

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

RECEIVED  
United States Court of Appeals  
Tenth Circuit

1117 -4 2009

CHRISTOPHER M. WOLFE  
Clerk

Thomas Wahpekeche

Plaintiff/Petitioner – Appellant/Appellee,

v.

Luke Pettigrew

Defendant/Respondent – Appellant/Appellee.

Case No. 23-6176

Appellant's Combined Opening  
Brief and Application for a  
Certificate of Appealability

**INSTRUCTIONS TO LITIGANTS PROCEEDING WITHOUT COUNSEL**

The court will accept a completed copy of this form as a combined opening brief and application for a certificate of appealability. You may attach additional pages as needed. In the alternative, you may prepare your own combined opening brief and application for a certificate of appealability.

Your combined opening brief and application for a certificate of appealability must include all the arguments you intend to make on appeal. Citations to legal authorities (cases, statutes, etc.) are encouraged but not required. The purpose of an appeal is to determine if the district court erred in its decision-making based on the arguments, pleadings, and evidence that were submitted to that court. This court generally does not consider new evidence and will base its decision on the existing district court record. **Because you are proceeding without an attorney, the record of proceedings from the district court has been or will be prepared from the district court where your case was heard. You are not required to attach district court documents to your combined opening brief and application for a certificate of appealability.**

If the district court did not issue an order granting a certificate of appealability on an issue or issues you wish to raise with this court on appeal, you must show you are entitled to a certificate of appealability. To do so, you must make a “substantial showing of the denial of a constitutional right.” Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). This generally requires a “showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Court,

Rough draft for this (C.O.A.) Certificate of Appealability was Completed, with law library Assistance, on December 8, 2023, and Submitted for formatting and typing.

The facility has one law Clerk who services over 1600 inmates, and has roughly 4 1/2 hours a day, (due to counts), to accomplish everything.

On February 23, 2024, the law Clerk informed me that my formatting and typing would not be

Completed on time, and that we would have to "Frankenstein" a packet together, (A mixture of typed and handwritten submissions), with pages left off due to 30 page length limit.

As a blind person, I have submitted numerous motions for appointment of counsel, to the Western Federal District Court, in an attempt to negate this very issue, based on the U.S. Supreme Court decision in Lewis v. Casey, 518 U.S.

343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (June 24<sup>th</sup>, 1996), finding that individuals that are illiterate, or functionally illiterate, have an inability to receive adequate legal assistance, and that appointment of counsel was appropriate under the "Access to Courts" guarantee of The United States Constitution.

As the instructions state that I need to show the violation of a Constitutional right to receive

A C.O.A., I would like to make the following declaration:

In Addition to the Constitutional Violation of "Access to Courts" Stated Above, the following Constitutional Violations also occurred in the State Conviction:

- 1) Violation of Treaty Rights - The Constitution declares that treaties are "the Supreme law of the land," yet the State asserted jurisdiction over lands to which the government guaranteed "would never be within the jurisdiction of any state."
- 2) Violation of the Supremacy Clause - The Supremacy Clause precludes State Courts from usurping federal jurisdiction, and in cases which this occurs, the State law is "without effect", and the State conviction is null and void ab initio. (MCA)
- 3) Violation of right to be secure - An illegal search and seizure was conducted in "bad faith", as officer requesting search warrant was aware of the lack of jurisdiction - yet still proceeded to request and execute said search warrant, (testimony of Chief Detective Jose Chavez).

- 4) Violation of Miranda Rights - An illegal questioning occurred when Police conducted questioning without Miranda notice of Rights, and when questioning was over, then informed me that I was the primary suspect.
- 5) Violation of Right to Counsel - During the above cited questioning, I requested counsel, prior to questioning, yet was told "Counsel is not required for voluntary questioning". The questioning was not voluntary the moment I requested counsel, a clear Massiah violation.
- 6) Violation of Due process - Under *Yellow Bear*, this Court has determined that the claim that a state court lacks jurisdiction, is a constitutional claim, whether brought as a stand alone jurisdictional claim, or a due process claim. *Yellow Bear v. Wyo. Attorney Gen.*, 525 F.3d 921 224 (10<sup>th</sup> Cir. 2008).
- 7) Violation of The Doctrine of Substantive Law - The State violated numerous Acts of Congress, namely the MCA P.L. 280 (Oklahoma failed to assert jurisdiction over Indian lands under P.L. 280), and most recently P.L. 117-103, which stated that Oklahoma was required to disclaim

Jurisdiction over All Lands held or Owned by An Indian, Tribe, or Nation.

8) Violation of Clearly Established Federal Law- The U.S. Supreme Court Applied the Solemn Test" in 1991, to the lands in question, And found the State of Oklahoma failed to Assert Jurisdiction Under P.L. 280, thus the State Lacked Jurisdiction of the lands in question. Oklahoma Tax Comm. v. Ctt. Potawatomi Nation 111 S.Ct. 905, NO. 89-1322 (Feb. 26, 1991), to which this Court Affirmed in Ctt. Potawatomi Nation v. L.N. Collier (U.S.). 142 F.3d 1325, 98 CJ C.A.R. 2284 (MAY 5, 1988) Finding that "In Sum, We Conclude that the language, Legislative history, And historical Circumstances of the 1891 Act do not evince A sufficiently Clear Congressional Intent to Abrogate the Potawatomi Tribes treaty right to the exclusive use And Occupancy of its former reservation.

In Addition, if We Apply the declaration from this Courts decision in U.S. v. Simkins, 90 F.4th 1312 NO. 22-7048 (Jan. 24, 2024) holding that "Court of Appeals is bound by Supreme Court dicta Almost As firmly As by its Outright holding, particularly when dicta is recent  
(4)

And not enfeebled by later statements  
and when it squarely relates to the holding  
itself."

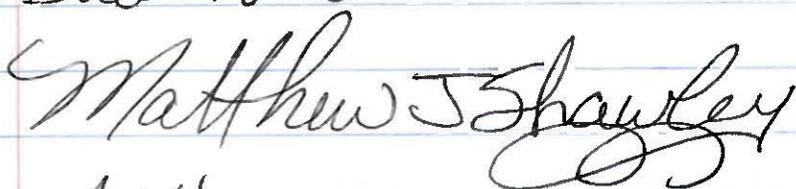
This, the McGirt ruling, in its entirety, would  
apply to the case at bar, which the state courts  
completely ignored McGirt v. Oklahoma, 140  
S.Ct. 2452 207 L. Ld. 2d. 985 (July 9, 2024).

Date: 2-25-24

  
Thomas Wahpekeche

I, Matthew Shawley, certify that I  
wrote the above document from dictation  
and from prior submissions, for  
Thomas Wahpekeche. Due to his blindness,  
as part of medical health care orderly duties,  
I have a less than high school education,  
and know little or nothing about the law, and  
any error made is unintentional.

Date: 2-25-24

Signed,   
Matthew Shawley.

**APPELLANT'S COMBINED OPENING BRIEF  
AND APPLICATION FOR A CERTIFICATE OF APPEALABILITY**

**1. Statement of the Case.** (Briefly summarize the events that took place in the district court. For example, identify when you filed your habeas application and any significant motions and orders that were entered.)

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| <p>A) Original § 2254 filed 11/15/2021 (11) grounds raised for violations of the U.S. Constitution, treaties of the United States, Doctrine of substantive law, Federal law (decisions of SCOTUS), Constitutions of the Absentee Shawnee Tribe, and OK Constitution</p> <p>B) State's Response to § 2254 filed 3/17/22</p> <p>C) Petitioner's Reply to State's Response filed 4/12/22</p> <p>D) Report &amp; Recommendation by magistrate filed 6/28/22</p> <p>E) Petitioner's Objection to R&amp;R filed 7/13/22</p> <p>F) § 2254 denied on 10/20/23</p> <p>G) Notice of intent to appeal filed 10/20/23</p> <p>H) Receipt of notice of intent issued 10/27/23</p> <p>I) State's Ala Asst. Entry of Appearance filed 10/31/23</p> | <p>J) 10<sup>th</sup> Cir docketing of appeal issued 10/31/23</p> <p>K) Federal Dist. Court denial of COA issued 11/1/23</p> <p>L) State's Certificate of interested parties filed 11/2/23</p> <p>M) Petitioner's Cert. of interested parties filed 11/7/23</p> <p>N) Petitioner's Request for appointment of counsel filed 11/7/23, based on legal blindness/functional illiteracy, Treaty Rights, 25 U.S.C. § 175.</p> <p>O) State's opposition to appt. of counsel filed 11/15/23</p> <p>P) Petitioner's Motion to Alter/Amend Judgment pursuant to rule 59(e) filed 11/15/23</p> <p>Q) Petitioner's Motion to strike state's objection to motion for appt. of counsel filed 11/21/23</p> <p>R) Receipt of payment of 10<sup>th</sup> Cir appeal filed 11/27/23</p> <p>S) Order rendering In forma Paup. moot filed 12/11/23</p> |
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**2. Prior proceedings.** (Identify any prior state, federal, or administrative proceedings in which you also sought relief from the conviction and sentence at issue in this appeal.)

- A) Direct Appeal to OCCA (April 27, 2017) - P-2015-1137
- B) Post Conviction Relief to Cleveland Co. Dist. Court (June 18, 2018)
- C) Petition in Error to OCCA (Sept. 26, 2018) # PC-2018-816
- D) Motion to Dismiss to Cleveland Co. Dist. Court (June 11, 2019).
- E) Okla. Const. Art XV Violation to Cleveland Co. Dist Court (Dec. 9, 2019)
- F) Motion to Assume Orig. Jurisdiction to OCCA (July 19, 2020)
- G) Petition in Error to OCCA (Aug. 10, 2020) - PC-2020-0541
- H) Petition in Error to OCCA (Sep. 26, 2021) - PC-2020717

## STATEMENT OF FACTS

Petitioner is a member of a protected class, Native American, whose Tribal Treaty Rights are guaranteed by the Sixth Amendment, Clause 2, of the Constitution of the United States. Article III, Clause 2, states: "This Constitution, and the laws of the United States, which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." The treaty with the Potawatomi (Feb. 27, 1867), 15 Stat. 531, guaranteed that "the agreed upon reservation land will never be included within the jurisdiction of a state." This guarantee has been found still operational on three separate occasions by the U.S. Supreme Court; (1) In *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 111 S. Ct. 905 (Feb. 26, 1991) holding that "a state that has not asserted jurisdiction over Indian lands under Public Law 280 may not tax sales of goods on the Reservation," Pg. 909-912, and "nor is there merit to Oklahoma's contention that sales did not occur on a formally designated "Reservation," the lands had been "validly set apart for the use of the Indians as such, under the superintendence of the Government," and in 2001, *C & L Enterprises, Inc. v. Citizen Band Potawatomi*, 121 S.Ct. 1589 (April 30, 2001), stating "The property in question lies outside the tribe's reservation." At 414, 415; Then in 2020, the case *Bentley v. Oklahoma*, 141 S.Ct. 191 (July 9, 2020) it was ordered that the judgment be vacated and the case remanded "in light of *McGirt*."

This very Court reached the same conclusion in *Citizen Band Potawatomi v. Collier*, 142 F.3d 1325, (May 5, 1998) holding that "Statute setting out agreements by Potawatomi Tribe's treaty right to exclusive use and occupancy of its former reservation," stating further "in sum, we conclude that the language, legislative history, and historical circumstances of the 1891 Act do not

evinced a sufficiently clear Congressional intent to abrogate the Potawatomi tribe's treaty right to the exclusive use and occupancy of its former reservation." At 1334. Affirmed by McGirt, stating "that doesn't make these laws special. Rather, in using the language that they did, these allotment laws tracked others of the period, parceling out individual tracts, while saving the ultimate fate of the land's reservation status for another day." At 2465, citing *Mattz*, 412 U.S. at 497, 93 S.Ct. 2245 ("Allotment under the... Act of 1891 is completely consistent with continued reservation status"); *Seymour v Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-358, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) (holding that 1891 Allotment Act "did no more than open the way for non-Indian settlers to own land on the reservation")

This line of thinking was stated earlier in *U.S. v Reynolds*, 39 S.Ct. 409 (May 19, 1919, stating: "(1) under the Act of Feb. 8, 1887, as amended by the Act of March 3, 1891 (General Allotment Act), Chapter 543, 26 Stat. 989, 1019, The allotment was made pursuant to trust period terminology stating: "...the United States does and will hold the land thus allotted." And *U.S. v Reilly*, 54 S.Ct. 41 (Nov. 6, 1933), stating: "(1) it is settled and is conceded that a restriction on alienation such as here shown is not personal to the allottee, but runs with the land;" and *Brendale v. Yakima Indian Nation*, 109 S.Ct. 2994 (June 29, 1989), stating: "The fact that the Allotment Act was repudiated in 1934 by the Indian Reorganization Act..." citing *Montana v U.S.* 101 S.Ct. 1245 (March 21, 1981).

In addition, *U.S. v Renfrow*, 3 Okla. 161, S. Ct. of the Okla. Territory (Federal) (July 27, 1895, found that the Act of 1891 (General Allotment Act) did not disestablish the Citizen Potawatomi Reservation, stating: "We conclude therefore, that... Indian has not reached that condition of intelligence and self-reliance... or that the president has not, under the authority granted him by

Congress, discontinued the control and supervision of the Indian agency over the Citizen Band Potawatomi Indians.”

As to the Petitioner being a member of a protected class, the eighth amendment of the Federal Constitution prohibits a punishment for a “type of crime” or “a class of offenders. “Any Indian who commits... certain enumerated crimes... of this title within the Indian Country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States” (Major Crimes Act).

Two doors down, at § 1151(a) confers the MCA to all Indian Reservations, at § 1151(b) confers the MCA to all “Dependent Indian communities, as defined by the Indian Reorganization Act (i.e. Native villages and Tribal Housing Authorities), and at § 1151(c), confers the MCA to all Indian Allotments. For the case at bar, the land in question resides with the Citizen Potawatomi Reservation, is held in Fee simple title, tax free, status by the Absentee Shawnee Housing Authority, and is an original Indian Allotment to John Sloan, to which the restrictions on alienation were never removed by Congress. There is much argument about whether the land in question is one, the other, or the third, if not all three. But what is most certainly not true is that the State of Oklahoma has subject matter jurisdiction over a “major crime” taking place on the land in dispute. \*see complete land file presented to the Cleveland County district Court directly from the Cleveland County Assessor’s Office at the jurisdictional hearing held prior to sentencing, \* Also included with the Direct Appeal to the OCCA.

In addition to the State conviction being preempted by the MCA, it is also preempted by the Violence Against women Act (VAWA), The Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Public Law 113-4 (March 7, 2013), 28 C.F.R. § 90.1, which bestowed special

tribal authority for violent crimes against women, and conferred exclusive Tribal/Federal jurisdiction for those enumerated crimes occurring within the “Indian Country.” In reaction to Oklahoma’s continued disregard to the *McGirt*, as in this case, Congress passed Public Law 117-103 [HR 2471], 136 Stat 49, the Consolidated Appropriations Act of 2022, in which not only was the VAWA Reauthorized, but Congress included a retroactive clause in declaring that “Oklahoma was required to disclaim jurisdiction over Indian lands as a prerequisite to attainment of Statehood,” H.R. 2471. See Public Law 117-103, (March 15, 2022). 136 Stat. 49.

The Supreme Court has been clear and consistent regarding state convictions that are preempted by substantive law, stating “states may not disregard a controlling federal constitutional command in the own courts,” *Montgomery v Louisiana*, 136 S.Ct. 718 (Jan 27, 2016), and “substantive rules of constitutional law for criminal cases, which are not subject to the *Teague* general bar on retroactivity applying new constitutional changes of criminal procedure to convictions that were final when the new rule was announced, including rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense,” and “when a state enforces a proscription or penalty barred by the federal constitution, the resulting conviction or sentence is, by definition, unlawful,” and “A conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment,” and “A conviction or sentence imposed in violation of a substantive rule of constitutional law is not just erroneous but contrary to law and, as a result, void, and it follows, as a general principal, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless whether the conviction or sentence became final before the rule was announced,” and “a penalty imposed on a state prisoner pursuant to an unconstitutional law is no less void because the prisoner’s sentence became final

before the law was held unconstitutional; There is no grandfather clause that permits states to enforce punishments the federal constitution forbids, and to conclude otherwise would undercut the constitution's substantive guarantees."

This very Court has found that "a claim that the convicting court lacked subject matter jurisdiction presents a cognizable Federal Habeas claim, whether it is viewed as a claim alleging a due process violation, or as a claim alleging a violation of 'laws or treaties of the United States'." Yellowbear, 380 Fed. Appx. 740, no. 09-8069 (May 5, 2010 – 10<sup>th</sup> Cir.) cited pg #4, Petitioner's Objection to Report and Recommendation.

Petitioner asserts that he is similarly situated to both Murphy and McGirt but with greater standing. This court granted a COA to both Murphy and McGirt even though they raised the jurisdictional claim for the first time on post-conviction review, and was beyond the one-year time limitation under the AEDPA. Petitioner raised the jurisdictional claim pre-trial, at trial, pre-sentencing, thru current habeas filing, and is within the one-year time limitation under the AEDPA.

Petitioner states that "he is in custody in violation of the constitution or laws or treaties of the United States." 28 U.S.C. § 2254 (a).

## STATEMENT OF ISSUES AND ARGUMENT

1. The Federal District Court (FDC) committed manifest error by wholly failing to address Ground #1 of habeas – that the state conviction was in violation of Amendment VI, clause 2, of the United States Constitution. The FDC failed to conduct a preemption analysis (PA) to determine, if the pre-existing treaty rights preempted state jurisdiction. If the PA had been completed, the FDC would have identified the treaty with the Potawatomi (Feb. 27<sup>th</sup> 1867), 15 Stat. 531, as the governing treaty over the land in dispute. Upon review the FDC would have noted the plain language and clear text within the treaty in which the United States guaranteed that “the agreed upon reservation land will never be included with the jurisdiction of a state.” Further analysis would have revealed that the treaty rights of the citizen Potawatomi have never been called in to question, with the U.S. Supreme Court addressing the issue in 1991, *Oklahoma Tax Comm’n v. Citizen Band Potawatomi*, III S. Ct. 905 (Feb. 26<sup>th</sup> , 1991) holding that the state that has not asserted jurisdiction over Indian lands under Public Law 280 may not tax sales of good on the reservation, “Pp 909-912, and “Indian tribes are domestic dependent nation, which exercise inherent sovereign authority over their members and territories,” pg. 509, and “Nor is there merit to Oklahoma’s contention that sales did not occur on formerly designated “reservations” the land was validly set apart for the use of the Indian, as such under the superintendence of the government,” pg. 511, and in 2001, *C &L Enterprises, Inc. v. Citizen Band Potawatomi*, 121 S.Ct. 1589 (April 30, 2001), stating “the property in question lies outside the Tribe’s Reservation,” pg. 414-415 (The same reservation that the F.D.C. found not to exist), and in 2020, *Bentley v. Oklahoma*, 141 S.Ct. 191 (July 9, 2020), stating “Judgment vacated, and case remanded... in light of *McGirt*.”

A state court decision is “contrary to” clearly established federal law, as may warrant habeas relief under the AEDPA, if the state court (1) applies a rule that contradicts the governing law set forth in Supreme Court cases, or (2) confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court’s conclusion.

2. The FDC committed manifest error by construing Petitioner’s jurisdictional claims as only arising under § 1151(a), despite Ground #2 of Habeas stating: state conviction was in violation of the Major Crimes Act, 18 U.S.C. § 1153. The FDC wholly failed to address the Major Crimes Act, and failed to conduct a preemption analysis to determine if the MCA preempted state jurisdiction.

If PA had been conducted, not only would the FDC identify the three Supreme Court cases cited in issue #1 (Continued existence of the Citizen Pottawatommi Reservation- De facto MCA jurisdiction), but also cases specific to the CPN reservation that has found the area to be “Indian Country.” First, in 1895, *U.S. v Renfrow*, 3 Okla. 161, Supreme Court for Territory (Okla.), (July 27, 1895), stating that “Act of 1891 did not disestablish the Citizen Pottawatommi Reservation in Oklahoma,” and in 1918, *Shawnee Nat. Bank v. U.S.*, 249 F. 583, 8<sup>th</sup> CCA (March 4 1918), stating that “Introduce spiritous liquors into the Indian Country” (Potawatomi/Absentee Shawnee Indian Allotments), in 1958, Indian .claims commission, *Citizen Band Potawatomi*, 61 C.C at 661-63 (Sept 18, 1958), stating “we do not find any evidence in the record of any consent or waiver on the part of the CPN to a Tract of Land containing less than 900 square miles,” and in 1998, by this very Court, *CPN v. Collier*, 142 F.3d 1325, (May 5, 1998 – 10<sup>th</sup> CCA). Stating “in sum that 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 former reservation.

In addition, during the appeal of this case, an intervening change in the understanding of the law occurred, the supreme court decision in *McGirt*, 140 S.Ct. 2452 (July 9<sup>th</sup> 2020), which held “[E]astern Oklahoma is not exempt from the Major Crimes Act,” stating further “when Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms.” Pg. 2477

In response to Oklahoma continued disregard for the *McGirt* decision, Congress passed P.L. 117-103 [HR 2471], 136 stat. 49 (March 15<sup>th</sup> 2022), which designated special tribal jurisdiction, and exclusive Tribal/Federal Jurisdiction in regard to all past violations of the Violence Against Women Act (VAWA), and contained a retroactive declaration that “Oklahoma was required to disclaim all jurisdiction over Indian Lands as a prerequisite to attainment of statehood” HR 24171

A state court decision in “contrary to” clearly established federal law as may warrant habeas relief under the AEDPA if the state court (1) applied a rule that contradicts governing law set forth in Supreme Court cases, or (2) confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives a result different from the Supreme Court’s conclusion.”

3. The FDA committed manifest error by wholly failing to address Ground #3 of habeas – state conviction was in violation of the Oklahoma Enabling and Organic Act, and the Oklahoma constitution. The FDC failed to conduct preemption analysis, both the Oklahoma Organ Act of May 2<sup>nd</sup> 1890 (36 stat. 8151) and the Enabling Act of June 16<sup>th</sup> 1906 (54 stat. 267, Sec. 1), contain plain language and clear text barring the State of Oklahoma from asserting of jurisdiction over land held, or owned by an Indian, Tribe, or Nation.” In addition, Article 1, Section 3, of the Statehood Constitution contains the same language “barring assertion of jurisdiction over Indian lands.” This sentiment was affirmed in Oklahoma’s Proclamation of Statehood (Okla. Nov. 6<sup>th</sup>

1906) which conveyed territorial to all lands within its boundaries except “to all Indian lands... and that it contains all of the six provision expressly required by section 3 of the Oklahoma constitution, to be therein contained.

Congress never conveyed territorial or State jurisdiction over Indian lands. This declaration is affirmed in P.L. 117-103. [H.R. 2471), 136 stat. 49 (March 15<sup>th</sup> 2020), which contained a retractive declaration that “Oklahoma was required to disclaim all jurisdiction over Indian lands as a prerequisite to attainment of state hood [H.R. 247]

Failure of the state courts to abide by substantive law U.S. Constitution, (Supremacy clause) and presents a cognizable habeas claim “under the doctrine of substantive law.

4. The FDC committed manifest error by decreeing that petition had not exhausted all state remedies to claims four, six, seven, nine, and eleven. This decision is not supported by supported by the record, namely the OCCA denial of Petition in Error, PC-2020-717, which states that “all claims have been fairly presented to the OCCA and adjudicated. Petitioner has exhausted all state remedies to the eleven claims presented in PC-2020-717.” OCCA denial of Petition in Error PC-2020-717. Further, the state concedes that all claims were fairly presented (same claims presented in habeas) , and adjudicated, in the state’s response to petitioner’s application for Habeas Corpus, stating “ respondent will, in light of the OCCA’s final order address said claim as adjudicated by the OCCA .” pg, 33.

Based on Appeal record, the OCCA’s final order, and the state’s concession, the finding of the FDC that petitioner did not exhaust all state remedies is clearly erroneous, and prejudicial to the petitioner in that the claims were never reviewed by the FDC for possible habeas relief.

5. The FDC committed manifest Error by wholly failing to address Ground #4 of the Habeas – that the “state conviction was in violation of the Indian Child Welfare Act (ICWA). The ICWA requires a tribal representative be present at all questioning of Native American minors, when possible, displacement from Native American homes could be the outcome. The state conducted numerous interviews with the native child without a tribal representative present, and refused to allow the Native American biological grandmother to be present during the questioning, despite the State’s agreement to the placement of the native child with the grandmother (emergency custody). The State then utilized information from the native child as evidence for an illegal search warrant, warrant for arrest, and as evidence at trial. Failure to adhere to the mandates of the substantive law of the ICWA was highly prejudicial to the Petitioner (fruit from a poisonous tree), and violates Amendment VI, Clause 2, of the United States Constitution.

6. The FDC committed manifest error by wholly failing to address Ground #5 of Habeas – that the “state conviction was in violation of Federal Judicial Decisions regarding “Indian Country.” The FDC failed to conduct a preemption analysis. Since the beginning, it has been judicially developed, by the federal courts, that the policy of leaving Indians free from state jurisdiction and control is deeply rooted in this nation’s history. As to the case at bat, the state courts, and the FDC, failed to apply the “Solem Test” as directed by the U.S. Supreme Court (holding that the application of the Solem factors is the only way to make a merits-based determination regarding “Indian Country” status). *Solem v Bartlett*, 104 S.Ct. 1161 (Feb. 22 1984). The U.S. Supreme Court applied this test to the CPN Reservation in 1991, *OTC v CPN*, 111 S.Ct. 905, (Feb. 26, 1991) Holding that “A state that has not asserted jurisdiction over Indian lands under P.L. 280 may not tax sales of goods on the reservation.” pg 909-912, and “nor is there merit to Oklahoma’s contention that sales did not occur on a formerly designated ‘reservation’, the land had been

‘validly set apart’ for the use of the Indians as such, under the superintendence of the Government,” and in 2001, *C & L v CPN*, id, stating “the property in question lies outside the tribe’s reservation” (the same reservation that the FDC contends does not exist), and in 2020, *Bentley v Oklahoma*, id, stating “judgment vacated, and case remanded... in light of *McGirt*.”

A state court decision in “contrary to” clearly established federal law as may warrant habeas relief under the AEDPA if the state court (1) applied a rule that contradicts governing law set forth in Supreme Court cases, or (2) confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives a result different from the Supreme Court’s conclusion.”

7. The FDC committed manifest Error by wholly failing to address Ground #6 of Habeas – that the Petitioner received ineffective assistance of trial counsel, pursuant to Amendment XIV of the U.S. Constitution, “Trial Counsel wholly failed to formulated, raise, and execute a competent argument regarding the State of Oklahoma lacking jurisdiction over “Indian Country.” Trial counsel failed to raise the governing U.S. Supreme Court decisions raised in Ground #1, much less the Constitution of the Absentee Shawnee Tribe, pursuant to the Thomas Rogers Oklahoma Indian Welfare Act (June 26, 1936), 49 Stat. 1967, to which Congress recognized Absentee Shawnee Jurisdiction as “I.7 Tribal Criminal Jurisdiction, 8. Criminal law and procedure, tribal court may exercise criminal jurisdiction over tribal non-member where alleged criminal act is committed within tribal geographical jurisdiction,” and “I.7 Tribal Criminal Jurisdiction, 8.3 other crimes, while the U.S. Supreme Court case law temporarily divested tribes of criminal jurisdiction over non-member Indians in 1990, subsequent federal legislation restored such jurisdiction,” and “9.6.2.2. Dependent Indian Communities, houses held by the Housing Authority of the Absentee Shawnee Tribe are part of dependent Indian Community as defined by 18 U.S.C. § 1151(b),” and

Article II, section 1, states “The Jurisdiction and governmental powers of the AST shall extend to all real and personal property... within the boundary of the tribal jurisdiction established by agreement dated June 26, 1890, and ratified by the Act of March 3, 1891 (26 Stat. 1019), and such other land or interest in land, which may be subsequently acquired,” and Article II, section 2, stating “the jurisdiction and governmental powers of the AST...extend outside the exterior boundaries of the AST,” and under “Courts, section3, titled Territorial Jurisdiction, states “The territorial jurisdiction of the courts shall extend to... all land owned by tribal agencies in their own name (Absentee Shawnee Tribal Housing Authority)... by purchase, relinquishment or by any other lawful means,” see Absentee Shawnee Tribe v Janil Bear, 2 Okla. Tribe. 425, 1992 WL 752132 (Ab. Shawnee D.Ct.), No. CRM-91-29. (Sept. 3 1992) for more detailed constitutional decree.

If the trial counsel would have presented this substantive law, the state’s argument that the Absentee Shawnee Housing Authority’s 1057 status precludes tribal/federal exclusive jurisdiction, which the FDC found convincing, and bestowed deferential treatment to despite finding earlier that the OCCA never made a merits-based decision regarding Petitioner’s jurisdictional claims.

The trial counsel’s failure to raise the Constitution of the Absentee Shawnee Tribe, the prior governing U.S. Supreme Court cases, and that the “Solem Test” was required to be applied was highly prejudicial to the Petitioner, and if such evidence had been presented, the outcome of the jurisdictional hearing would have been different.

8. The FDC committed Manifest Error by wholly failing to address Grand #7 of Habeas - that the "State Court Conviction was in violation of Article XIV of United States Constitution". The Cleveland County Sheriff's Office ignored Petitioner's request for counsel during interrogation and failed to read Petitioner his Miranda Rights (As a suspect), proceeded with a uncounseled interrogation (Massiah violation), and then utilized information gained as basis for illegal Search Warrant, Arrest Warrant, and a evidence at trial. Evidence of Material fact, regarding these violations, exists in the form of the video interrogation, which has never been included in the record as relevant to the case, as determined by the state.

Failure to abide by Petitioner's Civil Rights is highly prejudicial to Petitioner, and information was illegally obtained (fruit from a Poison tree), and the State should be ordered to present the video interrogation, by the Cleveland County Sheriff's Office, for review by this Court to determine constitutionality of the interrogation.

9. The FDC committed Manifest Error by wholly failing to address Grand #8 of habeas - that the "state conviction was in violation of Article XIII of the U.S. Constitution", Cleveland County Chief Detective Jose Chavez testified that he knowingly applied for a "out-of-jurisdiction" search warrant, breaching the "Good-faith exception", as his actions and testimony that he was aware that the state lacked jurisdiction over the land in dispute, as it was "Indian Country", The property seized during the illegal search was utilized to obtain an arrest warrant, and was used as evidence at trial.

This action ~~could~~ also violate Amendment IV of the U.S. constitution, and was highly prejudicial to the Petitioner, and if not obtained illegally, would have led to different outcome of the trial.

10. The FPC committed Manifest Error by wholly failing to address Ground #9 of Habeas - that the "state conviction was in violation of Article XIV of U.S. Constitution. The evidence collected during the "out-of-jurisdiction" was not held in a safe and secure evidence storage area, did not have a identifying evidence storage tracking number, but was held in office of Jose Chavez, accessible to all gainful access to office, workers & visitors alike, which led to an incompetent chain-of-custody. The evidence collected in the Illegal Search & Seizure, and the held incompetently, was the foundation of the state's case, and was presented at trial.

Utilizing this evidence at trial was highly prejudicial to Petitioner, and if not preserved, would have led to a different outcome at trial.

11. The FDC committed Manifest Error by wholly failing to address Ground #10 of Habeas - that the "State Conviction was in violation of Article XIV of U.S. Constitution." Despite Petitioner raising the issue of Jurisdiction pre-trial thru current 10th CCA Appeal, the state continually applied procedural bars to all filings, to which the FDC found should not have been applied, and that the state of Oklahoma Court system "Never reached a Merits based decision regarding jurisdiction over 'Indian Country'".

However, at the "Emergency Jurisdictional Hearing", held at beginning of trial, the judge issued a verbal Bench Order that "Petitioner had the absolute right to raise jurisdictional issues at any point in future, as jurisdiction can never be waived". Despite the decree, the state continually moved to apply procedural bars, which the State Courts affirmed. In response to Petitioner raising this ground on Habeas - the state ~~ordered~~ declared this decree was never issued, and provided evidence of the record from the jurisdictional

Hearings held nearly a year later, prior to sentencing. This is just smoke and mirrors, claiming that the decree was never issued at trial, then supporting that claim by citing judges language at another jurisdictional hearing held a year later.

Petitioner invokes his guarantee from the District Court Judge at trial, and maintains that application of procedural bars despite this decree is a Due process violation under the XIV Amendment.

12.) The FDC committed Manifest Error(s), wholly failing to address Ground #11 of Habeas - that the "state conviction was in violation of Amendment XIV of the U.S. Constitution. The state applied for a "shield law" order, which the trial court granted, blocking all reference to the numerous prior "unsubstantiated claims" put forth by the alleged victim, and to the documented "behavioral" issues displayed by the alleged victim. At second close, knowing petitioner would not have a chance to rebutt, the ADA knowingly entered information into the record, and to the jury, stating that "the alleged victim never made prior unsubstantiated claims, and never exhibited behavior inconsistent with decorum put forth by state".

This intentional action was detrimental to the defense, and was put forth in an attempt to collaborate and bolster the case put forth by the state.

13. The FDC committed Manifest Error by first finding that the OCCA had not adjudicated the claims on the basis of their merits, then bestowing deference onto the State two prior jurisdictional hearings in which the state failed to perform Preemption Analysis to determine if Treaty rights, Supreme Court decisions, or substantive law preempted the State Conviction. Thus, Full Faith & credit or comity cannot be given to the state's determination of Jurisdiction.

Further, the DC found that no State Court had applied the Solem test to determine "Indian Country" status. The 10<sup>th</sup> CCA has addressed this issue in Murphy, stating "If the state Court failed to apply Solem, and <sup>failed to</sup> adjudicated the claim "on the merits", there is no decision to which the federal court can defer" citing *Stauffer v. Trammell*. The CCDC failed to articulate, or apply, the proper legal framework in its opinion, and its determination is incompatible with Solem framework.

Not only does bestowing deference on the two prior CCDC jurisdictional findings violate Amendment XIV, due process, of the U.S. Constitution, but it also usurps the 10<sup>th</sup> CCA "within Circuit" Authority. The FDC was required to follow 10<sup>th</sup> CCA precedent.

U.S. Const. Amendment 8, Thomas v. Stitt, 2023 WL 359560, Case No. 1 CIV-20-944-D, (Jan. 23, 2023 - W.D. Okla.)

Furthermore, "state courts are expected to enforce federal law", and "Congress can require state courts, unlike state executives and legislature, to enforce federal law", New York v. U.S., 505 U.S. 144, 178-179, 112 S. Ct. 2468, 120 L. Ed. 120.

In addition, an intervening change in the Unstaiding of the law occurred prior the FDC decision, Congress passed P.L. 117-103 (HR247) that contained a retractive declaration that, "Oklahoma was required to disclaim all jurisdiction over Indian lands as a prerequisite to the attainment of statehood." "When Congress enacts a valid statute, state law is naturally pre-empted to the extent of any conflict with a Federal statute", Haaland v. Brackeen, 599 U.S. 255, 143 S. Ct. 1609, 216 L. Ed. 2d 251 (June 15, 2023)

14/ The FDC committed Manifest Error by wholly failing to address to preemptive language contained in the Thomas Rogers Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967, and its "Jurisdictional Authority" which was provided to the Absentee Shawnee Tribe of Oklahoma, and its Constitution pursuant to the Indian Reorganization Act of (IRA), and the Indian Self-determination and Education Assistance Act (ISDA), which recognized tribal Housing Authorities and Native Villages as "Indian Tribes", based on special programs and services provided by the United States to American Indians because of their status as "Indians", *Tellen v. Chehalis Reservation*, 141 S.Ct. 2434 (June 25, 2021). This very Court reached the same conclusion in *Duke v. Absentee Shawnee Tribal Housing Authority*, 199 F.3d 1123 (Dec. 20-1999-10th CA), stating, "Absentee Shawnee Housing Authority (ASHA) was "Indian Tribe", and that, "Tribe had chosen to create ASHA under 1057 as State Agency, as opposed to tribal ordinance, does not preclude the ASHA being a tribal Agency," inasmuch as ASHA was designed to further tribe's interests and tribe held exclusive control of the ASHA".

As for the Jurisdictional Authority bestowed upon the Absentee Shawnee by the three Congressional Acts cited above, one only

### **RELIEF REQUESTED**

Petitioner requests this Court issue a Certificate of Appealability for all issues raised, appoint legal counsel for Petitioner due to his blindness, perform a de novo review of all of Petitioner's habeas corpus grounds, find that all remedies have been exhausted at state level, and eventually grant Petitioner a writ of habeas corpus.

**FILL OUT AND SIGN EACH OF THE FOLLOWING TWO SECTIONS**

I affirm under the penalty for perjury that I placed this Appellant's Combined Opening Brief and Application for a Certificate of Appealability with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to the Clerk of the U.S. Court of Appeals for the Tenth Circuit, 1823 Stout St., Denver, CO 80257. In addition, I hereby certify that a copy of this form was placed with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to:

Oklahoma Attorney General,  
Gentner Drummond  
313 NE 21<sup>st</sup> St.  
Oklahoma City, OK 73105

(identify the name and address of the opposing governmental attorney)

on the following date:

February   27   2024     
month   day   year   signature

I certify that the total number of pages I am submitting as my Appellant's Combined Opening Brief and Application for a Certificate of Appealability is 30 pages or less or alternatively, if the total number of pages exceeds 30, I certify that I have counted the number of words and the total is \_\_\_\_\_, which is less than 13,000. I understand that if my Appellant's Combined Opening Brief and Application for a Certificate of Appealability exceeds 13,000 words, my brief may be stricken and the appeal dismissed.

February   27   2024     
month   day   year   signature

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