No. 18-8801

In the Supreme Court of the United States

PATRICK JOSEPH TERRY - Petitioner

Vs.

THE STATE OF OKLAHOMA – Respondents (s)

ON PETITION FOR A WRIT OF CERIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Patrick Joseph Terry
Petitioner *pro se*
ODOC-97730-JCCC-U3
216 N. Murray St.
Helena OK 73741-1017

April 4, 2019

QUESTION PRESENTED

"Whether the boundaries established in the Treaty of February 23, 1867, for the Eight (8) Tribes within the former Indian Territory of northeastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C § 1151(a)."

LIST OF PARTIES

[XX] **All parties appear in the caption of the case on the cover page.**

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASE AUTHORITY CITED

CONSTITUTIONAL AND STATUTORY AUTHORITY CITED

ACTS OF CONGRESS CITED

PERSUASIVE AUTHORITIES CITED

In the
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

PARTIES TO THIS ACTION

All parties to this action are listed on the cover page of the Petition.

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

XX These are cases arising from post-conviction proceedings in state courts:

The Order of the state district court was entered on September 18, 2018. The opinion of the state district court asked to review the merits appears at **Appendix A** to the petition and is unpublished

The Order of the Oklahoma Court of Criminal Appeals was entered on February 25, 2019. The opinion of this highest state court to review the merits appears at **Appendix B** to the petition and is unpublished.

JURISDICTION

XX This is a case arising from post-conviction proceedings in the following state court(s):

The date on which the state district court decided my case was on September 17, 2018. **Appendix A** to the petition, unpublished. Timely appealed.

The date on which the highest state court decided my case was on February 25, 2019. **Appendix B** to the petition, unpublished.

The jurisdiction of this Honorable Court is invoked under **28 U.S.C. § 1257(a).**

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED

1). **Article VI** to the United States Constitution provides, in part:

> ". . . [t]his 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. . . ". **U.S. Const. Art. VI (1791).**

2). The **Fifth Amendment** to the United States Constitution provides, in part:

> "[n]o person . . . shall be deprived of life, liberty or property without due process of law. . . ". **U.S. Const. Amend. V (1791).**

3). The **Sixth Amendment** to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ". **U.S. Const. Amend. VI (1791)**

4). The **Fourteenth Amendment** to the United States Constitution provides, in part:

> "**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .". **U.S. Const. Amend. XIV (1868).**

Anatomy of State Court Proceedings

After a non-Jury trial in a state district court, Petitioner was convicted of the following offenses in Ottawa County Oklahoma Case No. CF-2012-242: Count1: ***Manufacturing a controlled dangerous substance within 2000 feet of a public school***, in violation of **63 O.S. § 2-401(G)**; Count 2: ***Possession of a controlled dangerous substance*** in violation of **63 O.S. § 2-402 (A)**; and, Count 3: ***Unlawful possession of Drug Paraphernalia*** in violation of **63 O.S. § 2-405**.

Testimony at trial revealed that the evidence was obtained during a non-consensual, warrantless search of Petitioner's home by agents of the state, county Sherriff's office. An ongoing ***Motion to Suppress*** was asserted by Petitioner throughout the state district court proceedings and was ultimately denied by the state trial court judge. Upon the finding of guilt, Petitioner was sentenced to: Count 1: Thirty (30) years in the care and custody of the Oklahoma Department of Corrections and a $10,000.00 Fine; Count 2: Six (6) years in the care and custody of the Oklahoma Department of Corrections and a $1,000.00 Fine; and, Count 3: One (1) year in the County Jail and a $200.00 Fine, all sentences to run concurrently each with the other, with no credit for time served.

A direct appeal was taken before the highest state appellate court. Trial Court's verdict was "affirmed" by published opinion in **2014 OK CR 14** (9/18/2014). Certiorari was sought before this Honorable Court in the matter styled *Patrick Joseph Terry v State of Oklahoma*, in **SCOUS Case No. 14-1064**, filed February 14, 2015. Certiorari was denied by this Court on May 4, 2015. *See*: **135 S.Ct. 2053**

Petitioner then sought relief from the state district court through a properly filed state court post-conviction application on February 25, 2016, which trial Court denied on May 2, 2016. Review of the state district court decision was timely sought before the highest state appellate court in **OCCA Case No. PC-2016-412**. The highest state appellate court affirmed trial court's order denying relief by unpublished opinion on July 21, 2016.

A petition for a writ of habeas corpus was timely filed by Petitioner in the United States District Court for the Northern District of Oklahoma on September 19, 2016 in **Case No. 16-CV-604**. The petition is fully briefed and pending before that Court, the Honorable Terrence Kerns, U.S. District Judge, presiding.

On April 23, 2018, Petitioner filed a second a state court post-conviction petition before the state district trial court in **Ottawa County Oklahoma Case No. CF-2012-242**. The state trial Court judge denied the petition on September 17, 2018. *See:* **Appendix A**. Appeal of the state trial court order was timely sought before the highest state appellate court on October 22, 2018, in **OCCA Case No. PC-2018-1076**. The state appellate court affirmed state trial court's order by unpublished opinion on February 25, 2019. *See:* **Appendix B**

In every action had before both the state district and appellate courts, Petitioner sought Evidentiary Hearing by filing separate, specific motions dedicated to that single request. In all proceedings had before both state district and appellate court's, Petitioner's multiple requests for Evidentiary Hearing were, in each instance, summarily denied.

Summary of the Argument

The Eight (8) Tribes[1] of northeastern Oklahoma's Indian Territory are described in detail by the Congress of the United States of America in the ***Treaty of February 23, 1867*, 13 Stat. 513 (1867), 1867 WL 24064** ("1867 Act") [known also as the ***Treaty with the Seneca, mixed Seneca, Shawnee, Quapaw, and others***] Since the establishment and formal recognition of those eight (8) Indian tribes, and establishment by the Congress of the unique, specific boundaries of the reservation lands unique to each Tribe, the Tribes have maintained strong and resilient governments and presence on their reservation land.

Federal allotment and statehood legislation involving the Eight (8) Tribes near the end of the 19th Century and early years of the 20th Century proved to be consistent with the contemporaneous implementation of federal allotment and assimilation policies throughout the United States. The survival of these tribes and their reservations is all the more remarkable in light of the federal agency policy of suppression of each tribal government. The United States' failure to protect these citizens and their allotments from theft through rampant land frauds throughout the tribal reservations was prevalent in the early twentieth century. Such ongoing theft by fraud was further exacerbated and aided by the State's unlawful exercise of criminal jurisdiction over offenses occurring on such reservation lands.

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[1] The eight (8) tribes are listed as: 1) The Ottawa Indian Tribe of Oklahoma; 2) Eastern Shawnee Tribe of Oklahoma; 3) Miami Tribe of Oklahoma; 4) Confederated Peoria Tribe of Indians of Oklahoma; 5) the Quapaw Indian Nation; 6) the Seneca-Cayuga Nation; 7) the Wyandotte Nation; and, 8) the Modoc Tribe of Oklahoma.

Immediately after statehood, Oklahoma ignored federal statues and state and federal court precedent concerning the jurisdictional status of Indian country. Meanwhile, federal officials waffled in their position regarding the enforcement of federal statues applicable to reservation land, and, until the 1970's, brought few active prosecutions for forgery, fraud, or murder in Indian country in Oklahoma, including crimes related to the taking of Indian lands and minerals.

For over a Century, there has been an unsuccessful state campaign to secure judicial acceptance of the legal fiction that the Indian lands in Oklahoma do not have the same jurisdictional status as Indian lands in other states. This campaign wholly ignores and actively seeks to distract attention away from the wealth of decades old state and federal decisions holding that allotment legislation in the 1890's and early 1900's applicable to the former Indian Territory **did not** destroy the Indian country status of the Indian allotments, tribal fee lands, and tribal trust lands or grant jurisdiction over these lands to the state. The reasoning in those decisions uniformly applies to reservations the same as it applies to those other forms of Indian country.

After the civil war, westward expansion caused a "shrinking reservoir of 'vacant' land". Frederick E. Hoxie, ***A Final Promise: the Campaign to Assimilate the Indians*, 1880 – 1920 (2001), ("Hoxie") at 43.** Federal policy began to shift, in part due to political, economic and commercial expansion, as well as the efforts of well-meaning East Coast reform associations that campaigned for Indian equal rights. ***Hoxie* 2-3, 11-13** The resulting assimilation and allotment

policy became a dominant force in the late 1800's. The Congress desired that Indians receive their share of tribal lands, yet rushed the process in an effort to allow settlers to acquire the remaining, 'unappropriated' lands. The stated goal was to help the Indians to learn farming from non-Indian farmers, and, thus, transform the Indians into prosperous citizens. **D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, 8-9, 12-22, 77-80 (Francis Paul Prucha edition; University of Oklahoma Press, 1973) ("Otis"); *Hoxie*, at 75.** Reservation dismantlement and tribal dissolution nationwide were also goals held by some federal policy makers, especially in the allotment era. ***Id.* at 11-12; 1885 *Ann. Rep. of Comm. Ind. Aff.* 26 (October 5, 1885).**

The Congress sought to implement the assimilation and allotment policy nationwide for a number of reasons. None of these reasons suggest or support a theory that allotment, reservation disestablishment, or tribal dissolution were prerequisites for the formation of Oklahoma or any other state. Such policy implementation, for example, is shown by the treatment of 167 Ottawa Indians in 1891, when each of them were allotted lands, resulting in a surplus of land that was sold by the United States Government. Such action "did no more than to open the way for non-Indian- settlers to own land on the reservation. . . ". ***Solem v Bartlett*, 465 U.S. 463, 474 (1984).**

Critics characterized Indian reservations (regardless of whether owned by the United States in trust for the benefit of a tribe, or, owned by the tribe in fee for the benefit of tribal members) as "communist". ***Otis* 11, 54-55** Criticism of communal ownership was a major factor in the federal push to allot lands in Indian Territory, where it was reported that a relatively small number of tribal citizens maintained control over large areas of land, contrary to the treaties expressing intent that tribal lands were to be held by the tribes for the benefit of all tribal citizens. ***Heckman v United States*, 224 U.S. 413, 434, 438 (1912)**; ***see also*: *Woodward v De Graffenried*, 238 U.S. 284, 297, 305 (1915)** Allotment was intended to eliminate these land monopolies, to enable tribal citizens to enjoy equal benefit of the land as required by treaties, and "to educate the Indians in the benefits to be derived from separate occupancy and enjoyment of the land." ***Woodward*, 238 U.S. at 297, n. 2, 309**

The outcry for lands by the large non-Indian population that surrounded reservations in the western United States by the late nineteenth century was another precipitating factor. As Texas and Kansa "began to be filled up with settlers, longing eyes were turned by many upon this body of land lying between them, occupied only by Indians." ***Smith v Townsend*, 148 U.S. 490, 493 (1893)** The non-Indian population flowed onto tribal lands in Indian Territory, ***Marlin v Lewallen*, 276 U.S. 58, 61-62 (1928)** disregarding repeated proclamations by successive presidents "warning against such entry and occupation" in 1879, 1880, 1884 and 1885. ***Smith*, 148 U.S. at 495-96** This influx of non-Indian settlers was

characterized by including settlement in towns mostly occupied by non-Indians who, while having no legal claim to the underlying land, erected improvements "worth many thousands of dollars". ***Johnson v Riddle*, 240 U.S. 467, 476-77 (1916)** This caused Congressional concern regarding the "equities" between the tribes who owned the lands and non-citizens who had built the town site improvements. ***Id.*, 240 U.S. at 477** As a "logical part" of the allotment policy, there were "frequent allusions to the fact that the Indians were, of course, making no use of the natural resources which should be developed in the interests of civilization." ***Otis* 17-18**

I. UNLAWFUL STATE PROSECUTIONS OF CRIMINAL OFFENSES DOES NOT PRESENT AS EVIDENCE OF RESERVATION DISESTABLISHMENT.

A. Introduction.

The state's prosecution of offenses on the reservation of the Eight (8) Tribes involving Indian offenders and/or victims with federal acquiescence does not present as evidence supporting reservation disestablishment or diminishment. These prosecutions by the state were contrary to federal statutes and state and federal decisions concerning the allocation of state and federal jurisdiction by the ***Act of June 16*, 1906, ch. 3335, 34 Stat. 267** ("Enabling Act"). When state jurisdiction over Indian country in the former Indian Territory was challenged in the 1980's, state and federal courts specifically rejected arguments that the ***Act of June 7, 1897*, ch. 3, 30 Stat. 62, 83** ("1897 Act"), the ***Act of June 28, 1898*, ch. 517, 30 Stat 495** ("Curtis Act"), and the Enabling Act conferred jurisdiction to the state over all crimes arising in the former Indian Territory.

B. Criminal Jurisdiction in Indian Territory

B. 1. General Crimes Act and Major Crimes Act

The policy of the United States concerning criminal prosecutions in "the Indian country" began with federal enactments as early as 1796. ***Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)** As of 1883, this federal policy was embodied in the General Crimes Act ("GCA") (a/k/a the "Indian Country Crimes Act"), **Rev. Stat. §§ 2145, 2146**, codified as amended at **18 U.S.C. § 1152. *See*: *Ex parte Crow Dog*, 109 U.S. at 558** Offenses enumerated and defined under the general laws of the United States which were committed in "the Indian country" by Indians against "white persons", and by "white persons" against Indians[2] were federal offenses, and those committed by Indians against each other in "the Indian country' were left to each tribe according to local custom. ***Id.*, 109 U.S. at 571-72** (murder of Indian by another Indian on Sioux reservation subject to tribal, rather that federal, jurisdiction under **§ 2146**).

In direct response to the decision in *Crow Dog*, the Congress enacted the Major Crimes Act, ***Act of March 3, 1885*, ch. 341, § 9, 23 Stat. 362, 385** ("MCA") (now codified, as amended, at **18 U.S.C. § 1153**; **see *United States v Kagama*, 118 U.S. 375, 383-83 (1886); *United States v John*, 437 U.S. 634, 649 n. 18 (1978)** MCA conferred federal jurisdiction over certain enumerated major crimes by

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[2] The federal government did not recognize tribal criminal jurisdiction over non-citizens in Indian Territory. **1886 Ann. Rep. of Comm. Ind. Aff. 91** It first began serious effort to address the problem of non-Indian lawlessness by conferring criminal jurisdiction on federal courts located in adjacent states over offenses by the intruders, and late by establishing a federal court in Indian Territory. *See infra*, n.5.

an Indian offender against an Indian or non-Indian victim, including murder, when committed on an "Indian reservation" within a state. **§ 9, 23 Stat. 362, 385.** [3]

B. 2. 1890 Act, 1895 Act and 1897 Act

In 1890, Congress authorized the establishment of a territorial government in portions of western and central Indian Territory, to be known as the Oklahoma Territory. ***Act of May 2, 1890*, ch. 182, §§ 1-28, 26 Stat. 81** ("1890 Act"). The Five (5) Tribes reservations and a small area occupied by eight (8) tribes served by the Quapaw Agency remained in the reduced Indian Territory. **§§ 29-44, 26 Stat. 93-100**[4]

The **1890 Act** divided jurisdiction over Indian Territory among three (3) United States District Courts previously authorized to serve Indian Territory.[5] **§ 33-35, 26 Stat. 81, 96-97** As courts of local jurisdiction, these courts enforced certain

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[3] Reservation lands include fee lands within reservation boundaries. ***United States v Celestine*, 215 U.S. 278, 284-87 (1909)** In 1948, MCA was amended to replace the term "reservation" with the broader term "Indian country", which was "used in most of the other special statutes referring to Indians . . . ". *See:* ***United States v John*, 437 U.S. at 647 n. 16, 649** (citing **18 U.S.C § 1153).** The 1948 amendments also added a definition of "Indian country" based on this Court's definitions of Indian country in decisions issued after enactment of MCA. **18 U.S.C § 1151;** ***see Donnelly v United States*, 228 U.S. 243 (1913)** (reservations); ***United States v Sandoval*, 231 U.S. 28, 47 (1913)** (dependent Indian communities); United ***States v Pelican*, 232 U.S. 442 (1914)** (trust allotments); and, ***United States v Ramsey*, 271 U.S. 467, 469 (1926)** (restricted allotments).

[4] It is this small area occupied by the eight (8) tribes as established by Congress, **1867 Act**, where the search incident to arrest occurred, which was the Genesis initiating the prosecution and ultimate conviction in Ottawa County Oklahoma felony Information CF-2012-242. This fact was affirmed by the state district court judge in the order of September 17, 2018. **Appendix A, at 5**

[5] See: ***Act of January 31, 1877*, ch. 44, 19 Stat. 230** (federal court in Ft. Smith, Arkansas); ***Act of January 6, 1883*, ch. 13, § 3, 22 Stat. 400** (federal court for Northern District of Texas with jurisdiction over offenses in described areas not set apart for any of the Five Tribes "against any of the laws of the United States now or that may hereafter be operative therein); ***Act of March 1, 1889*, ch. 333, §§ 1, 5, 25 Stat. 783** (federal court in Muskogee, Indian Territory, with jurisdiction over "all offenses against the laws of the United States committed within the Indian Territory. . . not punishable by death or by imprisonment at hard labor").

listed Arkansas laws, except "if in conflict with this act or with any law of Congress" and enforced Arkansas criminal laws "as far as applicable". **§§ 31, 33, 26 Stat. 81, 94, 96.** The application of Arkansas laws in Indian Territory was "merely provisional", to establish a body of laws for "matters of local or domestic concern" in the absence of a territorial government over Indian Territory. ***Shulthis v McDougal*, 225 U.S, 561, 571 (1912)** The federal courts in Indian Territory additionally enforced general federal laws, such as GCA, consistent with the **1890's Act's** requirement that "all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole jurisdiction of the United States . . . . . shall have the same force and effect in the Indian Territory as elsewhere in the United States". **§ 31, 26 Stat. 81, 94** In cases where the laws of the United States and the laws of Arkansas concerned the same offense, "the laws of the United States shall govern as to such offense". ***Id.* at § 33** "The tribes, however, retained exclusive jurisdiction over all civil and criminal disputes involving only tribal members, and the incorporated laws of Arkansas did not apply to such cases. ***See Id.* at § 30, 26 Stat. at 94**". ***Indian Country, U.S.A. v Oklahoma ex. rel. Okla. Tax Comm'n.*, 829 F.3d 967, 977-78 (10th Cir. 1987) *cert. denied* 487 U.S. 1218 (1988)**

In 1895, Congress repealed all laws that had previously conferred jurisdiction on the western district of Arkansas and the eastern district of Texas over certain offense committed in the Indian Territory, effective September 1, 1896. *See*: ***Act of March 1, 1895*, ch. 145, 28 Stat. 693** ("1895 Act"). The 1895 Act provided that "the

jurisdiction now conferred by law upon said courts is hereby given from and after said date aforesaid to the United States in Indian Territory", and created three (3) districts for that court. **§§ 1, 9, 28 Stat. 693, 697** It gave the courts in Indian Territory "exclusive original jurisdiction of all offenses against the laws of the United States" committed in Indian Territory. ***Id.* at § 9** The 1895 Act further provided that the laws of the United States and Arkansas "heretofore put in force in said Indian Territory", were to remain in "full force and effect" in Indian Territory, except so far as they were in conflict with the 1895 Act.

Two years later, Congress enacted the ***Act of June 7, 1897*, ch.3, 30 Stat. 62, 83** ("1897 Act") which was designed to coerce the tribes to negotiate with the Commission". ***Muscogee (Creek) Nation v Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988)** The 1897 Act provided that after January 1, 1898, the federal courts in Indian Territory "shall have original and exclusive jurisdiction and authority to try and determine all . . . criminal causes for the punishment of any offense committed" after that date. **30 Stat. 62, 83** It further provided that "the laws of the United States and the State of Arkansas in force in the [Indian] Territory shall apply to all persons therein, irrespective of race, said [federal] courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes." ***Id.*** (emphasis added) This effectively "broadened the jurisdiction of the federal courts". ***Indian Country, U.S.A.*, 829 F.2d at** **977-78** and in so doing, had the collateral effect of divesting the tribal courts of their exclusive jurisdiction over cases involving tribal members.

The language in the 1897 Act added an escape mechanism by providing that any agreement with a tribe, when ratified, would "operate to suspend any provision of this Act if in conflict therewith as to said nation". **30 Stat. 62, 83** Congress understood that the threat to end exclusive tribal jurisdiction over tribal members, together with this provision, was "was intended to drive them into an agreement with the Dawes Commission, and if they do not agree to it, they shall get this terrible blow . . .". **29 Cong. Rec . 2310 (1897)** (Bates, U.S. Senator, who concluded that "one of the ugly features in this . . . is that while we are holding out the hand of negotiation, we hold in the other hand a bludgeon with which to brain the Indian".)

This form of coercion continued with the passing by Congress of the ***Act of June 28, 1898*, ch. 517, 30 Stat. 495** ("Curtis Act"), which included numerous provisions related to the division of tribal lands into allotments for the use and occupancy of tribal citizens. Significantly, the Curtis Act contained language that provided measures for the potential abolishment of "all tribal courts in Indian Territory" and the transfer of tribal court cases to the federal court in Indian Territory, effective July 1, 1898. ***See* § 28, 30 Stat. 495, 504-05**

B. 3. 1906 Oklahoma Enabling Act

In 1906, Congress enacted the Oklahoma Enabling Act, ***Act of June16, 1906, ch. 3334, Pub. L. No. 59-233, 34 Stat 267*** ("Enabling Act"). While paving the way for statehood, Congress mandated that no provision in the Oklahoma Constitution would have language that would "limit or impair the rights of person or property pertaining the Indians of said Territories" or "limit or affect the authority of the government of the United States to make any law or regulation respecting such Indian, their land, property, or other rights." **Enabling Act, § 1** Such language, thus, ensured "the control of the United States of the large Indian reservations . . . . of the new state." ***Coyle v Smith*, 221 U.S. 559, 570 (1911)**

The passage and publication of the **Enabling Act** definitively ended all speculation as to the scope of the **1897 Act**, by replacing the application of Arkansas laws after statehood with the "laws in force in the Territory of Oklahoma, *as far as applicable* . . . ."[6] "until changed by the legislature thereof." **§ 13, 34 Stat. 267, 275** (emphasis added) **§ 16**, as amended in 1907, required the transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within the Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts. " ***Act of March 4, 1907*, ch. 2911, § 1, 34 Stat.**

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[6] Limitation on the authority and applicability of state criminal statutes on the reservations of the eight tribes is reflected not only in the history leading up to the passage of the **Enabling Act**, but in the specific language contained in the GCA, aka Indian Country Crimes Act, ***Act of March 4, 1909*, ch. 321, § 2899, 35 Stat. 1145** (codified as amended at **18 U.S.C. § 13**). This Court has determined that the GCA authorizes federal courts to apply state laws defining offenses and punishments for such offenses in the Indian country within the state, in the absence of a federal law defining such offenses. ***Williams v United States*, 327 U.S. 711, 718 (1946)**

1286 This includes crimes under the GCA and MCA. ***United States v Ramsey*, 271 U.S. 467, 469 (1926)**

Conversely, **§ 20** of the **Enabling Act**, as amended in 1907, established state courts as successors to federal courts in Indian Territory for those civil and criminal cases that were not transferred to the new federal court. **§ 3, 34 Stat. 1286, 1287** The **Enabling Act**, thus, ensured and preserved federal jurisdiction over Indians and their lands and required the state to disclaim all rights and title to such lands. The Oklahoma Constitution contains the required disclaimer. **Okla. Const. Art. 1, § 13**

Courts, too, recognized that the reservation endured. After passage of the **Enabling Act**, the Court in ***U.S. Express Co. v Friedman*, 191 F. 673 (8th Cir. 1911)** rejected the argument that the "Indian Territory ceased to be 'Indian Country' upon the admission of Oklahoma as a state", observing, specifically, that the Five tribes "owned about 3,000,000 acres or more of land" and, as such, "[i]t would indeed be difficult to show how the land ceased to be Indian country." ***Id.*, at 678-79**

B.4. 1956 Act

The state district court's order of September 17, 2018 (**Appendix A**) denying relief relied significantly on Congressional passage of the ***Act of August 3, 1956*, Public Law 943, ch. 909, 70 Stat. 953** ("1956 Act") as authority to justify the judicial determination that "Petitioner has failed to provide any support for the proposition that the situs of the crime was in the Indian Country of the Ottawa

Tribe . . . [or] . . . on any clearly recognized 'Indian Country' . . . ". (**Appendix A, at 6**) Such reasoning is clearly misplaced. Review of the **1956 Act** reveals that no language contained therein expressly demonstrates Congressional intent to diminish the reservation boundaries set by the Congress in the **1867 Act** as to the Ottawa Indian Tribe and others.

While state trial court Judge reasoned that language contained in **§13** proved to be compelling as authority supporting his decision to deny relief, such conclusion lacks foundation. No language contained in **§13**, specifically, or in any other section of the **1956 Act**, suggest that Congressional intent at that time was focused on diminishing or disestablishing the reservation boundaries set in the **1867 Act.** [7]

Facts being troublesome things, ***John Adams, 1771***, the continued recognition by Congress of the tribal reservation of the Ottawa Indian Tribe is seen in the **1956 Act's** language at **§11**. There, the Congress directed that "[N]othing in this Act shall abrogate any water rights of the Ottawa Tribe or its members." Inherent in such language is the reaffirmation of this Court's decision in ***Winters v United States*, 207 U.S. 564 (1908)** where this Court held that the creation of an Indian reservation carries an implied right to unappropriated water "to the extent needed to accomplish the purposes of the reservation." ***Crow Creek Sioux Tribe v United States*, 900 F.3d 1350, 1352 (D.C. Cir. Aug. 17, 2018) citing *Cappaert v United States*, 426 U.S. 128 (1976).**

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[7] See: ***May v Seneca-Cayuga*, 711 P.2d 77 (Okla. 1986)**, where Oklahoma's Supreme Court held: "[T]hese lands, embracing those of several other tribes in eastern Indian territory, including the Seneca's, were described as a 'reserve' or 'reservation' in the ***Omnibus Treaty of February 23, 1867*, Arts 4 and 6, 15 Stat. 513** . . . Title to the land also survived further changes in tribal affiliations and land holdings." ***Id.* 711 P2d at 79, & n, 11.**

These reserved rights are known as ***Winters*** rights. "They arise as an implied right from the treaty, federal statute or executive order that set aside the reservation, and they vest on the date of the reservations creation." ***Winters,* 207 U.S. at 576-77** The Congressional understanding of the ***Winters*** rights of the Ottawa Tribe in their reservation is manifest in the clear and unambiguous language of **§11.**

C. Conclusion.

Congress characterized the lands established by passage of the **1867 Act** for the Ottawa Indian Tribe as a "reservation" at **Art. 16**, and has never since passed legislation in any form which diminished, or disestablished those boundaries using express language of 'cession' since that date. *See:* ***South Dakota v Yankton Sioux Tribe,* 522 U.S. 329 (1894 Act); *Solem,* 465 U.S. at 464 (1908 Act); *Rosebud Sioux Tribe v Kneip,* 430 U.S. 584, 585 (1977) (Acts of 1904, 1907 and 1910); *DeCoteau v Dist. Cty. Ct. for Tenth Judicial District,* 420 U.S. 425, 441-42 (1975) (1891 Act); *Mattz v Arnett,* 412 U.S. 481, 184-85 (1973) (1892 Act); and, *Seymour v Supt, Wash. State Penitentiary,* 388 U.S. 351, 354 (1962) (1906 Act).**

Reasons for Granting the Writ

II. THE STATE OF OKLAHOMA LACKED JURISDICTION TO PROSECUTE PETITIONER BECAUSE THE *INDIAN COUNTRY CRIMES ACT* GIVES THE FEDERAL GOVERNMENT EXCLUSIVE JURISDICTION TO PROSECUTE CRIMES COMMITTED BY INDIANS IN INDIAN COUNTRY.

The state district court prosecutor argued at trial that the search incident to arrest occurred at a residence occupied by Petitioner with a physical address of 510 East Central Avenue, Miami, Oklahoma (*See*: Trial Transcript I 52, 54-56; *and, see*: **State's Exhibit No. 5**, admitted at trial, Transcript I 56) Such location was alleged to be within 2000 feet of the physical boundary of NEO A&M College. What remains yet to be resolved is this: was the location of the search incident to arrest within the physical boundary set by Congress in the **1867 Act** as to the reservation of the Ottawa Indian Tribe?

Given the state district Court's determination that Petitioner is, in fact, an enrolled member of the Cherokee Nation, and that he is "as such [is] an Indian as set forth in **18 U.S.C. § 1151**" **(Appendix A, at 3)** the status of the geographic location of the search incident to arrest is all that remains unresolved. Petitioner asserts that this Court should conclude that reservation boundary remains intact today and therefore, the crimes were committed in 'Indian country'. Mr. Terry, a Cherokee citizen, should have been charged, prosecuted and convicted in either Federal or tribal court.

A. Discussion.

The court below concluded that petitioner is an "Indian as set forth in **18 U.S.C. § 1151**". **(Appendix A, at 3)** Petitioner now presents argument and evidence supporting the conclusion that the location of the search incident to arrest lay geographically within the boundary established by Congress in the **1867 Act**; that this fact is beyond dispute; and, that such location was, and is, "Indian country'.

Mr. Terry, therefore, is subject to the provisions of the ***Indian Country Crimes Act*, 18 U.S.C § 1152. ("Act")**

The violations alleged under Oklahoma's ***Uniform Controlled Dangerous Substances Act*** as to Counts 1, 2 and 3 of Ottawa County Oklahoma Felony Information CF-2012-242 were exclusive to Federal or tribal prosecutions. Such interpretation of state violations of statutory drug offenses has been uniformly accepted. *see*: ***United States v Blue*, 722 F.2d 383, 384 (8th Cir. 1983).**[8] Oklahoma's prosecution, conviction and incarceration in the state prison system for such criminal acts must be seen as *void ab initio*.[9] Under the ***Indian Country Crimes Act***, Mr. Terry "shall be tried in the same courts and in the same manner as are all persons committing such offenses within the exclusive jurisdiction of the United States." **18 U.S.C. § 3242**

Petitioner moved both the state district court and state appellate court for Evidentiary Hearing pursuant to **22 O.S. § 1084** to resolve two (2) questions: 1) is petitioner an Indian? and, 2) did the crime occur in 'Indian country'? Both state courts denied each request, although the state district court concluded that, as to question 1, Mr. Terry is an "Indian".

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[8] The use of ***Blue*** by the state district court Judge fact-finder was primary to the judicial determination warranting denial of the Petition. (**Appendix A, at 3**) The state district court Judge, it appears, misapprehended or misapplied ***Blue's*** legal conclusions. The Court in ***Blue***, and the language therein, serves eloquently to support Petitioner's argument that, as an Indian committing criminal drug offenses in the 'Indian country', the ***Indian Country Crimes Act*** was the only lawful statutory provision, dictating that the crimes were exclusive to Federal prosecution.

[9] "Being so, the lack of judicial power inherent in every stage of the proceedings by which color of authority is sought to be imparted to the void judgment, and a subsequent order by the same court denying a motion to vacate such void judgment is likewise void for the same reason." ***Neal v Travelers Ins. Co.*, 188 Okla. 131, 106 P.2d 811, 814, 1940 OK 314**

B. Analysis.

The Congress of the United States has defined 'Indian country' broadly to include three (3) general categories: (a) Indian reservations; (b) dependent Indian communities; and, (c) Indian allotments. *See:* **18 U.S.C 1151; *and see: Okla. Tax Comm'n v Sac and Fox Nation,* 508 U.S. 114, 123 (1993).** It is the 'reservation clause' that is most relevant to the question presented here. All land within the borders of an Indian reservation – regardless of whether the tribe, individual Indians, or non-Indians hold title to a given tract of land – is 'Indian country' unless the Congress has disestablished the reservation or diminished its borders.

The term "Indian reservation" has been used in various ways to define 'Indian country'.[10] ***Indian Country, U.S.A.,* 829 F.2d at 973,** citing ***Cohen's Handbook of Federal Indian Law,* at 34-38 (R. Strickland ed., 1982)** Gradually, the term has come to describe 'federally protected Indian tribal lands", ***Id.* at 35, n. 66**, meaning those lands which the Congress has set aside for tribal and federal jurisdiction. ***cf. Solem*, 465 U.S. at 468-69**

Only Congress may disestablish or diminish an Indian reservation. ***Nebraska v Parker*, 136 S.Ct. at 1082.** Once 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

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[10] A formal designation of Indian lands as a reservation is not required for them to have 'Indian country' status. ***Indian Country, U.S.A.,* 829 F.2d at 973** This Court has determined that Congress's definition of 'Indian country' in `**18 U.S.C. § 1151 (a)** "squarely puts to rest" this argument. *see:* ***Seymour v Supt*, 368 U.S. at 357** Under **§ 1151(a)**, therefore, all lands within the boundaries of a reservation have 'Indian country' status.

explicitly indicates otherwise. ***Solem*, 465 U.S. at 479**, citing ***Celestine*, 215 U.S. at 285**. Applying this Court's test to determine whether the Congress has acted to diminish the boundaries of the Ottawa Indian Reservation since its establishment by that body through passage of the **1867 Act**, it is clear that Congress has not done so.[11]

B. 1. Federal Imposition on the Indian Tribal Nations.

While making solemn promises and guarantees to the Indian people, the United States adopted a policy aimed at completely extinguishing the Indian Nations right to their native lands. ***Choctaw Nation v Oklahoma*, 397 U.S. 620, 623 (1970)** Pursuant to this policy, the Cherokee Nation was compelled to agree to a treaty with the United States, exchanging their aboriginal domain in the East for more than 14,000,000 acres of land west of the Mississippi River, then in Indian Territory but now a part of Oklahoma. **397 U.S. at 636 (Douglas, J, concurring)** When making these agreements, the United States also imposed certain reservations. Specific to the question at issue was the stipulation that this area was reserved by 'any rights to the lands assigned the Quapaw's, which turned out to be within the bounds of these Cherokee lands'. **397 U.S. at 636** Such assignment of land to the Quapaw Indian Nation can now been seen as the Genesis creating the specific area of land which, ultimately, was described by Congress when establishing the borders of the Ottawa Indian Tribe at **Art. 16** of the **1867 Act**.

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[11] Courts do not lightly infer that Congress has exercised its power to disestablish or diminish a reservation, ***DeCoteau*, 420 U.S. at 444** (holding that "[The Supreme] Court does not lightly conclude that an Indian reservation has been terminated) Congress can so act to disestablish or diminish any reservation, but its intent "must be 'clear and plain'". ***Yankton Sioux Tribe*, 522 U.S. at 343** (quoting ***United States v Dion*, 476 U.S. 734, 738-39 (1986)**)

These treaties were imposed on the Indians and they had no choice but to consent. As a consequence, this Court has often held that such treaties with the Indians must be interpreted as they would have understood them, **397 U.S. at 631** (citing ***Jones v Meehan*, 175 U.S. 1, 11 (1899)**) and any doubtful expressions in them should be resolved in the Indians favor. ***Id.***, citing ***Alaska Pacific Fisheries v United States*, 248 U.S. 78, 89 (1902)**

B.2. Treaty History of the Ottawa Indian Tribe.

The Ottawa Indian Tribe, through a series of treaties executed during the late 18th and early 19th centuries, was displaced from Northern Ohio to Kansas and, then later, to Oklahoma, where it members reside today. ***Ottawa Tribe of Oklahoma v Logan*, 577 f.3d 634 (6th Cir. 2009)** No less than twenty-three (23) such treaties are memorialized under the Acts of the Congress of the United States to effect this migration of the Ottawa Indians.

The last, controlling Act of Congress addressing the Ottawa Indian Tribe, established the boundary of the Ottawa Indian reservation. **Art. 16, 1867 Act** It is within such borders established then that the search incident to arrest occurred on July 12, 2012. Such land established by Congress on February 23, 1867, was then, and remains still today, an Indian reservation and falls within the definition of what is 'Indian country'.

Noting that "[I]t is desirable that arrangements should be made by which portions of certain tribes, parties hereto, now residing in Kansas, should be enabled to remove to other lands in the Indian country south of that state", **1867 Act**, at 1,

paragraph 2. Congress specifically provided for the acquisition of land to be ceded under specific Articles of the **1867 Act** to the various tribes mentioned as parties to the agreement. Relevant to the question presented here is the language found at **Articles 1, 2, 3** and **16**,[12] specifically, with detailed descriptions of the geographic character of the land itself. Congress ensured then that the Ottawa Indian Tribe received some 14863 acres of land;[13] how such land was acquired from other Indian tribes; where such land was located; and, how the boundary of such lands were

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12 *See*: ***Treaty of February 23, 1867*** **(1867 Act) 15 Stat. 513, 1867 WL 24064:**

> **Article 1** established (in part) that: "[T]he Seneca cede to the United States a strip of land on the north side of their present reservation in the Indian country; the land so ceded to be bounded on the east by the State of Missouri, on the north by the north line of the reservation, on the west by the Neosho River and running south . . . ".
>
> **Article 2** established (in part) that: "[T]he Senecas now confederated with the Shawnee and owning an undivided half of a reservation in the Indian country immediately north of the Seneca reservation mentioned in the preceding article, cede to the United States one-half of said Seneca and Shawnee reserve, which it is mutually agreed shall be the north half, bounded on the east by the State of Missouri, north by the Quapaw reserve, west by the Neosho River, and south by an east west line . . . ".
>
> **Article 3** established (in part) that: "[T]he Shawnee, heretofore confederated with the Senecas, cede to the United States that portion of their remaining lands, bounded as follows, beginning at a point where Spring River crosses the south line of the tract in the second article ceded to the United States, thence down said river to the south line of the Shawnee reserve, thence west to the Neosho River, thence up said river to the south line of the tract ceded in the second article, and thence east to the place of the beginning. . . ".
>
> **Article 16** established (in part) that: "[T]he west part of the Shawnee reservation, ceded to the United States by the third article, is hereby sold to the Ottawas, at one dollar per acre; and for the purpose of paying for **said reservation** the United States shall take the necessary amount . . . "

Id.**, 15 Stat. 513, 1867 WL 24064**

13 *source*: Ottawa Tribe of Oklahoma, ***Oklahoma Indian Tribe Education Guide***, July 2014, Oklahoma Historical Society source for Indian Removal Information: www.ottawatribe.org; *and see*: http://digital.library.okstat.edu/encyclopedia/entrie/i/in015.html

uniquely defined, clearly recognized and firmly and finally established such that it can be recognized today.

Clearly, the **1867 Act** addresses the area of land within the triangle formed on the southwest by the Neosho River, on the north by the State of Kansas and on the east by the State of Missouri. As to the area sold to the Ottawa Tribe for their reservation in **Article 16**, such language should be understood to describe the strip of land bordered on the west by the Neosho River, between Township 27 North and Township 28 North, and 23-24 East. *see*: *Department of the Interior Commission to the Five Civilized Tribes* **Map** © 1903[14] The Ottawa Indian Tribe still maintains a strong relationship with this area of land as of this date.

B. 3. The Ottawa Indian reservation has not been disestablished or diminished since its establishment by Congress in the 1867 Act.

This Court reaffirmed three terms ago that ***Solem v Bartlett*** provides the "well settled" framework for assessing disestablishment. ***Parker*, 136 S.Ct. at 1078-79** "[O]nly Congress can divest a reservation of its land", and Congressional intent must be "clear". ***Solem*, 465 U.S. at 470** In analyzing reservation boundaries, this Court directs that such analysis start with "statutory language" (the "most probative" indication of Congressional intent), then turn to "circumstances surrounding the" statutes (less probative), and then "subsequent history" (least probative). ***Parker*, 136 U.S. at 1079, 1081** (quotations omitted)

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14 Relevant to the question presented is the incontrovertible fact that the location of the search incident to arrest lay within such grid coordinates, some 1500 feet east of the Neosho River. *see:* **Appendix D, MAP © 1903**

The Ottawa Indian reservation has not been diminished or disestablished since established with the passage of the **1867 Act**.[15] As the Honorable Mr. Justice Marshall pointedly observed:

> "[A]lthough the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific Congressional purpose of diminishing reservations with the passage of every surplus land act. Rather, it is settled law that some surplus land acts diminished reservations and other surplus land acts did not. . . ".

***Solem*, 465 U.S. at 468-69**

To distinguish Congressional acts that changed a reservation borders from those "that simply offered non-Indians the opportunity to purchase land within established reservation boundaries" this Court has developed a three-part framework. ***Id.*, 465 U.S. at 470**[16] Under such scrutiny, it is clear that the

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15 The Ottawa Indian Tribe is a federally recognized Indian Tribe in what is today northeastern Ottawa County, Oklahoma, organized under the ***Oklahoma Indian Welfare Act*** of **June 26, 1936, Ch. 831, 49 Stat. 1967** (codified, as amended, at **25 U.S.C. §§ 5201 through 5210**); federal relationship modified under the **1956 Act, *see supra*, 16, 17, 18**; federal recognition reestablished when Ottawa Indian Council and Congress ratified a new Constitution and Bylaws on October 15,1979, as approved by the Acting Deputy of Indian Affairs.

The Ottawa Indian Nation is listed as one of the ***Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*** published as a "Notice", pursuant to **§ 104 of the *Act of November 2, 1994*, Pub. L. 103-454, 108 Stat. 4791, 4792,** in the ***Federal Register*, Vol. 80, No. 9.**

16 **First:** ***Solem*** instructs Courts to examine the test of the statute purportedly disestablishing or diminishing the reservation. Statutory language is the most probative evidence of Congressional intent. **465 U.S. at 470** The analysis, *supra*, at 9 through 16, shows no diminishment

Second: ***Solem*** requires Courts to examine events surrounding the passage of the statute purportedly disestablishing or diminishing the reservation. **465 U.S. at 471**

Third: ***Solem*** considers, though "to a less3er extent" "events that occurred after the passage" of the relevant statute. This evidence can include Congresses own treatment of the area and the manner in which the bureau of Indian Affairs dealt with the un-allotted open land. **465 U.S. at 471-72**

reservation boundaries remain intact today, and, specifically, on July 12, 2012, the date of the search incident to arrest.

The strong tribal presence in the opened area has continued until present day. The seat of Tribal Government is now located in a town in the opened area where most important tribal activities take place. ***Solem,* 465 U.S. at 480**[17] Absent substantial and compelling evidence, of which there is none, Courts must be bound by traditional solicitude for the Indian Tribe. Based on the evidence, it is apparent that the Ottawa Indian Tribe and the other Eight (8) Tribes present as operating, vibrant and viable entities as defined by statute and case law.

B. 3. a. Under *Solem's* First and "Most Probative" Step, No Statute Disestablished the Ottawa Indian Tribal Reservation or the Reservation of Any of the Other Eight (8) Tribes.

Parker confirms that the disestablishment test is stringent and text-focused. "[O]nly Congress can "disestablish"; "its intent . . . must be clear"; and statutory text is the most "probative evidence" of that intent. **136 S.Ct. at 1078-79 (**quoting ***Solem*, 465 U.S. at 470;** *and, see* ***Hagen*, 510 U.S. at 411)** The analysis in ***Parker*** "beg[a]n with the text" and, finding no diminishment, "conclu[ded] that Congress did not intend to diminish" ***Id.* at 1079-80** The ***Parker*** Court duly examined ***Solem's*** two other factors but was unwilling to let "mixed historical evidence . . . overcome the lack of clear text[]".***Id.* at 1080** This case demands the same result.

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17 The Ottawa Indian tribe issues its own vehicle license tags ***see: Oklahoma Tax Comm'n v Sac and Fox Nation*, 508 U.S. 114 (1993)** The tribe operates two (2) tribal smoke shops; one gas station; the *Otter Stop Convenience Store* (located less than 1200 feet from the location of the search incident to arrest); and, one casino, the *High Winds Casino*. The Ottawa Indian Tribe conducts an annual Pow-Wow, which is held annually every Labor Day weekend.

B. 3. b. *Solem's* Text-Focused Test Protects Bedrock Principles.

Three (3) principles guide ***Solem's*** first step. First, because only Congress can disestablish reservations, ***Celestine*, 215 U.S. at 285**; *see* ***Parker*, 136 S.Ct. at 1078-79**, Congressional intent is paramount – and statutory text is the only unfailing evidence of Congress's intent. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." ***Conn. Nat'l Bank v Germain*, 503 U.S. 249, 253-54 (1992)** Across substantive areas, the alpha and omega of statutory interpretation is the text. *e.g.*, ***Nat'l Ass'n of Mfrs' v Dep't of Def.*, 138 S.Ct 617, 630-31 (2018)**; ***Ratzlaf v United States*, 510 U.S. 135, 146-48 (1994)** As ***Parker*** confirms, this remains true in Indian reservation cases. **136 S.Ct. at 1079**.

Second, the standard is especially demanding for sovereign rights. This rule, again, is not Indian-specific. *e.g.*, ***Nev. Dep't of Human Res. v Hibbs*, 538 U.S. 721, 726 (2003)** (abrogation of immunity must be "unmistakably clear"); *see* ***Raygor v Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002)** But the rule applies to Tribes, too. ***Parker*, 136 S.Ct at 1079**; *see* ***Michigan v Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2031 (2014)** Appeals to "vague notions of . . . 'basic purpose'," ***Mertens v Hewitt Assocs.*, 508 U.S. 248, 261 (1993)**, cannot justify abrogating sovereign rights.

Third, Indian-specific principles reinforce these rules. Although a statute "may abrogate Indian Treaty rights", Congress "must clearly express its intent" ***Minnesota v Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03**

(1999) Likewise, statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." ***Cty. of Yakima v Confederated Tribes and Bands of Yakima Indian Nations*** **502 U.S. 251, 269 (1992)**; *see* ***Yankton Sioux Tribe*****, 522 U.S. 344** These principles confirm that the test is text driven.

B.4. Statutes Show that Congress Did Not Disestablish the Ottawa Indian Reservation

The simple, dispositive, and undisputed point is that none of the relevant statutes, from 1890 through statehood, and up to the **1956 Act**, contain clear language of disestablishment. While disestablishment does not require "magic words" neither does a Court conjure disestablishment from thin air. ***Parker*** surveys this Court's disestablishment cases and catalogs the textual "hallmarks" that embody Congress's intent to go beyond altering land title to "diminish reservation boundaries." **136 S.Ct. at 1079** Congress may provide an "[e]xplicit reference to cession" to the United States, or an "unconditioned commitment . . . to compensate the Indian tribes for its opened land." ***Id.*** Congress may restore portions of the reservation to "the public domain", or Congress may use "other language evidencing the present and total surrender of all tribal interests," ***Id.*** – providing, for example, that a reservation is "discontinued," "abolished," or "vacated." ***Mattz*****, 412 U.S. at 504, n. 22;** ***Rosebud Sioux Tribe v Kneip*****, 430 U.S. at 618;** ***Seymour*****, 368 U.S. at 354** Similar formulations may suffice.

Here, there is nothing. There was no "cession" to the United States. The United States did not unconditionally commit to compensate the Ottawa Indians or

the other of the Eight (8) Tribes for its lands. Nowhere did Congress declare the Ottawa Indian Reservation discontinued, abolished or terminated. Under ***Solem's*** text-first test, the Court's have never found diminishment or disestablishment unless some statute, treaty, or agreement spoke clearly to disestablish.

C. Failure to Recognize the Ottawa Indian Reservation as 'Indian Country' Would be Contrary To or An Unreasonable Application of Clearly Established Federal Law as Held by This Court.

In the exercise of war and treaty powers, the United States overcame the Indians and took possession of their lands. "The plenary power of Congress to deal with the special problems of the Indians is drawn both explicitly and implicitly from the Constitution itself. **U.S. Const. Art. I, § 8, cl. 3** provides Congress with the power to regulate Commerce . . . with the Indian Tribes and thus, to this extent, singles Indians out as a proper subject for separate legislation. **U.S. Const. Art. II, § 2, cl. 2** gives the President the power, by and with the advice and consent of the Senate, to make treaties." ***Morton v Mancari,* 417 U.S. 535, 552 (1974)** citing ***Board of County Comm'rs v Seber*, 318 U.S. 705, 715 (1943)**; *see also:* ***Kagama*, 118 U.S. at 383-84** This ability to make treaties has often been the source of the Government's power to deal with the Indian tribes.

The ***Treaty of February 23, 1867*, 15 Stat. 513 (1867) 1867 WL 24064,** referenced though out as the **1867 Act**, clearly set the boundary for the Ottawa Indian Reservation. At no time since, and in no subsequent Act, has Congress declared the Ottawa Indian Reservation discontinued, abolished or terminated. Therefore, under this Court's definition and case law, that land set aside for the

Ottawa Indian Tribe is a reservation under **18 U.S.C. § 1151(a)**. As such, the location of the search incident to arrest in Petitioner's criminal case must be seen as having occurred in the 'Indian country'. No other result to this question can be had.

CONCLUSION

This Court must not in good conscience fail to use the tools of justice to correct a manifest injustice. The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Patrick Joseph Terry 3-Apr-2019

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