21-7017
No. 22[illegible]

SUPREME COURT OF THE UNITED STATES

KENNETH LYNN FUNKHOUSER,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

Kenneth Lynn Funkhouser
#91752
Oklahoma State Penitentiary
P.O. Box 97
McAlester, OK 74502-0097
Petitioner pro se

QUESTION PRESENTED

Does Oklahoma's 1906 Federal Enabling Act preempt the State from exercising jurisdiction over "Indian lands"—despite race—thus rendering petitioner's judgment imposed *void ab initio*?

PARTIES TO THE PROCEEDINGS

Petitioner is Kenneth Lynn Funkhouser.

Respondent is the State of Oklahoma, by and through the Oklahoma Court of Criminal Appeals.

RELATED PROCEEDINGS

Kenneth Lynn Funkhouser v. State of Oklahoma, No. PC-2021-597 (Okla. Crim. App.)

State of Oklahoma v. Kenneth Lynn Funkhouser, No. CF-1983-133 (Tulsa County, Okla. Dist. Ct.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Lynn Funkhouser respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals ("OCCA").

OPINIONS BELOW

The Order of the OCCA affirming denial of post-conviction relief is unpublished but available at Pet. App. 1a-2a. The trial Court's Order denying post-conviction relief is unpublished but available at Pet. App. 36a-38a.

JURISDICTION

The OCCA affirmed the denial of post-conviction relief on November 30, 2021. Pet. App. 1a. This petition is being filed within 90 days of that Order. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Admissions Clause, the Supremacy Clause, the Due Process Clause, and the relevant provisions of Title 18 of the U.S. Code set forth in the appendix (Pet. App. 69a).

INTRODUCTION

The United States promised to reserve certain lands for the Five Tribes in Eastern Oklahoma in the nineteenth century; the U.S. never rescinded those promises; thus, the lands remain reserved to the Five Tribes today. These lands remain "Indian country" within the meaning of the Major Crimes Act (MCA), 18 U.S.C. § 1153(a), which divest Oklahoma of jurisdiction to prosecute "[a]ny Indian"

who committed one of the offenses enumerated while in "Indian country." *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2460-2482 (2020). *See* 18 U.S.C. § 1151 (June 25, 1948, ch. 645, 62 Stat. 757; May 24, 1949, ch. 139, § 25, 63 Stat. 94). Federal jurisdiction under Section 1153 over crimes committed by Indians is exclusive. *United States v. John,* 437 U.S. 634, 651 (1978); *Seymour v. Superintendent,* 368 U.S. 351, 359 (1962); *Williams v. Lee*, 358 U.S. 217, 220 n.5 (1959).

Here, the State of Oklahoma was deprived of subject-matter jurisdiction because of Oklahoma's 1906 Federal Enabling Act (Act of June 16, 1906, ch. 3335, 34 Stat. 267). Congressional intent is clear given there is an explicit preemption to State authority providing that "the people inhabiting said proposed State do agree and declare that they ***forever disclaim*** all right and title in or to... all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States...." *Id.* at §§ 1 and 3 at Third., 267 and 270. This intent is further reinforced within Okla. Const., art. I, § 3, which provides a clear disclaimer of jurisdiction over "Indian lands," or any land held by the federal government.

At no point did Oklahoma have subject-matter jurisdiction over "Indian lands," thus petitioner's judgment and sentence is a nullity, his convictions are *void ab initio,* where his request for relief is not subject to forfeiture or waiver. When there is an absence of subject-matter jurisdiction it renders a judgment *void. Kalb v. Feuerstein,* 308 U.S. 433 (1940). However, this occurs only when there is a plain usurpation of

power, when a court wrongfully extends its jurisdiction beyond the scope of its authority. *Stoll v. Gottlieb,* 305 U.S. 165, 171 (1938); 7 Moore's Federal Practice ¶ 60.25 at 302-3 (2d ed. 1979). A void judgment, as opposed to an erroneous one, is one which from its inception was legally ineffective. *See Williams v. North Carolina,* 325 U.S. 226 (1945); *Jordan v. Gilligan,* 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975). When a State obtains a conviction in violation of the Federal Constitution, it is always a serious wrong, not only to a particular convict, but to Federal law. *Brown v. Allen,* 344 U.S. 443, 544 (1953).

In *Marbury v. Madison,* 5 U.S. 137, 176 (1803), this Court addressed a situation finding that an act of the legislature, repugnant to the constitution, is void. The OCCA's decision in applying "finality" to petitioner's *void ab initio* Judgment is repugnant to the constitution. "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on." *Id.* at *177.*

Oklahoma prosecuted petitioner for a crime allegedly committed on the Muscogee (Creek) Nation Reservation. Pet. App. 1a-68a. The State was deprived of subject-matter jurisdiction where that authority belongs exclusively to the United States. Petitioner sought post-conviction relief contesting Oklahoma's jurisdiction to try and sentence him under *McGirt* in conjunction with the Enabling Act, the District

Court issued an Order two days later and the OCCA affirmed the denial of relief deciding that *McGirt* was not retroactively applied to cases on collateral review. The State's Congressional preemption and disclaimer preclude any Oklahoma court from exercising jurisdiction over or involving "Indian lands," much less the "retroactive" status of the lands, which is the sole province of Congress as interpreted by this Court. For this reason *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶¶ 12, 15 ___ P.3d ___ (wherein the court asserted independent and adequate State procedural grounds—"our independent authority to interpret the remedial scope of state post-conviction statutes" to hold that *McGirt* and its state-court progeny do not, under state law, "apply retroactively to void a conviction that was final when *McGirt* was decided.") is incompatible with the dictates of due process, given *Matloff* itself is rendered a nullity by federal preemption to State authority for alleged offenses that occurred on "Indian lands."

The Oklahoma court's ruling in *Matloff* has sweeping implications: it upends the Constitution's structural allocation of authority between Oklahoma and federal governments; it allows Oklahoma to usurp authority that Congress has reserved to the United States; and Oklahoma's refusal to grant relief from its *ultra vires* convictions violates fundamental due process principles that have long been vindicated on *habeas corpus, viz.* that only a court of "competent jurisdiction" may impose a valid criminal conviction or sentence. *See In re Mayfield*, 141 U.S. 107 (1891).

Petitioner argues the argument asserted herein materially differs from *Pacheco v. Oklahoma*, No. 21-923 (cert. filed December 20, 2021), or *Bosse v. Oklahoma*, No. 21-6443, (cert. filed November 22, 2021 (Capital Case)[1], pending before this Court, wherein the identical question presented is: "Whether *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), applies retroactively to convictions that were final when *McGirt* was announced." Petitioner argues that a conviction could never become if it was not in a court of competent jurisdiction. The key difference between the cases pending before this court and the instant action is the concept of "retroactivity." This case differs because it is not a request for "retroactive" application because the *Teague v. Lane,* 489 U.S. 288 (1989). framework is inapplicable. The facts herein legally demonstrate that petitioner's judgment and sentence is *void* and ***could never have become final.***

This Court's recognition in *McGirt* that Congress did not disestablish the Muscogee (Creek) Reservation and was bound by treaties from the 1800's—the most recent of which is 1866 (Treaty with the Creek, June 14, 1866, 14 Stat. 785)—was "nothing new." Petitioner ponders, "how can the recognition of an inaction be new?" The Muscogee (Creek) Reservation has existed since 1832 (Treaty with the Creeks, March 24, 1832, 7 Stat. 366), and upon Oklahoma's admission to the Union in 1907, both its Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267 (as a Congressional

[1] Additional pending death penalty cases posing this question include *Ryder v. Oklahoma*, (No. 21-6432), *Hanson v. Oklahoma*, (No. 21-6464), and *Cole v. Oklahoma*, (No. 21-6494),

preemption and prohibition), and Okla. Const., art. I, § 3 (as a state disclaimer) controlled.

STATEMENT

A. Oklahoma's Enabling Act is a federal preemption to State authority.

Petitioner asserts Oklahoma's Enabling Act is a federal preemption to State jurisdiction regardless of an individual's "Indian status" as it is irrelevant where the Enabling Act provides in part:

> *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories **(so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed....** Third. **That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States....**

Id. (Oklahoma) Enabling Act of June 16, 1906, ch. 3335, §§ 1 and 3 at Third., 34 Stat. 267, 267 and 270 (emphasis added).[2]

Any Oklahoma state district court in Indian Territory is deprived of subject-matter jurisdiction *to **hear any claim, civil or criminal*** because both the United

[2] It must be noted that at no point did the Oklahoma courts below address the Enabling Act in the context of the foregoing, rather the federal question of preemption and preclusion was avoided.

States retained jurisdiction, and further the State ceded jurisdiction to the United States upon entry into the Union. *Id.* Okla. Const., art. I, § 3, derives specifically from the Enabling Act,[3] and must be interpreted by a plain language reading of the text to arrive at a meaning of what the framers intended. The Enabling Act is embodied into art. I, § 3, and was not addressed in *McGirt*, or *Murphy v. Royal.*[4] Okla. Const., art. I, § 3, states:

> **The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to** any unappropriated public lands lying within the boundaries thereof, and to **all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States**....

Id. (emphasis added). These terms are unambiguous and plain in ordinary parlance.

1. The Tenth Circuit's Interpretation Of:

a. Oklahoma's Enabling Act

In *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) the Court held:

> Indeed, Oklahoma, like many other states, was required to disclaim jurisdiction over Indians at statehood. *See* Oklahoma Enabling Act, ch.

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[3] Okla. Const. art. I, § 3, derives directly from the Oklahoma Enabling Act itself at Section 3, Third. *Id.* at 34 Stat. 270. *See In re Initiative Petition* No. 363, 1996 OK 122, 927 P.2d 558, 563 & n. 12. Citing "the Enabling Act (Art. 1, §§ 1 and 3), and Art. 1, § 3, Okl. Const." (same).

[4] *Cf. Murphy v. Royal*, 866 F.3d 1164, 1201-1202 (10th Cir. 2017) as modified, which recognized: "In 1897, Congress imposed several measures to force the Creek Nation's agreement to the allotment policy. **Congress** (1) '**provid[ed] that the body of federal law in Indian Territory, which included the incorporated Arkansas laws, was to apply irrespective of race**'...." *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017) (emphasis added), cert. granted, 138 S.Ct. 2026 (2018), *and aff'd sub nom. Sharp v. Murphy*, 140 S.Ct. 2412 (2020) (per curiam). *Murphy* presented the same jurisdictional issue as *McGirt* and was affirmed "for the reasons stated in *McGirt*." *Murphy*, 140 S.Ct. at 2412.

> 3335, § 3, 34 Stat. 267, 270 (1906); Enabling Act Amendment, ch. 2911, 34 Stat. 1286 (1907); *see generally Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n.*, 829 F.2d 967, 976-81 (10th Cir.1987) (**citing § 1 of the Oklahoma Enabling Act and interpreting it as a general reservation of federal and tribal jurisdiction over Indians and their lands and property**), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2870, 101 L.Ed.2d 2906 (1988).... We held in *Indian Country, U.S.A.* that **Oklahoma's disclaimer is one both of proprietary and of governmental authority**. *See Indian Country, U.S.A.*, 829 F.2d at 976-81. Neither the Oklahoma Supreme Court, nor the State in this litigation, agree with that conclusion. The Oklahoma Supreme Court has held in recent years that the Oklahoma disclaimer is one of proprietary, but not of governmental, authority. *See Currey v. Corporation Comm'n*, 617 P.2d 177, 179-80 (Okla.1980) (disclaimer is one of proprietary interest in Indian lands), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed.2d 952 (1981); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1961) (construing Alaskan disclaimer as proprietary rather than governmental); *Ahboah v. Housing Auth. Of the Kiowa Tribe of Indians*, 660 P.2d 625, 630 (Okla.1983) (confirming *Currey*). **We are not bound to follow this interpretation, however, as the Enabling Acts conferring statehood in Oklahoma are federal enactments**.

Id. at 712 & n. 2 (emphasis added).

b. Okla. Const., Art. I, § 3

In decisions that serve the interest of the State, rather than that of the law, both the Oklahoma Supreme Court and the OCCA have held that Okla. Const., art. I, § 3, is "proprietary rather than governmental." *Currey v. Corporation Comm'n of Okla.*, 1979 OK 89, 617 P.2d 177, 180 (relying upon *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962)). *See also Goforth v. State*, 1982 OK CR 48, ¶ 8, 644 P.2d 114, 116:

> Likewise, Okla. Const. art. I, § 3, did not deprive the district court of jurisdiction over this criminal proceeding. In *Currey v. Corporation Commission*, 617 P.2d 177 (Okl. 1979), the Oklahoma Supreme Court indicated that section 3 was meant to disclaim jurisdiction over Indian lands only to the extent that the federal government claimed jurisdiction. Thus, where federal law does not purport to confer

> jurisdiction on the United States courts, the Oklahoma Constitution does not deprive Oklahoma courts from obtaining jurisdiction over the matter.

The foregoing is based upon *Currey, supra.* As shown in *Seneca-Cayuga Tribe, supra,* the Tenth Circuit explicitly overruled *Currey*, which overrules *Goforth, supra,* as same was predicated upon Currey. In accord, Okla. Const., art. 1, § 3, is both "proprietary and governmental." *Seneca-Cayuga Tribe*, 874 F.2d, at 712, n. 2; *see also Indian Country, U.S.A. v. Oklahoma Tax Com'n*, 829 F.2d 967, 976-81 (10th Cir. 1987), *cert. denied*, 487 U.S. 1217 (1988).

Organized Village of Kake, does not affect Oklahoma, nor can it, given it revolves upon interpreting the State of Alaska's Constitution which is intrinsically under Public Law 83-280 as Alaska did not become a State until 1959. By stark contrast Oklahoma is ***not*** a PL-280 State, nor can *Organized Village of Kake* apply to Oklahoma under the Congressional preemptions within its Enabling Act.

2. The Oklahoma Supreme Court's 1908 Interpretation of The Federal Enabling Act.

Oklahoma courts have addressed the Enabling Act since as early as statehood. In *Higgins v. Brown,* 1908 OK 28, 20 Okla. 355, 94 P. 703, the Oklahoma Supreme Court discussed in great detail a comparison of laws with other states and determined that "Indian reservation(s)" within the state were exclusively under the jurisdiction of the United States:[5]

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[5] Although numerous far more contemporary cases—rather than *circa* 1908—have been filed within the respective Oklahoma Supreme Courts, said courts have refused to undertake the Oklahoma Enabling Act as it pertains to Indian County and Oklahoma's absolute lack of subject-matter jurisdiction over said lands. *See e.g. Crane, et al. v. Stitt,* No. MA-119393, ([Writ of] Mandamus, Denied April 12, 2021); *Smith v. Luton,* No. PR-2021-286 (Writ of Prohibition, Denied April 30, 2021); *State*

> By the same process of reasoning followed by the Supreme Court of the United States in cases of *United States v. McBratney,* [104 U.S. 621 (1882)], and *Draper v. United States,* [164 U.S. 240 (1896)], **we conclude that the Congress, upon the admission of Oklahoma as a state, where it has intended to except out of such state an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. *It is not contended that the alleged crime was committed on any such excepted reservation, or in any place where the United States has the sole and exclusive jurisdiction since the admission of the state.*** Now, mark you the language, "had they been committed within a state would have been cognizable in the federal courts," contained in section 16, as amended March 4, 1907, of the Oklahoma enabling act. Does not that mean in a state similarly circumstanced as one with enabling act like ours? When you consider this language in connection with section 39 of the same enabling act pertaining to Arizona and New Mexico, *supra,* it seems that Congress was recognizing the existing conditions and the bringing in of an organized and unorganized territory as one state, and that it was laying down the rule that if such offense had been committed after the admission of the state it would have been cognizable in the federal court, that then such Federal court would have jurisdiction; otherwise not. Any other conclusion can be reached only by reasoning against the apparent and reasonable literal meaning....
>
> We necessarily conclude that the district court of the county of the state in which the offense was committed has jurisdiction of this offense.

Id. at ¶¶ 164-165 (emphasis added).

The Oklahoma Constitution was created by an Act of Congress which defined the Congressional intent as determined in *Higgins.* The Enabling Act and State Constitution remain the same today as from their inception as addressed in *Higgins, supra.*

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ex rel. Matloff v. Wallace, 2021 OK CR 21, ___ P.3d ___ (No. PR-2021-366, Writ of Prohibition, Decided August 12, 2021—the Enabling Act was reurged upon Motion for Reconsideration and Request for Rehearing on August 17, 2021, and again Denied absent comment upon same August 31, 2021); *Long v. State*, No. PC-2021-185 (Post Conviction, Denied September 14, 2021); *Billy v State*, No. PC-2021-342 (Post Conviction, Denied September 14, 2021); as well as the instant petitioner's case. Pet. App. 1a-68a.

The preemptive—and/or disclaimer—language within Oklahoma's Enabling Act, and Okla. Const., art. I, § 3, is fatal to the State's position it has, or could have ever acquired jurisdiction over criminal and civil subject-matter involving these lands. Oklahoma's Enabling Act is a Congressional prohibition of State jurisdiction based upon the status of the land, it comprises a clear textual intent of the United States' assumption of jurisdiction over the lands and the proposed State's cession and acquiesce of jurisdiction. The proposed State of Oklahoma was forced to reject "right, title, jurisdiction, disposal and control" of these lands as a condition of Statehood. *Id.* at, § 3, at Third., 34 Stat. 267, 270. Oklahoma's misconceived notion that it has jurisdiction is wholly frivolous because Congress giveth and Congress taketh away, and once again the State cannot point to any Act of Congress which conferred jurisdiction over these lands despite race.

B. Oklahoma Is Not a Public Law 83-280 State.

Petitioner asserts that because the State of Oklahoma has never acted under Public Law 83-280, or Title IV of the Civil Rights Act to assume jurisdiction over the "Indian lands" within its borders it lacks subject-matter jurisdiction on any land not ceded to the State. In *C.M.G. v. State*, 1979 OK CR 39, ¶ 2, 594 P.2d 798, *cert. denied*, 444 U.S. 992 (1979), the OCCA held, "To date, the State of Oklahoma had made no attempt to repeal Art. I, § 3, of the Constitution of the State of Oklahoma, which prohibits State jurisdiction over Indian Country, so **the federal government still has exclusive jurisdiction over Indian country located within Oklahoma boundaries**" (emphasis added).

In *Murphy v. Royal*, 866 F.3d 1164, 1204 (10th Cir. 2017), and as affirmed by this Court,[6] the Tenth Circuit found: "Oklahoma chose not to use Public Law 280 to assert jurisdiction. State officials regarded the law as unnecessary because, in their view, Oklahoma already had full jurisdiction over Indians and their lands. *Indian Country, U.S.A.*, 829 F.2d at 980 n.6. But '[t]he State's 1953 position that Public Law 280 was unnecessary for Oklahoma ... [has] been rejected by both federal and state courts.' *Id.*" *See also United States v. Burnett*, 777 F.2d 593 (10th Cir.1985), *cert. denied*, 476 U.S. 1106 (1986); *C.M.G.*, *supra*; and Felix S. Cohen's Handbook of Federal Indian Law 60, at 537-38 & n.47 (Nell Jessup Newton ed., 2012). Had the State acted under Public Law 83-280, it could have assumed jurisdiction over the Is lands held in federal trust, but it did not; thus, the State lacks subject-matter jurisdiction irrespective of race because of the Congressional preemptions within Oklahoma's Enabling Act, *supra*, and Okla. Const., art. I, § 3.

C. The *McBratney/Draper* Rule Is Inapplicable to Oklahoma Under the Enabling Act's Congressional Preemptions and Prohibitions.

McGirt does not affect petitioner's claim as far as one's "Indian status," ***rather it solely involves the land***—the recognition that Congress has never disestablished the Reservations; this with the disclaimer language within Oklahoma's Enabling Act demonstrates a clear federal preemption to state authority despite race. Any reliance of the State on *United States v. McBratney*, 104 U.S. 621, 624 (1882) or its progeny is misplaced.

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[6] *See* footnote 4, *supra*.

While the *McGirt* Court held: "[N]othing we might say today could unsettle Oklahoma's authority to try non-Indians for crimes against non-Indians on the lands in question." *McGirt,* 140 S.Ct. at 2460. The Court's statement was made solely in the context of *McGirt* itself—defining Indian lands under treaties and thus the applicability of the MCA. The Court ***did not*** address Oklahoma's Enabling Act, much less, given the recognition that the Reservations have ***never been disestablished.*** *See also United States v. Ramsey*, 271 U.S. 467 (1926), wherein this Court recognized that upon Oklahoma's admission to statehood in 1907, federal authority ended with regard to non-Indians. *Id.* at 469, 46 S.Ct., at 559. In doing so the *Ramsey* Court did not undertake an analysis of the Oklahoma Enabling Act, but applied the broad principles set out in *McBratney* and *Draper v. United States,* 164 U.S. 240 (1896) to the case at bar, notwithstanding said cases directives pertaining to Congressional preemptions and prohibitions; this application combined with the mistaken belief that the reservations had been "disestablished," based upon allotment (*see McGirt*) rendered said decision. *McGirt*, nor *Ramsey* contemplate the Enabling Act, much less within the scope of how the Congressional preemptions imposed upon Oklahoma's ability to become a state affect its jurisdiction, or lack thereof, on Indian lands.

Petitioner presents just such an issue, one of first impression, wherein the Congressional preemption deprives the State of subject-matter jurisdiction over crimes committed—despite race—on, or within "***Indian lands and unappropriated public lands.***" In this context this Court has not been provided the opportunity to consider a non-Indian on non-Indian crime committed on Indian

lands or unappropriated public lands in relation to the Congressional prohibition within the Oklahoma Enabling Act, *see supra*, and Oklahoma's own Constitutional prohibition under Okla. Const., art. 1, § 3. *See e.g., Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992), (noting "the rights of States, ***absent a congressional prohibition***, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands") (emphasis added).

McBratney revolves on the Equal Footing Doctrine in conjunction with Colorado's Enabling Act, which explicitly ***repealed*** any prior statute or existing treaty inconsistent therewith:

> [T]he act of Congress of March 3, 1875, c. 139, for the admission of Colorado into the Union, authorized the inhabitants of the Territory "to form for themselves out of said Territory a State government, with the name of the State of Colorado; which State, when formed, **shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever;" and the act contains no exception of the Ute Reservation, or of jurisdiction over it.** 18 Stat., pt. 3, p. 474. The provision of section one of the subsequent act of June 26, 1876, c. 147 (19 Stat. 61), that upon the admission of the State of Colorado into the Union "the laws of the United States, not locally inapplicable, shall have the same force and effect within the State as elsewhere within the United States," does not create any such exception. Such a provision has a less extensive effect within the limits of one of the States of the Union than in one of the Territories of which the United States have sole and exclusive jurisdiction.
>
> The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. *The Cherokee Tobacco*, 11 Wall. 616. **Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words.**

Id. 104 U.S. at 623-624 (emphasis added).

McBratney also prominently discusses Congressional prohibitions or "exceptions" to this general rule (the Equal-Footing Doctrine). "Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words." *Id.* Congress expressed its desire that the United States maintain right, title, jurisdiction, disposal and control of the Indian and unappropriated public lands to the extent "***which it would have been competent to make if this Act had never been passed***" (*see* Enabling Act, *supra*). Under the State's premise the above Congressional wording and text become meaningless and irrelevant—such a scenario cannot be condoned by this Court. The history of the territories forming Oklahoma and the Congressional Acts before the Enabling Act provided for "exclusive federal jurisdiction." *See Indian Country, U.S.A. v. Oklahoma Tax Com'n*, 829 F.2d 967, 977-978 (10th Cir. 1987) (emphasis added):

> In 1889, Congress created a special federal court of limited jurisdiction in the Indian Territory, which at that time encompassed most of present-day Oklahoma. *See* Act of March 1, 1889, ch. 333, 25 Stat. 783. The following year, Congress carved the Territory of Oklahoma out of the western half of the Indian Territory. *See* Oklahoma Territory Organic Act, § 1, 26 Stat. at 81. The lands in the east held by the Five Civilized Tribes remained Indian Territory, **subject only to federal and tribal authority**. *See id.* § 29, 26 Stat. at 93. **Because of continuing jurisdictional difficulties, Congress expanded the civil and criminal jurisdiction of the special United States court in the diminished Indian Territory.** *See id.* §§ 29, 30, 26 Stat. at 93-94. The act also provided that "certain general laws of the State of Arkansas ... which are not locally inapplicable or in conflict with this act or with any law of Congress ... are hereby extended over and put in force in the Indian Territory." *Id.* § 31, 26 Stat. at 94-95. 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.* § 30, 26 Stat. at 94.... **In 1897, Congress enacted legislation providing that the body of federal law in Indian Territory, which included the incorporated Arkansas laws, was to apply "irrespective of race."** *See* Appropriations Act of June 7, 1897, ch. 3, 30 Stat. 62, 83. **In the same act, Congress broadened the jurisdiction of the federal courts**, thus divesting the Creek tribal courts of their exclusive jurisdiction over cases involving only Creeks.

Given the foregoing history as recounted by the Tenth Circuit with difference given to Congress's intent in specifying within the Enabling Act, "*Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) **or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise**, ***which it would have been competent to make if this Act had never been passed....***" (*see* Enabling Act, *supra* (emphasis added)); it cannot be argued there is ***no*** "[Congressional] provision vesting jurisdiction in the United States courts over [said] criminal matter[s]," in direct contradiction to *Goforth v. State*, 1982 OK CR 48, 644 P.2d 114, 116-117 and cases cited therein.

Tulsa County is Indian land as defined by *McGirt, see e.g., Cherokee Nation v. State of Oklahoma*, 461 F.2d 674 (10th Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972):

> [W]e are not concerned with sovereignty, a political issue, **but with land ownership**. The question is not whether the Indians have sovereignty but whether the tribes are still in existence and capable of land ownership. We believe that this question is answered by the 1906 Act. Section 27 thereof provides that, upon dissolution of the tribes, **lands belonging to them shall not become public lands nor the**

> **property of the United States but shall be held by the United States in trust for the Indians. 34 Stat. 148.** Section 28 provides for the continuation of tribal existence and tribal government for all purposes authorized by law. *Ibid.*
>
> The Supreme Court has said that "when Congress has once established a [Indian] reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Seymour v. Superintendent,* 368 U.S. 351, 359, 82 S.Ct. 424, 429, 7 L.Ed 2d 346. **There has been no separation here; the tribal governments still exist; and Oklahoma was admitted to the Union in 1907 upon compliance with the Enabling Act of June 16, 1906, 34 Stat. 267, which required a disclaimer of title to all lands owned "by any Indian or Indian tribes." *Ibid.* at 279. We adhere to the conclusion, which was implicit in our first decision, that the Indians have not divested themselves of the land in question.** The claims of Oklahoma and its lessees must be rejected.

Id. at 678 (emphasis added). In accord the federal government has criminal jurisdiction, the State has no subject-matter jurisdiction on these lands.

Turning now to *Draper v. United States,* 164 U.S. 240 (1896) as the last bastion of hope for the State's argument. *Draper* is contingent upon *McBratney* and the Court's interpretation of the State of Montana's Enabling Act in relation to the Crow Indian Reservation. It must be understood however, that Reservation was created four (4) years after the Enabling Act of Montana. "The treaty creating this reservation contained no stipulation restricting the power of the United States to include the land, embraced within the reservation, in any State or Territory then existing or which might thereafter be created." *Id.* at 242. "Unless the enabling act of the State of Montana contained provisions taking that State out of the general rule and depriving its courts of the jurisdiction to them belonging and resulting from the very

nature of the equality conferred on the State by virtue of its admission into the Union" then said State would have jurisdiction. *Id.* at 243.

Notwithstanding ***similar*** wording within its Enabling Act as to that of Oklahoma's, Montana did not cede jurisdiction to the federal government upon statehood. To assume so would "overlook[] not only the particular action of Congress as to the Crow reservation, but also the state of the general law of the United States, as to Indian reservations, at the time of the admission of Montana into the Union." *Id.* at 245. *Draper* then devolves to "allotments," quoting Section 6 of the Act of February 8, 1887, c. 119, 24 Stat. 388 the Court noted, "that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *Id.* at 246. Accord, "[f]rom these enactments it clearly follows that at the time of the admission of Montana into the Union, and **the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the State to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, <u>but which had become extinct by allotment in severalty</u>,** and in which contingency the Indians themselves would have passed under the

authority and control of the State." *Id.* at 246 (emphasis added). The same is simply not true of Oklahoma, nor its Enabling Act as evidenced above. *See McGirt, supra.*

This Court held in *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911) that Oklahoma's Enabling Act preserved federal authority over Indians, ***their lands*** and property, which it had before the passage of the act. *See* Enabling Act, ch. 3335, § 1, 34 Stat. 267, 267-68 (1906). Four years after statehood, the court in *United States Express Co. v. Friedman*, 191 F. 673 (8th Cir.1911), explicitly rejected the broad contention "that the portion of Oklahoma formerly called the Indian Territory ceased to be Indian country upon admission of Oklahoma as a state." *Id.* at 678-79. "[T]he enabling act preserved the authority of the federal government over Indians and their lands [because it] required the State to disclaim 'all right and title' to such lands. *See id.* §§ 1, 3, 34 Stat. at 267-68, 270." *Indian Country, U.S.A.*, 829 F.2d, at 978.

D. This Court's Habeas Jurisprudence Is Predicated on Subject Matter Jurisdictional Claims.

This Court has repeatedly held that a court's lack of jurisdiction is a quintessential basis for invoking the writ of habeas corpus. *See Ex parte Lange*, 85 U.S. 163 (1873), holding a defendant was entitled to the writ because the trial court lacked jurisdiction to impose his sentence.[7] In *Ex parte Wilson*, 114 U.S. 417 (1885), the Court held the petitioner was entitled to a writ of habeas corpus because the trial court had exceeded its jurisdiction in trying, convicting, and sentencing him. "It is well settled by a series of decisions that this court, having no jurisdiction of criminal

[7] *See also Ex parte Royall*, 117 U.S. 241, 253 (1886); and *Ex parte Watkins*, 28 U.S. 193, 202-203 (1830) (same). *See e.g. In re Mayfield*, 141 U.S. 107 (1891).

cases by writ of error or appeal, cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District Court in a criminal case, **unless the sentence exceeds the jurisdiction of that court**, or there is no authority to hold him under the sentence." *Id.* at 420-421 (emphasis added). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action" *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *see also The Ku Klux Cases*, 110 U.S. 651, 653 (1884). In *Ex parte Crow Dog*, 109 U.S. 556, 557, 572 (1883), the Court applied this principle to vacate a federal conviction on habeas corpus as "void" where a federal territorial court lacked "jurisdiction" over an Indian-on-Indian crime. *Id.* "A final judgment, after completion of trial and the exhaustion of any direct appellate review, was *res judicata*, and ***the sole exception was a lack of jurisdiction***." *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021) (Gorsuch, J., concurring) (emphasis added) (citing *Brown v. Allen*, 344 U.S. 443, 543-544 (1953)). The same established principles apply here.

E. Subject-Matter Jurisdiction Can Never Be Forfeited or Waived.

This Court has clearly established, "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). *See also United States v. Cotton*, 535 U.S. 625, 630 (2002), "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *See Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

F. This Court's Retroactivity Jurisprudence Necessarily Requires Retroactive Application to Any *Void Ab Initio* Judgment.

Because Oklahoma has no jurisdiction to prescribe and punish petitioner's conduct, the State is holding petitioner for a "non-crime" regardless of the OCCA's position in *Matloff*. A jurisdictional ruling of that character is necessarily retroactive under federal law. In *United States v. Johnson*, 457 U.S. 537 (1982), the Court noted that in certain "narrow categories of cases, the answer to the retroactivity question has been effectively determined ... through application of a threshold test" rather than by balancing competing concerns. *Id.* at 548. *Johnson* held:

> ***[T]he Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place.*** The Court has invalidated inconsistent prior judgments where its reading of a particular constitutional guarantee immunizes a defendant's conduct from punishment, *see, e.g., United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971) (penalty against assertion of Fifth Amendment privilege against self-incrimination), or serves "to prevent [his] trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of [that] trial," *Robinson v. Neil*, 409 U.S., at 509 (double jeopardy). In such cases, the Court has relied less on the technique of retroactive application than on the notion ***that the prior inconsistent judgments or sentences were void ab initio***. *See, e.g., Moore v. Illinois*, 408 U.S. 786, 800 (1972) (retroactive application of Eighth Amendment ruling in *Furman v. Georgia*, 408 U.S. 238 (1972)); *Ashe v. Swenson*, 397 U.S. 436, 437, n. 1 (1970) (retroactive application of double jeopardy ruling in *Benton v. Maryland*, 395 U.S. 784 (1969)). *See also Gosa v. Mayden*, 413 U.S., at 693 (MARSHALL, J., dissenting); *Michigan v. Payne*, 412 U.S., at 61 (MARSHALL, J., dissenting) (**rulings are fully retroactive when the "*Court has held that the trial Court lacked jurisdiction in the traditional sense*"**).

Johnson, 457 U.S., at 550-551 (emphasis added).

Still, the exception for the writ of habeas corpus was "confined" to that "limited

class of cases" where a court's absence of "jurisdiction" was the basis for appeal. *Ex parte Parks*, 93 U.S. 18, 21 (1876). These limited classes of cases were discussed in *Johnson*, *supra*, which clearly found cases like the instant action would always be given retroactive application of a substantive right pertaining to subject-matter jurisdiction that followed clearly established law based upon a *void ab initio* conviction. One thing has remained the same throughout the history of the writ—as again recognized by this Court in *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021) (Gorsuch, J., concurring)—a federal court was powerless to revisit those proceedings unless a state court had acted without jurisdiction. *In re Graham*, 138 U.S. 461, 462 (1891); *Tinsley v. Anderson*, 171 U.S. 101, 104-106 (1898); *Markuson v. Boucher*, 175 U.S. 184, 185-186 (1899); *Medcraf v. Hodge*, 245 U.S. 630, 630 (1917) (per curiam).

G. The Current Controversy

1. Indictment And Initial Proceedings

On January 11, 1983, Oklahoma charged petitioner with one count of first-degree murder, *see* Okla. Stat. tit. 21, § 701.7, and three counts of robbery with a firearm, *see* Okla. Stat. tit. 21, § 801, in the District Court of Tulsa County. A jury found petitioner guilty of all charges and sentenced him to Life, and three 50-year sentences, each to run consecutively with the other in the Oklahoma state prison. Pet. App. 36a. The OCCA affirmed his conviction and sentence on direct appeal in *Funkhouser v. State*, 1987 OK CR 44, 734 P.2d 815. Petitioner's conviction and sentence became final on June 9, 1987.[8] Pet. App. 1a.

[8] Petitioner does not concede to the finality of his judgment, rather is demonstrating good faith as to procedure and defers to his arguments herein upon same.

2. Post-Conviction Proceedings

On April 28, 2021, petitioner applied for post-conviction relief. He stated that his crime occurred within the historical boundaries of the Muscogee (Creek) Nation. He argued that, under *McGirt*, Tulsa County remained "Indian lands" within the meaning of the Enabling Act, and Okla. Const., art. I, § 3. Petitioner contended, the federal government had exclusive jurisdiction to prosecute him, and his Oklahoma conviction was void lacking subject-matter jurisdiction. Petitioner asked the Oklahoma Court to vacate his convictions. Pet. App. 39a. The State did not file a formal response. However, two days later, on April 30, 2021, the trial court denied post-conviction relief. Pet. App. 36a.

3. Appellate Proceedings and The OCCA's Order

On June 16, 2021, petitioner appealed the Order of denial. See Pet. App. 3a. By Order dated November 30, 2021, the OCCA held:

> Before the District Court, Petitioner asserted he was entitled to relief pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, this Court determined that the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff*, 2021 OK CR 21, ¶¶ 27-28, 40. The conviction in this matter was final before the July 9, 2020, decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply. Therefore, the District Court's Order denying post-conviction relief is **AFFIRMED**.

Pet. App. 1a.

4. Collateral Estoppel

Petitioner's previous attempts to seek relief are irrelevant, given the subject-matter jurisdictional issues presented coupled with the OCCA making no attempt to

employ ***any form of procedural bar***, rather the Oklahoma Court relied solely upon its holding in *Matloff* that *McGirt* was not retroactive to deny petitioner relief. At this juncture and upon any prospective remand the State and Oklahoma courts have waived ***all*** procedural bars—collateral estoppel bars any prospective application of procedural default or waiver.

REASONS FOR GRANTING THE PETITION

H. The Decision Below Is Incorrect

The OCCA's decision implicates that Oklahoma as a sovereign can both ignore and overrule Congressional Acts and this Court's decisions exercising abject caprice. Oklahoma is exercising jurisdiction over crimes allegedly committed on Indian lands notwithstanding the Congressional preemption of the jurisdiction in contravention of the United States Constitution, and in violation of due process. By deciding that *McGirt* is not retroactive the OCCA has effectively usurped the powers of Congress.

The OCCA's application *of Matloff* to determine that a judgment is final, even though petitioner's trial court—the District Court of Tulsa County—lacked subject-matter jurisdiction to impose said judgment, is objectively unreasonable considering the only way a judgment can become final is that the case must be in a court of competent jurisdiction. *Moore v. Dempsey*, 261 U.S. 86, 95 (1923). The OCCA vested the State with a right that never properly belonged to it, in complete disregard to this Court's general rule of law that "an [unlawful] act . . . is void and confers no right upon the wrongdoer." *Waskey v. Hammer*, 223 U.S. 85, 94 (1912); *Miller v. Ammon*, 145 U.S. 421, 426 (1892); *Burck v. Taylor*, 152 U.S. 634, 649 (1894); and *Connolly v.*

Union Sewer Pipe Co., 184 U.S. 540, 548 (1902). *See also Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922).

The Oklahoma Court's ruling also warrants review because of its intrusion on a core feature of individual liberty that has for centuries been protected by the writ of habeas corpus. More than a century ago, this Court deemed it "perfectly well settled" that "'due process' in the constitutional sense," "a criminal prosecution in the courts of a state" must be in "a court of *competent jurisdiction.*" *Frank v. Mangum*, 237 U.S. 309, 326 (1915) (emphasis added). *McGirt* said nothing "new," rather it ***clarified*** the continued existence of the Muscogee (Creek) Reservation; it is ***not*** a new rule of law, rather it is predicated upon clearly established law and Congressional inaction in never having "disestablished" the Reservation. *McGirt* itself held:

> ***In saying this we say nothing new.*** For years, states have sought to suggest that allotments automatically ended Reservations, and for years courts have rejected the argument. Remember, Congress has defined "Indian country" to include "all land within the limits of any Indian reservation.... notwithstanding the issuance of any patent and including any rights-of-way running through the reservation." 18 U.S.C. § 1151(a).

Id. at 2464 (emphasis added).

Oklahoma's state disclaimer of jurisdiction over "Indian lands" under Okla. Const., art. I, § 3 was a congressional prohibition preempting state authority until the United States would extinguish the title and upon this Court's decision in *McGirt* no one stopped to think about the issues with the Reservations. This Court recognized in *McGirt* that "[a] number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions

in the very oil companies who sought to deprive Indians of their lands (citing A. Debo, And Still the Waters Run 86-87, 117-118 (1940))." *McGirt* at 2473 Further the history and demographics placed before us hardly tell a story of unalloyed respect for tribal interests or respect for congress' authority. This Court has held time and again:

> Congress' power to pre-empt state law is derived from the Supremacy Clause of Art. VI of the Federal Constitution. *Gibbons v. Ogden*, 9 Wheat. 1 (1824) . . . ***[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. " 'The purpose of Congress is the ultimate touchstone.' "*** *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) (emphasis added). *See also Pliva, Inc. v. Mensing*, 564 U.S. 604, 131 S.Ct. 2567 (2011):

> The Supremacy Clause establishes that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Where state and federal law "directly conflict," state law must give way. *Wyeth*, *supra*, at 583, 129 S.Ct. 1187 (THOMAS, J., concurring in judgment); *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, (2000) ("***[S]tate law is naturally preempted to the extent of any conflict with a federal statute***").

Id. at 2577 (emphasis added).

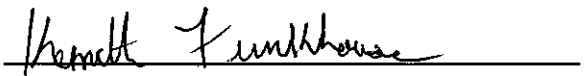
The reasoning behind retroactivity cannot be applied to the case at bar, simply because *McGirt* did not create a new rule of law; it only applied settled precedent to a set of clearly established facts, thus depriving the State of Oklahoma of subject-matter jurisdiction rendering the judgment *void*. The constitutional due process guarantee traces its roots to the Magna Carta and the effort to deny capricious kings the "power of destroying at pleasure," what Blackstone called the "highest degree" of tyranny. 1 William Blackstone, Commentaries *133. So perhaps it comes as little

surprise that we should look to the history of efforts to tame arbitrary governmental action to determine whether and under what conditions the conduct at issue is accepted as a necessary incident of organized society—or whether it is associated with the sort of whimsical sovereign the due process guarantee was designed to guard against. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079 (10th Cir. 2015) (GORSUCH, writing for the panel).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

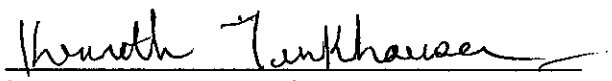
Respectfully submitted,



Kenneth Lynn Funkhouser
#91752
Oklahoma State Penitentiary
P.O. Box 97
McAlester, OK 74502-0097
Petitioner pro se

Declarations under penalty of perjury

Pursuant to 28 U.S.C. § 1746, I declare, verify, and state under penalty of perjury that the foregoing is true and correct. Executed on January 20, 2022.



Kenneth Lynn Funkhouser