Petitioner alleges that his conviction was invalid based on a violation of the Indian Child Welfare Act (ICWA). (ECF No. 1:18-20). According to Mr. Wahpekeche, the ICWA requires the presence of a tribal representative during questioning of a Native American child in a situation where the child could possibly be removed from the home, and this precaution was not taken in the instant case. (ECF No. 1:18-20). Petitioner claims that he exhausted this claim by raising it in his Direct Appeal;

his Application for Post-Conviction Relief; a Motion to Dismiss, "PC-2020-0541," and a "bar complaint." (ECF No. 1:19, 21). Petitioner is wrong.

An examination of Petitioner's Direct Appeal brief reveals no discussion/argument regarding the ICWA he raises in Ground Four. *See* ECF No. 14-2. And although Mr. Wahpekeche raised the issue in his initial appeal of the Cleveland County District Court's denial of his Application for Post-Conviction Relief, *see* ECF No. 14-11, that appeal was dismissed because it was untimely, with no ruling from the OCCA. *See* ECF No. 14-12. When Petitioner was finally granted an appeal out of time, Petitioner did not raise the issue in his Petition in Error. *See* ECF No. 14-30. Mr. Wahpekeche states that he raised the issue in the "Motion to Dismiss," which the Cleveland County District Court construed as a Second Application for Post-Conviction Relief, but a review of that pleading belies Petitioner's contention. *See* ECF No. 14-17. But even if he had, Petitioner never appealed the district court's denial of relief, so the issue was never ruled on by the OCCA, a necessary requisite for exhaustion. Finally, Petitioner states that he raised the issue in a "bar complaint," but such action is insufficient to satisfy the exhaustion requirement which requires a presentation of claims to the state's highest court—in this case, the OCCA. *See supra*.

Because Ground Four has not been presented to the OCCA for adjudication, the Court should conclude that it is unexhausted. To exhaust Ground Four, Petitioner would have to return to state court and file an additional post-conviction application. *See* 22 O.S. § 1086. However, if Petitioner did so, the OCCA would likely find that the claim was procedurally barred under a theory of waiver. *See* 22 O.S. § 1086 ("Any ground finally

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adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application[.]").

The Tenth Circuit Court of Appeals has recognized the OCCA's finding of waiver to be an "independent and adequate ground" barring habeas review. *See Thacker v. Workman*, 678 F.3d 820, 835 (10th Cir. 2012) (finding Oklahoma's doctrine of waiver to be independent and adequate). Under similar circumstances, the Tenth Circuit Court of Appeals has applied an anticipatory procedural bar to prevent habeas review. *See Grant v. Royal*, 886 F.3d 874, 893 (10th Cir. 2018) ("if Mr. Grant attempted to pursue this procedural competency claim in state court, that court would deem the claim procedurally barred under Oklahoma law because Mr. Grant could have raised it on direct appeal.").

As a result, Mr. Wahpekeche can only overcome the anticipatory procedural bar if he is able to demonstrate: (1) "cause and prejudice" for the default, or (2) that a fundamental miscarriage of justice has occurred. *See Coleman v. Thompson*, 501 U.S. at 750. "Cause" under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him, with the result being prejudice to the petitioner. *Coleman v. Thompson*, 501 U.S. at 753. To demonstrate a fundamental miscarriage of justice, a petitioner must make a "'credible' showing of actual innocence." *Frost v. Pryor*, 749 F.3d 1212, 1231 (10th Cir. 2014). That is, he must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 1232 (citation omitted). "The gateway

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should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013) (citation omitted). Here, Mr. Wahpekeche offers no "cause and prejudice" to excuse the default, nor does he make any argument that a fundamental miscarriage of justice had occurred. *See* ECF Nos. 1, 2, 23. As a result, the Court should find that Ground Four is procedurally barred from consideration on habeas review. *See Grant v. Royal*, 886 F. 3d at 902 ("Mr. Grant makes no effort to overcome this bar by arguing cause and prejudice, or a fundamental miscarriage of justice. Consequently, we hold that we are precluded from considering Mr. Grant's procedural due process competency claim.").

2. Ground Six

In Ground Six, Petitioner argues ineffective assistance of trial counsel for failing to challenge the trial court's jurisdiction based on the jurisdictional arguments asserted in Grounds One, Two, Three, Five, and Eight, aforementioned arguments. But nowhere in his state court pleadings—his direct appeal and/or post-conviction application and appeal—did Petitioner raise this issue. *See* ECF Nos. 14-2, 14-6, or 14-30. If Mr. Wahpekeche were to return to state court to exhaust the issue, it would likely be deemed "waived." As a result, the Court may apply an anticipatory procedural default to bar federal habeas review. Because Petitioner does not argue "cause and prejudice" or a "fundamental miscarriage of justice,"[8] he cannot overcome the procedural bar.

[8] *See* ECF Nos. 1, 2, 23.

3. Ground Seven

In Ground Seven, Petitioner contends that his Fourteenth Amendment rights were violated when Cleveland County Sheriff's Office employees: (1) began questioning him without reading his *Miranda* rights and (2) ignored his request for an attorney. (ECF No. 1:32-34). Petitioner claims that he exhausted this claim by raising it in his Direct Appeal, a Motion to Dismiss, "PC-2020-0541," and a "bar complaint." (ECF No. 1:33, 35). Petitioner is wrong. Nowhere in the Direct Appeal brief is the issue raised. *See* ECF No. 14-2. Even so, Petitioner raised the issue as part of an ineffective assistance of appellate counsel claim in Petitioner's initial post-conviction appeal to the Cleveland County District Court. *See* ECF No. 14-6:19. To exhaust the issue, even indirectly through an ineffective assistance of counsel claim, Mr. Wahpekeche was required to raise the issue on appeal following the district court's denial. Although Petitioner did raise the issue the issue in his initial appeal, *see* ECF No. 14-11, that appeal was dismissed as untimely. *See* ECF No. 14-12. When Mr. Wahpekeche was finally granted an appeal out of time, however, he did not raise Ground Seven in the Petition in Error. *See* ECF No. 14-30. And contrary to Petitioner's claims, the issue was not raised in the Motion to Dismiss, *see* ECF No. 14-17, or the Petition in Error filed in PC-2020-541. *See* ECF No. 14-26. Finally, raising the issue in a bar complaint is insufficient for exhaustion purposes, as discussed. *See supra*.

Because Ground Seven has not been presented to the OCCA for adjudication, the Court should conclude that it is unexhausted. Like Ground Five, the Court should also conclude that Ground Seven is subject to an anticipatory procedural bar based on the theory of waiver if Mr. Wahpekeche were to return to state court in an attempt to exhaust

the claim. *See supra*. Petitioner can overcome the anticipatory procedural bar if he is able to demonstrate "cause and prejudice" for the default, or that a fundamental miscarriage of justice has occurred. *See supra*. However, in this case, Mr. Wahpekeche offers no cause and prejudice to excuse the default, nor does he make any argument that a fundamental miscarriage of justice had occurred. *See* ECF Nos. 1, 2, 23. As a result, the Court should find that Ground Seven is procedurally barred from consideration on habeas review. *See supra, Grant.*

4. Ground Nine

In Ground Nine, Petitioner alleges a violation of the 14th Amendment because the State could not establish a proper chain of custody for physical evidence which was obtained following a search and seizure at Petitioner's home. (ECF No. 1:40-42). Petitioner claims that he raised this issue on Direct Appeal, the Motion to Dismiss, the initial and out-of-time appeals from the Cleveland County District Court's denial of post-conviction relief, a "Motion for reconsideration," and "numerous" writs of mandamus. (ECF No. 1:41, 43). The Could should reject Petitioner's exhaustion arguments.

First, he did not raise the issue on Direct Appeal, or in either the initial or out-of-time-appeal granted following the Cleveland County District Court's denial of post-conviction relief. *See* ECF Nos. 14-2, 14-6, 14-30. Second, in an attempt to obtain rulings on his first post-conviction application and Motion to Dismiss (which the Cleveland County District Court construed as a second post-conviction application), Mr. Wapakeche filed three petitions for mandamus, *see* 14-20, 14-31 & 14-32. But he did not raise Ground Nine in any of the petitions, nor did the OCCA issue any substantive findings when ruling

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on the same. *See* ECF No. 14-24, 14-33, 14-34. If Mr. Wahpekeche were to return to state court to properly exhaust the issue, it would likely be deemed waived. *See supra*. Because the theory of waiver is considered "independent" and "adequate," and Mr. Wahpekeche is unable to demonstrate cause and prejudice or a fundamental miscarriage of justice will occur absent a consideration of the claim,[9] the Court should find Ground Nine procedurally barred under the theory of "anticipatory procedural default."

5. Ground Eleven

In Ground Eleven, Petitioner argues a violation of the 14th Amendment because the State filed a "[Rape] Shield Act" application with the trial court which prevented Petitioner "from bringing forth documentation of prior 'unsubstantiated' claims by alleged victim and issue of behavior directly related to [the] case." (ECF No. 1:49-50). Petitioner claims that he raised this issue on Direct Appeal, the Motion to Dismiss, the initial and out-of-time appeals from the Cleveland County District Court's denial of post-conviction relief, and a "bar complaint." (ECF No. 1:41, 43). The Could should disagree and find Ground Eleven unexhausted.

Although Petitioner raised a somewhat related issue on Direct Appeal, the argument there was different enough from the issue as Petitioner presents it in the habeas Petition, that the Court could not find that Ground Eleven had been "fairly presented" to the OCCA for purposes of exhaustion. On Direct Appeal, Mr. Wahpekeche argued that his trial counsel was ineffective for failing to file an application/notice with the trial court which would allow the introduction of evidence related to the alleged victim

[9] *See* ECF Nos. 1, 2, 23.

as an exception to the "Rape Shield Act." (ECF No. 14-2:28-32). But in his habeas Petition, Mr. Wahpekeche challenged actions by the State, rather than his own attorney. *See* ECF No. 1:49-50).

The Tenth Circuit Court of Appeals has held that a petitioner "cannot assert entirely different arguments [in his or her request for habeas relief] from those raised before the state court." *Bland*, 459 F.3d at 1011. That is, there is no fair presentation if the claim before the state court was only "somewhat similar" to the claim pressed in the habeas petition. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *see also Bland*, 459 F.3d at 1012 (finding failure to exhaust "[b]ecause presentation of a 'somewhat similar' claim is insufficient to 'fairly present' a federal claim"). Indeed, "mere similarity of claims is insufficient to exhaust." *Id.* And the assertion of a general claim before the state court is insufficient to exhaust a more specific claim asserted for habeas relief. *See Gray v. Netherland*, 518 U.S. 152, 163 (1996) ("[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court."); *see also Thomas v. Gibson*, 218 F.3d 1213, 1221 n.6 (10th Cir. 2000) (holding petitioner's "generalized" state-court ineffective-assistance claim was insufficient to exhaust his later, more specific federal habeas claim). As a result, the Court should conclude that Petitioner did not exhaust Ground Eleven by presenting a related claim on Direct Appeal.

Petitioner's claim that he raised the issue in a bar complaint is insufficient for purposes of exhaustion, see supra, and Mr. Wahpekeche's claims that he presented the issue in the Motion to Dismiss, the initial and out-of-time appeals from the Cleveland

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County District Court's denial of post-conviction relief are simply untrue. *See* ECF Nos. 14-6, 14-17, 14-30. If Mr. Wahpekeche were to return to state court to properly exhaust Ground Eleven, it would likely be deemed waived. *See supra*. Because the theory of waiver is considered "independent" and "adequate," and Mr. Wahpekeche is unable to demonstrate cause and prejudice or a fundamental miscarriage of justice will occur absent a consideration of the claim,[10] the Court should find Ground Eleven procedurally barred under the theory of anticipatory procedural default.

VI. GROUND TEN

In Ground Ten, Petitioner claims that The OCCA improperly applied *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, to bar Petitioner's jurisdictional challenges when he appealed the district court's denial of his First Application for Post-Conviction Relief. (ECF No. 1:44-47). But because Ground Ten essentially presents a collateral challenge to the OCCA's decision on Petitioner's post-conviction appeal, the Court should conclude that this Ground is not cognizable and no habeas relief is warranted. *See Sellers v. Ward,* 135 F.3d 1333, 1339 (10th Cir. 1998) ("because the constitutional error [Petitioner] raises focuses only on the State's post-conviction remedy and not the judgment which provides the basis for his incarceration, it states no cognizable federal habeas claim"); *Mooney v. Allbaugh*, No. 15-CV-0197-TCK-PJC, 2018 WL 4855213, at *8 (N.D. Okla. Oct. 5, 2018) ("a collateral attack on the OCCA's decision denying his request for an out-of-time appeal or other post-conviction relief, … fails to state a cognizable habeas claim.").

[10] *See* ECF Nos. 1, 2, 23.

VII. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

Based upon the foregoing analysis, it is recommended that the Petition be **DENIED**.

Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by **July 15, 2022**, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

ENTERED on June 28, 2022.

Shon T. Erwin

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

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

THOMAS ROYE WAHPEKECHE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-21-1106-PRW
	)	
LUKE PETTIGREW, Warden,	)	
	)	
Respondent.	)	

ORDER

Before the Court is United States Magistrate Judge Shon T. Erwin's Report & Recommendation (Dkt. 30), recommending the Petition in the above titled case be denied in its entirety, and Petitioner Thomas Roye Wahpekeche's Objections to the Report & Recommendation (Dkt. 31). For the reasons below, the Court **ADOPTS** the Report & Recommendation (Dkt. 30) in part and **DISMISSES** the Petition (Dkt. 1).

Background

On December 21, 2015, a Cleveland County jury convicted Petitioner Wahpekeche of four counts of First-Degree Rape (Victim Under Age 14), two counts of Forcible Sodomy, three counts of Lewd or Indecent Acts to a Child Under 16, one count of Rape by Instrumentation, and one count of Performing a Lewd Act in the Presence of a Minor. Petitioner is currently an inmate at the Joseph Harp Correctional Center where he is serving a life sentence.

On April 27, 2017, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's convictions on direct appeal. Petitioner filed an Application for Post-

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Conviction Relief in Cleveland County District Court that was denied. Petitioner appealed this decision, and the OCCA dismissed the appeal as untimely. Petitioner then filed an Application for Out-of-Time Post-Conviction Appeal, which the Cleveland County District Court and then the OCCA granted. Petitioner appealed the Cleveland County District Court's denial of his Application for Post-Conviction Relief to the OCCA, which affirmed the lower court's denial.[1]

On September 18, 2021, Petitioner brought a habeas petition under 28 U.S.C. § 2254 in this Court. He raises several claims related to his conviction including challenges to the state court's jurisdiction over his criminal proceedings, as well as claims based on the Indian Child Welfare Act ("ICWA") and ineffective assistance of trial and appellate counsel.

Discussion

In his Report & Recommendation, Magistrate Judge Erwin divides Petitioner's grounds for relief into two categories, the first involving challenges to the state trial court's jurisdiction over Petitioner's criminal case, and the second involving challenges that are procedurally barred. Regarding the first category, the Report & Recommendation found that the OCCA did not address the merits of these claims on direct appeal. The Court

[1] While awaiting a decision on his Application for Out-of-Time Post-Conviction Appeal, Petitioner filed a Motion to Dismiss for Lack of Jurisdiction that the Cleveland County District Court construed as a second application for post-conviction relief. That court denied the Motion to Dismiss, and Petitioner did not appeal the denial.

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agrees,[2] and must therefore exercise its independent judgment over federal habeas claims not adjudicated on the merits in state-court proceedings.[3] "Any state-court findings of fact that bear upon the claim[s] are entitled to a presumption of correctness rebuttable only by clear and convincing evidence."[4]

The central dispute underlying the Petitioner's jurisdictional claims is whether his crimes occurred on Indian land.[5] Petitioner argues that, because his alleged crimes occurred on Indian land, the State of Oklahoma lacked jurisdiction to prosecute him. The Cleveland County District Court held two hearings on this issue and twice found that the land in question was not Indian land. The Report & Recommendation concluded that the state court's determination on this issue is a factual finding entitled to a presumption of correctness that Petitioner has failed to rebut since he has not presented any new evidence or arguments that were not previously before the state court. Petitioner objects that the Report & Recommendation erred by not applying the test the Supreme Court set forth in *Solem v. Bartlett* to determine whether the land at issue is "Indian Country."[6] Petitioner

[2] As the Report & Recommendation points out, the OCCA construed all of Petitioner's jurisdictional claims as a request to void his conviction under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). But Petitioner first presented his jurisdictional claims before *McGirt* was decided and maintains that his arguments are distinct from *McGirt*.

[3] *McCracken v. Gibson*, 268 F.3d 970, 975 (10th Cir. 2001).

[4] *Grant v. Royal*, 886 F.3d 874, 889 (10th Cir. 2018) (quoting 28 U.S.C. § 2254(e)(1)).

[5] Specifically, Petitioner's jurisdictional claims are labeled as Grounds One, Two, Three, Five, and Eight in the Petition.

[6] 465 U.S 463 (1984).

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insists that the Cleveland County District Court would have found that the land at issue was Indian land if it had applied the *Solem* test.

To be clear, Petitioner has raised two lines of jurisdictional arguments throughout various filings and hearings. Petitioner first argued at trial and on appeal of his conviction to the OCCA, that the land at issue was part of a "dependent Indian community" under 18 U.S.C. § 1151(b). The trial court and the OCCA rejected that argument. In his first and second Applications for Post-Conviction Relief, Petitioner argued that the land at issue was part of an Indian reservation, specifically the Citizen Potawatomi Nation ("CPN") Reservation, under 18 U.S.C. § 1151(a). The OCCA did not address this argument in its Order Affirming Denial of Post-Conviction Relief. The Court construes the jurisdictional claims made in this Petition as falling within his § 1151(a) line of jurisdictional arguments.

The only instance in which a state court addressed Petitioner's § 1151(a) arguments was the Cleveland County District Court's Order Denying Petitioner's Second Application for Post-Conviction Relief. Though the court did not explicitly apply the *Solem* test, it rejected Petitioner's § 1151(a) arguments by finding that Congress disestablished the CPN Reservation through the 1891 Act. That Act reads:

> The Citizen Band of Pottawatomie Indians of the Indian Territory, in consideration of the fulfillment of the promises hereinafter made, hereby cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to the following described tract of country . . . .[7]

[7] Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1016 ("1891 Act").

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The court also cited the Supreme Court's decision in *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, which held that the 1891 Act disestablished the Lake Traverse Indian Reservation.[8] The language that Act used to disestablish the Lake Traverse Indian Reservation is functionally identical to the language quoted above. Indeed, it appears the Tenth Circuit decided this issue in *Citizen Band Potawatomi Indian Tribe v. Collier*, where it described the 1891 Act as "embod[ying] the agreements under which the [CPN] reservation was ceded to the government."[9] *Collier* also repeatedly referred to the CPN Reservation as "the former Potawatomi reservation."[10] Petitioner's § 1151(a) jurisdictional claims thus fail under Tenth Circuit precedent regardless of whether any court applied the *Solem* test to those claims.[11]

Turning to the Petition's second category of claims, the Court agrees with the Report & Recommendation that these claims are unexhausted.[12] "The exhaustion of available administrative remedies is a prerequisite for § 2241 habeas relief."[13] Thus, if an

[8] 420 U.S. 425, 445 (1975).

[9] 142 F.3d 1325, 1332 (10th Cir. 1998).

[10] *Id.*, passim.

[11] The Court disagrees with the Report & Recommendation that this conclusion is a factual finding entitled to a presumption of correctness. The state court's determination that the 1891 Act disestablished the CPN Reservation was a result of statutory interpretation, making it a legal finding rather than a factual one. Nonetheless, the state court's conclusion is correct under Tenth Circuit precedent. *See id.*

[12] Specifically, these claims are labeled as Grounds Four, Six, Seven, Nine, and Eleven in the Petition.

[13] *Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010). Exhaustion "means using all steps that the agency holds out and doing so properly (so that the agency addresses the issues on

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administrative remedy was available to Petitioner, he was required to exhaust that remedy before filing his Petition.

Petitioner objects that each of his claims was raised on direct appeal to the OCCA by quoting Respondent's Response to his Petition. However, these quotes take the Response's language out of context. For example, regarding Ground Four, Petitioner argues that he did exhaust this claim by quoting language from the Response stating, "Petitioner is referring to the fact that he did at one point raise his ICWA argument to the OCCA[.]"[14] But the Response goes on to correctly explain that this argument was not properly exhausted because the OCCA dismissed Petitioner's appeal containing the ICWA argument on procedural grounds.

This example is repeated for all of Petitioner's second category claims except for Ground Six. Ground Six reads: "Ineffective assistance of trial counsel for failing to challenge the trial court's jurisdiction based on the aforementioned arguments."[15] To counter the Report & Recommendation's finding that this claim is unexhausted, Petitioner again objects by quoting the Response which states that this ground for relief "was briefly raised . . . in his Petition in Error and Brief in Support in OCCA Case No. PC-2020-717."[16] This quote is not taken out of context, as the Response does not argue that this ground for

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the merits)." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotation marks and citation omitted).

[14] Resp. to Pet. (Dkt. 14), at 96.

[15] Pet. (Dkt. 1), at 27.

[16] Resp. to Pet. (Dkt. 14), at 104.

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relief is unexhausted. But the Petition in Error and Brief in Support states only that "Petitioner was denied the effective assistance of *Appellate* counsel" for failure to "properly and adequately raise the issue of federal jurisdiction over lands lying within the historical/former boundaries of an Indian tribe."[17] This claim refers only to Petitioner's appellate counsel, unlike Ground Six of the instant Petition which refers only to Petitioner's trial counsel. Even construing Petitioner's claims and objections liberally, the Court cannot overlook the difference in these claims. Accordingly, the Court finds that Grounds Four, Six, Seven, Nine, and Eleven are unexhausted.[18]

Conclusion

Petitioner has failed to demonstrate that Magistrate Judge Erwin's conclusion—that the Complaint must be dismissed—is erroneous. Accordingly, the Court **ADOPTS** the Report & Recommendation (Dkt. 30) and **DISMISSES** the Petition (Dkt. 1) in its entirety, without prejudice. Because the Petition is dismissed, the Court also **DENIES AS MOOT** Petitioner's pending Motion to Appoint Counsel (Dkt. 32).

[17] Ex. 30 (Dkt. 14), at 30 (emphasis added).

[18] Ground Ten is the only claim in the Petition that is neither a jurisdictional claim nor procedurally barred. In that Ground, Petitioner argues that the OCCA improperly applied *State ex rel. Matloff v. Wallace* to bar Petitioner's jurisdictional challenges when denying his Application for Post-Conviction Relief. 497 P.3d 686 (Okla. Crim. App. 2021). This is a collateral challenge to the OCCA's decision on Petitioner's post-conviction appeal. It thus fails to present a cognizable federal habeas claim. *See Sellers v. Ward*, 135 F.3d 1333, 1335 (10th Cir. 1998) ("[B]ecause the constitutional error [petitioner] raises focuses only on the State's post-conviction remedy and not the judgment which provides the basis for his incarceration, it states no cognizable federal habeas claim.").

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IT IS SO ORDERED this 20th day of October 2023.

PATRICK R. WYRICK
UNITED STATES DISTRICT JUDGE

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