

**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.)

REPLY BRIEF OF PETITIONER- APPELLANT

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Oral Argument is Requested

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT	3
A.	The State Never Carried Its Burden To Establish It Had Subject Matter Jurisdiction To Arrest And Prosecute Mr. Wahpekeche.....	3
B.	Mr. Wahpekeche Exhausted His Jurisdictional Arguments.	6
1.	<i>Exhaustion in the State Courts</i>	8
2.	<i>Exhaustion in the Federal Courts</i>	12
C.	The Land is a Restricted Allotment and Thus Indian Country.....	13
D.	The Land Where the Crimes Allegedly Occurred Remains Part of the CPN Reservation Which Was Not Disestablished and was Merely Diminished.....	16
E.	The Court Should Ignore the State’s “Preliminary Matters”	18
F.	Mr. Wahpekeche’s Non-Jurisdictional Claims Were Exhausted.	22
III.	CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Allen v. Zavaras</i> , 568 F.3d 1197 (10th Cir. 2009)	20
<i>Bland v. Sirmons</i> , 459 F.3d 999 (10th Cir. 2006)	7
<i>Bowen v. Kansas</i> , 295 F. App'x 260 (10th Cir. 2008)	19
<i>C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma</i> , 532 U.S. 411 (2001)	16
<i>Childers v. Crow</i> , 1 F.4th 792 (10th Cir. 2021)	19
<i>Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier</i> , 142 F.3d 1325 (10th Cir. 1998)	17, 18
<i>Gardner v. Galetka</i> , 568 F.3d 862 (10th Cir. 2009)	6, 7
<i>Grant v. Royal</i> , 886 F.3d 874 (10th Cir. 2018)	6, 12
<i>Holcomb v. Whitten</i> , 836 F. App'x 682 (10th Cir. 2020)	18
<i>Hughes v. Beck</i> , 161 F. App'x 797 (10th Cir. 2006)	19
<i>Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Comm'n</i> , 829 F.2d 967 (10th Cir. 1987)	14, 15
<i>Jones v. Hess</i> , 681 F.2d 688 (10th Cir. 1982)	13
<i>Magnan v. Trammell</i> , 719 F.3d 1159 (10th Cir. 2013)	15
<i>Mars v. White</i> , 2025 WL 702813 (10th Cir. Mar. 5, 2025)	1
<i>Matloff v. Wallace</i> , 497 P.3d 686 (Okla. 2021), cert. denied 142 S.Ct. 757 (2022)	21

<i>McNutt v. General Motors Acceptance Corp. of Indiana</i> , 298 U.S. 178 (1936)	3
<i>Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma</i> , 498 U.S. 505 (1991)	16
<i>Pacheco v. Habti</i> , 62 F.4th 1233, 1233, 1242 fn.7 (10th Cir. 2023), cert. denied, 143 S. Ct. 2672, 216 L. Ed. 2d 1245 (2023).....	3
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965)	22
<i>Smith v. Duckworth</i> , 824 F.3d 1233 (10th Cir. 2016)	21
<i>United States v. Pelican</i> , 232 U.S. 442 (1914)	16
<i>United States v. White</i> , 454 F.2d 435 (7th Cir. 1971)	21, 22
<i>Vantage Trailers v. Beall Corp.</i> , 567 F.3d 745 (5th Cir. 2009)	3
<i>Yankton Sioux Tribe v. Podhradsky</i> , 606 F.3d 994 (8th Cir. 2010)	13

Statutes

18 U.S.C. § 1151(a).....	9, 13
18 U.S.C. § 1151	18
18 U.S.C. § 1151(a)-(c).....	1, 24
18 U.S.C. § 1151(a), (b), and (c).....	11
18 U.S.C. § 1151(c)	9, 10, 11
18 U.S.C. § 1153	5, 12
18 U.S.C. § 1162	18
25 U.S.C. § 331	8
25 U.S.C. § 5102	15, 16
28 U.S.C.A. § 2254(b)	6
Act of May 8, 1906, ch. 2348 (34 Stat. at L. 182).....	15
Article 6, Clause 2 of the United States Constitution.....	12

Other Authorities

Opinion of the Solicitor, Department of the Interior, M-36184 (February 15, 1954)	14
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I. INTRODUCTION

The State's Answer/Supplemental brief continues to assert this Court's Certificate of Appealability ("COA") should be vacated. The Court has already rejected this argument and should reject it again. The case law the State relies on for its assertion the COA should be vacated and it is "implausible" that all of the claims meet the AEDPA standard is inapplicable. *See, e.g., Mars v. White*, No. 24-6038, 2025 WL 702813, at *1 (10th Cir. Mar. 5, 2025) (cited by the State at pp.11-12 of the Answer Brief). Moreover, the State's false assertion that because Mr. Wahpekeche's Supplemental Opening Brief did not regurgitate and repeat arguments made in his Opening Brief constitutes waiver must be rejected.

On the merits, Mr. Wahpekeche's habeas petition must be granted because it is clear Oklahoma lacked subject matter jurisdiction to prosecute his alleged crimes because he is indisputably an Indian and the land on which the crimes allegedly occurred is Indian Country as defined by 18 U.S.C. § 1151(a)-(c). To begin with, the State has never met its burden to prove it had jurisdiction, particularly after Mr. Wahpekeche provided *prima facie* evidence the land was Indian Country. Also, the State's arguments that Mr. Wahpekeche has not exhausted his

arguments fall flat because throughout trial, post-conviction proceedings, direct appeals, and habeas proceedings, Mr. Wahpekeche repeatedly and thoroughly argued Oklahoma courts lacked subject matter jurisdiction. He asserted during all phases the property where the alleged crime occurred was: an Indian allotment, specifically the original allotment of John Sloan, Absentee Shawnee; a dependent Indian community; and was on the CPN reservation which was merely diminished and not disestablished. These arguments appear at multiple places throughout the appellate record, including state and federal court filings, motions, supporting briefs, and evidentiary materials.

The State's efforts to demonstrate that the land is not Indian Country fail. Again, the contemporaneous documentary evidence proves the land is an Indian allotment and nothing the State presents identifies how or when any restrictions were lifted – it is all speculation. Further, the CPN reservation was diminished and not disestablished based on the language of the 1891 Act, contemporaneous documents, and subsequent case law.

II. ARGUMENT

A. **The State Never Carried Its Burden To Establish It Had Subject Matter Jurisdiction To Arrest And Prosecute Mr. Wahpekeche.**

For all of the State's bluster about AEDPA and exhaustion (*see* Answer Brief at pp.17-21, 25-29), the State ignores a cornerstone of subject matter jurisdiction: it must prove subject matter jurisdiction exists. *See McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936) (must allege facts supporting subject matter jurisdiction), *Vantage Trailers v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009) (must show subject matter jurisdiction by preponderance of evidence). Such is particularly so in this case where Mr. Wahpekeche produced *prima facie* evidence that he is an Indian and the alleged crimes occurred within Indian Country. *See Pacheco v. Habti*, 62 F.4th 1233, 1233, 1242 fn.7 (10th Cir. 2023), *cert. denied*, 143 S. Ct. 2672, 216 L. Ed. 2d 1245 (2023) (noting Oklahoma and Supreme Court cases hold that once defendant provides *prima facie* evidence the state court lacks subject matter jurisdiction, "the burden shifts to the State to prove it has subject matter jurisdiction").

On January 29, 2015, during trial, a hearing was held because Mr. Wahpekeche challenged subject matter jurisdiction because of State

witness testimony; the State attempted to prove jurisdiction existed through unqualified witnesses. *See* Supplemental Opening Brief at pp.36-37. Without the opportunity to obtain documents and put on evidence to show the State lacked jurisdiction, the court found it had jurisdiction, but once Mr. Wahpekeche had the time and opportunity to do so, he presented the court with chain of title and deeds in December 2015 showing “[t]he land at issue was originally an allotment to John Sloan, a member of the Absentee Shawnee Tribe.” *See* Rec. Vol. I p.323-326. The State never carried its burden to rebut this evidence and show Oklahoma had subject matter jurisdiction. On appeal, even this appeal, this issue is reviewed *de novo* and there still is no proof of subject matter jurisdiction.¹

¹ The State apparently agrees *de novo* review is proper. *See* Answer Brief p.28, though it is not “abandoning” an argument that AEDPA deference applies to subject matter jurisdiction arguments. *De novo* review applies regardless because Mr. Wahpekeche raised the jurisdictional issue at every single stage and no actual adjudication on the merits was made, the state court’s “factual” determination is owed no deference because it flies in the face of the facts and was thus unreasonable, and the state court never properly applied the burden to prove subject matter jurisdiction on the state.

Nothing in AEDPA indicates Congress intended to somehow modify or amend the Major Crimes Act and remove the federal courts’ exclusive

The State concedes the land on which these alleged crimes were committed was an Indian allotment. *See Answer Brief* at pp.45-46. The only thing the State can muster to try and salvage jurisdiction is that “it appears” the land ceased to be or was not a trust allotment and “it does not appear” Mr. Wilson, to whom the land was sold in the early 1900’s, was an Indian. *Id.* p.43. The “appearance” of jurisdiction is not proof of jurisdiction and the fact the State cannot demonstrate the land was not a trust allotment, ceased being a trust allotment, or Mr. Wilson was not an Indian shows subject matter jurisdiction never existed in the Oklahoma state courts.

jurisdiction over crimes committed by Indians in Indian Country. *See* 18 U.S.C. § 1153.

The case law the State cites to claim AEDPA deference applies to subject matter jurisdiction arguments is inapposite as neither case involved a question of subject matter jurisdiction. *See Answer Brief* at p.28. Regardless, a decision finding that the State of Oklahoma had jurisdiction to prosecute an Indian who committed a crime in Indian Country is contrary to clearly established federal law and/or was based on an unreasonable determination of facts which proved the land was Indian Country, particularly since at no point did any state court apply the *Solem* test to determine whether the state had jurisdiction. *See Supplemental Opening Brief* at pp.33-35.

B. Mr. Wahpekeche Exhausted His Jurisdictional Arguments.

A habeas petition may be granted under 28 U.S.C.A. § 2254(b) where the petitioner has exhausted state remedies or demonstrates that no state corrective process is available or effective. A claim is exhausted when the substance, or “substantial equivalent” of that claim has been “fairly presented” to the state court. *See (Donald) Grant v. Royal*, 886 F.3d 874, 891 (10th Cir. 2018). A “petitioner cannot assert entirely different arguments [in his or her request for habeas relief] from those raised before the state court.” *Id.* (citation omitted).

Here, throughout the state and federal court proceedings, Mr. Wahpekeche has asserted the land on which the crimes were allegedly committed was Indian Country as defined by 18 U.S.C. § 1151(a) through (c) and he has repeatedly invoked each sub-section. Thus, his claims and arguments in the lower and state courts were the substantial equivalent of the arguments he makes here. Compare this case to *Gardner v. Galetka*, 568 F.3d 862, 872 (10th Cir. 2009) where this Court found that the petitioner’s claims were “were based on an entirely different factual predicate.” In *Gardner* petitioner’s state-court ineffective-assistance claim was regarding counsel’s inaccurate description of the petitioner's

injury to the jury, but his habeas claim was grounded on counsel's failure to undertake an investigation of the murder weapon. *Id.* See also e.g. *Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006) (challenge to prosecution's actions "differ[ed] significantly from" the state-court "challenge to the instructions given by the court"). *Gardner* involved two completely different legal theories and factual arguments. Here, Mr. Wahpekeche has consistently invoked the same basis for his jurisdictional argument – that the property was Indian Country and he has done so using the same evidence showing the land on which the alleged crimes occurred was Indian Country, including that it was on an Indian Allotment.

Perhaps that is why the State does not explicitly argue Mr. Wahpekeche's jurisdictional claim is unexhausted. Instead, the State claims his allotment and diminishment arguments "greatly expanded" during the procedural history of this case and are therefore unexhausted. See Answer Brief p.25. Not so.

During trial and post-trial proceedings, Mr. Wahpekeche argued, *inter alia*, that Oklahoma lacked jurisdiction because the Land is an allotment on a reservation, which, at most, was diminished by Congress

in the 1891 Act. Rec. Vol. II p.935. He reiterated these allotment and diminishment arguments at every stage of his direct and habeas appeals, alongside his dependent Indian Community arguments. *See* Rec. Vol. IV pp.295-296. In support of his arguments, Mr. Wahpekeche submitted property documents to the state and federal courts. In contrast, the State has failed to rebut Mr. Wahpekeche's evidence and instead is left to speculate about how evidence and information appears, guessing about the ethnicity of the purchaser of land based solely on his name. *See* Answer Brief p.43.²

1. Exhaustion in the State Courts

Following trial and prior to sentencing, Mr. Wahpekeche moved to dismiss the case for lack of jurisdiction in the state district court. Rec. Vol. IV p.171. Within that motion, Mr. Wahpekeche argued that Congress "only diminished the reservation" under the 1891 Act as the CPN Reservation was "specifically set aside...under the General Allotment Act, 25 U.S.C. § 331 *et seq.*, for the CPN." Rec. Vol. IV p.173. He argued

² The State is mute about whether the name "John Sloan", a decidedly British name, appears to be Indian or not. Suffice it to say, speculating regarding someone's ethnicity, heritage, and lineage based on their name is a fool's errand.

the Land was originally an allotment to John Sloan, a member of the Absentee Shawnee Tribe, and is therefore Indian Country. Rec. Vol. IV p.170.

In his direct appeal, Mr. Wahpekeche similarly argued, *inter alia*, that Oklahoma lacked jurisdiction because the Land was “originally an allotment to John Sloan”. See Rec. Vol. II p.359. He also stated that there is not “any indication in the records that restrictions [on the Land] have been lifted” and any prior applicable treaties between the CPN and the United States “only diminished the [R]eservation as the United States specifically set aside these lands under the General Allotment Act.” Rec. Vol. II, pp.198, 200.

Mr. Wahpekeche filed various post-conviction motions and appeals where he raised allotment and diminishment arguments. Rec. Vol. II p.359. Mr. Wahpekeche stated that the Land:

is in Indian Country under 18 [U.S.C.] § 1151(c)...regardless of its status as restricted or unrestricted allotment. Alternatively, it is Indian Country under 18 [U.S.C.] § 1151(a). The legal history of the [CPN] elucidates the terms ‘reservation’ and ‘allotment’ as uniquely applicable to the [CPN] and its citizens...

Rec. Vol. II p.361. He explicitly argued the land was Indian Country under § 1151(c). Rec. Vol. II pp.363, 383. Regarding disestablishment, he

stated that “no act of Congress has disestablished Indian Territory within the boundaries of the CPN...[t]here exists no agreement which contains any language characteristic of disestablishment such as ‘[e]xplicit reference to cession’ to the US...” Rec. Vol. II p.383.

In his Petition in Error, Mr. Wahpekeche challenged Oklahoma’s lack of jurisdiction on various grounds, including arguing that the CPN Reservation was allotted land. In support, Mr. Wahpekeche quoted the state district court which determined that the CPN Reservation “is an original Indian allotment (John Sloan Allotment)” under the General Allotment Act. Rec. Vol. II pp.633, 636, 644-647. Thus, it is patently obvious that Mr. Wahpekeche made, and the courts considered, his arguments that the land was an allotment under 18 U.S.C. § 1151(c)

The OCCA addressed the issue of whether the Land was allotted, dependent Indian community, or a reservation. *See* Rec. Vol. II pp.152-153. The OCCA stated, contrary to the facts in the record, that “[t]he record does not support any claim that Wahpekeche’s house was on Indian trust land, or is an allotment.” *Id.* p.152. The court even noted he purchased it “from the Absentee Shawnee tribal housing authority,” indicating it was Indian land. *Id.* p.153. The court then, without evidence

and in contradiction to its prior conclusion, seems to have found that the land, which was originally an allotment, was sold to a non-Indian and thus lost its status as Indian Country without any legal or factual basis. *Id.* Mr. Wahpekeche has no control over the OCCA's framing of an issue or whether its orders specifically address all of his arguments. All that was required was he present all of his arguments, which he did.

The state courts summarily dismissed Mr. Wahpekeche's jurisdictional arguments without citing to or addressing relevant, clearly established federal authority, case law, and statutes. Rec. Vol. II p.393 (state district court opinion denying post-conviction relief on jurisdiction argument); *id.* pp.530-532 (state district court again denying post-conviction relief on jurisdictional issue); *id.* pp.823-824 (OCCA order denying post-conviction relief with no analysis other than determining that *McGirt* is not retroactive). The summary rejections of Mr. Wahpekeche's well-developed and factually supported arguments that the State lacked jurisdiction because the land was Indian Country as defined by under 18 U.S.C. § 1151(a), (b), and (c) does not change the fact he presented, and thus exhausted, the arguments. At a minimum, the substance, or "substantial equivalent" of the jurisdictional claim, i.e.

allotment and diminishment, has been “fairly presented” to the state court. See (*Donald*) *Grant*, 886 F.3d at 891.

2. *Exhaustion in the Federal Courts*

Mr. Wahpekeche filed his Petition for Writ of Habeas Corpus and Brief in Support in federal district court where he once again challenged Oklahoma’s jurisdiction. ROA Vol. I pp.7-158. Mr. Wahpekeche raised the following pertinent jurisdictional arguments in Grounds One, Two, and Five, respectively:

Ground One: Mr. Wahpekeche’s conviction was in violation of Article 6, Clause 2 of the United States Constitution due to a treaty in 1867 which exempted the CPN Reservation;

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

Ground Five: Mr. Wahpekeche’s conviction was obtained in violation of various “Federal Judicial Decisions regarding Indian Country,” in determining whether the CPN Reservation had been disestablished.

As set forth in Grounds One, Two, and Five, Mr. Wahpekeche’s broader jurisdictional argument is that the land on which the crimes allegedly occurred is Indian Country within the exclusive jurisdiction of the United States. He has argued that the Reservation is Indian Country

because Congress did not disestablish the land that it is on and it was not disestablished because it was, at most, diminished. He's further argued that because the land was an Indian allotment, which the State concedes and the property documents definitively prove, it is Indian Country. *See, e.g.*, Rec. Vol. III pp.10, 13, 31, 36 (response to state's brief regarding habeas petition in federal district court); Rec. Vol. I at pp.18, 21, 31 (federal district court habeas petition); *id.* p.88, 92-93 (brief in support of federal district court habeas petition). Also, at every stage in the federal courts, Mr. Wahpekeche has presented and re-presented the property records showing the land is an Indian allotment.

Mr. Wahpekeche exhausted his allotment and diminishment arguments, or the "substantial equivalency" of them in the habeas proceedings. *Jones v. Hess*, 681 F.2d 688, 694 (10th Cir. 1982).

C. The Land is a Restricted Allotment and Thus Indian Country.

"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). "Tribal lands, trust lands, and certain allotted lands generally remain

Indian country despite disestablishment.” *Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 970 (10th Cir. 1987).

The land at issue was an original Indian allotment to John Sloan. The allotment states that the allotment, which includes the Land, was initially held in trust by the United States and at the expiration of the trust period, “all charge or incumbrance [sic] whatsoever” would be lifted. Rec. Vol. IV p.180. Mr. Sloan’s death did not terminate “the trust to which the allotment [was] subject” and nothing permitted a fee patent to be issued to his heirs unless they “applied for the same.” Opinion of the Solicitor, Department of the Interior, M-36184 (February 15, 1954).³ Nothing in the deeds or property records shows Mr. Sloan’s heirs applied for a fee patent. To the contrary, the “Indian Deed Inherited Lands” document, Rec Vol. I p.339-40, by its terms indicates the trust and restrictions remained on the land since it passed via “Indian Deed” and nothing states a fee patent was issued.

³ Available at https://thorpe.law.ou.edu/sol_opinions/p1626-1650.html#m-36184

Congress extended the trust period **before** the 1911 sale from Sloan's heirs to Wilson. *See* Act of May 8, 1906, ch. 2348 (34 Stat. at L. 182). Therein, 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." *Id.* No such fee-simple patent was ever issued. Further, to the extent the 1906 law did not apply, in 1934, "any restriction on alienation" of any allotment was extended indefinitely. *See* 25 U.S.C. § 5102.

None of the deeds or documents clearly or explicitly extinguish the encumbrances from the original allotment. Rec. Vol. II pp.181-187. The deeds further demonstrate that neither the Indian title was extinguished nor any of the encumbrances that came with the original allotment. *Id.* Notably absent from the property documents is any language which "use[s] the phrase 'removal or restrictions,'" or requests the Secretary of Interior to "remove all restrictions form the [Land]." *Magnan v. Trammell*, 719 F.3d 1159, 1174 (10th Cir. 2013). Moreover, because restrictions in trust patents run with the land, the Secretary of the Interior must issue a fee simple patent to extinguish any restriction. The Secretary of Interior never issued a fee simple patent for the Land. Thus,

the Land is still an allotment that is held in trust and the restrictions on the land created as a result of the original allotment remain indefinitely “until otherwise directed by Congress.” 25 U.S.C. § 5102. The Land is Indian country under § 1151. *See United States v. Pelican*, 232 U.S. 442, 450–51 (1914).

D. The Land Where the Crimes Allegedly Occurred Remains Part of the CPN Reservation Which Was Not Disestablished and was Merely Diminished.

The State attempts to minimize two Supreme Court cases that recognize the CPN Reservation exists. *See Answer Brief pp.36-37*. It defies logic and the Supreme Court’s opinion in *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 414-15 (2001) to say that the CPN Reservation was disestablished when the Court stated, “[t]he building...is **not on the Tribe’s reservation.**” (emphasis added). The “Tribe” involved in that case is the CPN. The Court’s explicit recognition that the CPN has a reservation should end the discussion on whether the CPN’s Reservation was disestablished. Even if it doesn’t, the Court’s decision in *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) does. Underlying that case is whether the convenience store was on CPN’s reservation. That determination had to be made in order for the

tax decision to be made. The determination that it was land held in trust and not within CPN's reservation boundaries, definitionally, means that the CPN has a reservation that has boundaries and is not disestablished.

The State also spends several pages of its brief arguing that *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 142 F.3d 1325 (10th Cir. 1998) undermines Mr. Wahpekeche's position and supports the State's asserting that the CPN Reservation was disestablished. But, the State admits that "[t]his Court then determined that **nothing contained within the 1891 Act abrogated the pre-existing ownership rights of the CPN**" in the land set forth as the CPN's reservation in the 1867 treat. Answer Brief p. 51. It is unclear how the State can argue that the CPN Reservation was disestablished while, at the same time agreeing that nothing in the 1891 Act that purportedly disestablished the Reservation abrogated the CPN's ownership rights in the land. Moreover, this Court rejected the idea that the 1891 Act created reservation rights in the Absentee Shawnee. *Collier*, 142 F.3d at 1333. By rejecting the idea that the 1891 Act created a reservation for the Absentee Shawnee, this Court implicitly, if not explicitly, recognized the CPN's Reservation. And, to drive the point further, the Court stated that

the CPN has the “right to the exclusive use and occupancy of its former reservation.” *Id.* at 1334. How could the CPN have exclusive rights to the land if the Reservation was completely disestablished, or if the land was not restricted, or if the land was not held in trust? The State’s assertion that the Supreme Court and Tenth Circuit decisions that recognize the CPN Reservation are inapposite is unpersuasive.

The land on which the alleged crimes were committed was Indian Country under 18 U.S.C. § 1151.⁴ The state courts thus lacked subject matter jurisdiction and the petition should be granted.

E. The Court Should Ignore the State’s “Preliminary Matters”

The State on pages 9 through 14 of its brief sets forth preliminary matters it wants the Court to consider. The Court should not.

The first preliminary matter is a second request for reconsideration of the Court’s order granting the COA. This Court has already rejected the State’s effort and should do so again. The cases cited by the State are not persuasive. In *Holcomb v. Whitten*, 836 F. App’x 682, 685 (10th Cir.

⁴ The State argues in passing that it is unclear whether Oklahoma has jurisdiction over crimes committed by Indians in Indian Country. *See* Answer Brief p.35, fn.8. The text of 18 U.S.C. § 1162 (and the chart therein) belies this assertion. Congress identified with specificity which states have jurisdiction and Oklahoma is not one of them.

2020), this Court reformulated the COA and did not vacate it. In *Childers v. Crow*, 1 F.4th 792, 794 (10th Cir. 2021), the Court found the petitioner never raised the claims relevant to his habeas petition either in the district court or in his application for a COA. No such circumstance exists here. Mr. Wahpekeche raised all of his claims in his habeas petition and in the district court. *See* ECF No. 71 at pp.2-3; Rec. Vol. I at pp.7-55 (grounds in habeas petition); Rec Vol. IV at 293-300 (district court’s denial of all grounds). In *Bowen v. Kansas*, 295 F. App’x 260, 263 (10th Cir. 2008), the petitioner was granted a COA on a single issue and this Court found that the petitioner had neither raised that issue on direct appeal nor raised it in his state habeas petition; thus he “procedurally defaulted” on the single issue for which the COA was granted. In contrast here, the COA this Court granted encompasses myriad issues, including several that the State concedes are not procedurally barred. Similarly, *Hughes v. Beck*, 161 F. App’x 797, 799 (10th Cir. 2006), the Court granted a COA on a single issue that it ultimately determined the petitioner failed to raise in the district court. Again, no such situation exists here. Thus, the Court should not vacate the COA and should instead address the merits of the arguments.

The second preliminary issue is the State's assertion that because the Supplemental Brief did not reiterate some issues in Mr. Wahpekeche's 31-page Opening Brief, somehow those issues are waived. The case law the State cites for the proposition does not say what the State claims, and its arguments are borderline misleading. In *Allen v. Zavaras*, 568 F.3d 1197, 1199 (10th Cir. 2009), the Court did not come close to saying that if a supplemental brief does not re-argue issues in an opening brief, the issue is waived. In that case, the petitioner's COA was denied by the district court and this Court appointed counsel who was free to "brief and **seek** a COA on any issue counsel deemed to have potential merit." *Id.* (emphasis added). Counsel raised a single issue; the Court granted a COA on that issue; and the Court affirmed. *Id.* at 1200. No where did this Court say that if a petitioner had raised an issue in his request for a COA, a COA was granted on that issue, and a supplemental brief did not reargue, reiterate, or regurgitate that same issue it was waived, particularly if it is well presented in the opening brief.⁵

⁵ And certainly nothing suggests an appellant or a supplemental brief should use all of the allotted words under the rules. Undersigned counsel presumes that the judges of the Court (and their clerks) prefer brevity and efficiency rather than needless repetition.

Here, Mr. Wahpekeche's opening brief – particularly for a *pro se* party – is cogent and thorough. This Court will (or already has) read Mr. Wahpekeche's Opening Brief. Issues and arguments raised therein that undersigned counsel determined did not need supplemental briefing are not waived. The Court will consider them and either agree or disagree. Regardless, federal habeas courts have discretion to bypass any procedural issues when a claim is readily resolved on the merits. *Smith v. Duckworth*, 824 F.3d 1233, 1242 (10th Cir. 2016).

What should not be lost on the Court, however, is that the State has completely failed to address myriad issues raised in Mr. Wahpekeche's Opening Brief. The State acknowledges the fact that Mr. Wahpekeche's Opening Brief raised: violations of the Indian Child Welfare Act; the State's failure to preserve evidence; and improper application of *Matloff v. Wallace*, 497 P.3d 686 (Okla. 2021), *cert. denied* 142 S.Ct. 757 (2022). But the State does not address those issues or arguments in its Answer Brief. Thus, the State has conceded those issues, or, at least, has waived any arguments it may later seek to assert whether during oral argument or subsequent proceedings. *See United States v. White*, 454 F.2d 435, 439 (7th Cir. 1971).

F. Mr. Wahpekeche's Non-Jurisdictional Claims Were Exhausted.

The State picks nits with the language Mr. Wahpekeche used to raise his rape shield, *Miranda*, and ineffective assistance claims during the procedural history of this case. Regarding the rape shield claim, the State agrees Mr. Wahpekeche raised this issue on direct appeal. *See* Answer Brief p.45. The State asserts Mr. Wahpekeche did not raise this issue “in his post-conviction proceedings.” *Id.* The federal habeas petition form asks if the issue was raised “through a post-conviction motion or petition for habeas corpus in a state trial court.” Rec. Vol. I p.56. Mr. Wahpekeche checked the “yes” box and referenced his motion to dismiss in the state trial court and asserted the prosecutor’s injection of improper argument regarding the credibility of the victim during rebuttal closing violated his due process rights. *Id.* p.57. Moreover, during the direct appeal, the OCCA had the opportunity to rule on the merits of this issue because it was framed as, *inter alia*, a violation of the Confrontation Clause. Rec. Vol. II p.265-268. Because the Confrontation Clause is incorporated through the Due Process Clause of the Fourteenth Amendment, *see, e.g. Pointer v. Texas*, 380 U.S. 400, 406 (1965), Mr.

Wahpekeche's presentation of this claim on its merits to the OCCA adequately exhausted the claim.

Regarding the *Miranda* claim, the State concedes he raised violations and issues regarding *Miranda* multiple times during multiple phases. *See Answer Brief p.46*. The State, however, claims that the assertion that *Miranda* rights were violated were unexhausted because they were discussed as violation of his *Miranda* rights by interviewing him without reading him his rights when the State knew he was suspect, in the context of ineffective assistance of trial counsel's failure to raise the issue at trial, and in the context of ineffective assistance of appellate counsel's failure to assert trial counsel's errors. *Id.* What never changed was the fundamental factual basis for the *Miranda* issue. And, it is not difficult to discern that the failure of counsel at any level to assert violation of *Miranda* rights, particularly when the facts regarding the violation are the same each time, is a claim for ineffective assistance of counsel which is "fairly presented" to the court. Mr. Whapekeche provided the state and federal courts all of the factual information and legal arguments necessary to determine, on the merits, whether his interview without receiving *Miranda* warnings was unconstitutional,

whether in the context of the Fourth Amendment's protection against self-incrimination or the Sixth Amendment's right to counsel.

III. CONCLUSION

Unlike many Native Americans who were prosecuted in state courts before *McGirt*, Mr. Wahpekeche raised his objections to Oklahoma's jurisdiction over his crimes and prosecution long before The Supreme Court even granted certiorari on, let alone decided, *McGirt*. Mr. Wahpekeche has steadfastly maintained his jurisdictional arguments throughout this odyssey – even raising them during trial. No credence should be given to the assertions that he failed to exhaust them, he has waived/failed to preserve his arguments, that they have not been “fairly presented,” or that they are so different in briefing before this Court that they are new and should not be considered.

The Court should grant Mr. Wahpekeche's habeas petition and find the Oklahoma state courts lacked subject matter jurisdiction to prosecute and convict him for the alleged crimes. Mr. Wahpekeche is an Indian and the alleged crimes occurred on land that the State concedes was an Indian allotment. Further, the CPN Reservation was never disestablished (at most it was diminished). Thus, it is Indian Country under 18 U.S.C. § 1151(a)-(c).

The Court should also find that Mr. Wahpekeche's non-jurisdictional arguments were exhausted, are preserved for review, and, on their merits, they warrant habeas relief. Each one implicates fundamental constitutional problems with his arrest and prosecution that courts should not tolerate. Coupled with the fact that a key witness in the trial has recanted his testimony and provided a sworn affidavit that demonstrates actual innocence, this Court should find the habeas petition and arguments therein more than sufficient to warrant relief and vacate his conviction.

Respectfully submitted this 21st day of August 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 August 13, 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 Reply 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 Table of Contents, the Table of Authorities, and the certificates of counsel (*See Fed. R. App. P. 32(a)(7)(iii)*) is **5,064**.

s/ Jason B. Wesoky _____

Jason B. Wesoky

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August 2025 a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER-APPELLANT** was filed with the Court and served via CM/ECF on the following:

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