APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

KENNETH LYNN FUNKHOUSER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC-2021-597**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, through counsel Debra K. Hampton, appeals the denial of post-conviction relief by the District Court of Tulsa County in Case No. CF-1983-133. 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**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 30th day of November, 2021.

Scott Rowland

SCOTT ROWLAND, Presiding Judge

Robert L. Hudson

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ATTEST:

John D. Hadden

Clerk

PA

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KENNETH L. FUNKHOUSER,	)	
Petitioner,	)	
	)	
-vs-	)	PC 2021 597
	)	
THE STATE OF OKLAHOMA,	)	**District Court of Tulsa County**
Respondent.	)	**Case No. CRF-1983-133**

PETITION IN ERROR

COMES NOW, the Petitioner, **KENNETH L. FUNKHOUSER**, by and through counsel, Debra K. Hampton, and submits his Petition in Error.

1. This Post-Conviction Appeal arises from a regular felony conviction in the District Court of Tulsa County Case No. CRF-1983-133, for the crimes of:

Count 1: Murder I,	21 O.S. § 701.7.
Count 2: Robbery with a firearm,	21 O.S. § 801.
Count 3: Robbery with a firearm,	21 O.S. § 801.
Count 4: Robbery with a firearm,	21 O.S. § 801.

2. A certified copy of the April 30, 2021, Order Denying Post-Conviction Relief is attached as [Exhibit A].

3. Notice of Post-Conviction Appeal was filed on May 6, 2021.

4. The Petition in Error is timely.

Respectfully submitted,

Debra K Hampton

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CERTIFICATE OF SERVICE

This is to certify that on the day of filing, I requested the Clerk to place one file-stamped copy of this instrument in the Notice Receptacle of the Attorney General.

Debra K Hampton

DEBRA K. HAMPTON

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY DISTRICT COURT
STATE OF OKLAHOMA

FILED
APR 30 2021
DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

Kenneth Funkhouser,	)	
	)	
Petitioner,	)	
vs.	)	**CF-1983-133**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S "APPLICATION FOR POST-CONVICTION RELIEF" FILED April 28, 2021

Comes on for consideration of Petitioner's "Application for Post-Conviction Relief" filed April 28, 2021. The Court has reviewed Petitioner's application, the docket sheet in this matter, as well as the pleadings filed by the Petitioner subsequent thereto requesting post-conviction relief based on the recent decision of the United Supreme Court in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). Petitioner's application does not present a genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony. *Johnson v. State*, 1991 OK CR 124, 823 P.2d 370. This matter will therefore be decided based on records the Court has stated it has reviewed.

Petitioner claims, based on the recent decision by the United States Supreme Court in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), that the offenses for which he was convicted were committed in portions of Oklahoma located in Indian Country, prohibiting Oklahoma courts from exercising jurisdiction over his crimes. However, the prosecution of Petitioner's offenses were justiciable matters, and Petitioner has not

established that the trial court lacked jurisdiction. *See,* Okla. Const. Art. VII, § 7 (District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma).

Additionally, Petitioner has failed to offer any proof that he is an "Indian" for purposes of invoking an exception to state jurisdiction. *See Goforth v. State,* 1982 OK CR 48, 644 P.2d 114 (Two elements must be satisfied before it can be found that appellant is an Indian under federal law. Initially, it must appear that he has a significant percentage of Indian blood. Secondly, the appellant must be recognized as an Indian either by the federal government or by some tribe or society of Indians.) The Petitioner has not presented this Court with any affirmative evidence that he has any significant degree of Indian blood and that he is recognized as an Indian by the federal government or by some tribe or society of Indians. In *Russell v. Cherokee Cty. Dist. Court,* 1968 OK CR 45, 438 P.2d 293, 294, the Court stated:

> "It is fundamental that where a petition for writ of habeas corpus, or for post-conviction appeal is filed, the burden is upon the Petitioner to sustain the allegations of his petition, and that every presumption favors the regularity of the proceedings had in the trial court. Error must affirmatively appear, and is never presumed."

Based on the foregoing, the Court finds that Petitioner's application for post-conviction relief filed April 28, 2021, should be, and is hereby DENIED.

IT IS SO ORDERED this 30 day of April, 2021.

DAWN MOODY
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I certify that on the date of filing a true and correct certified copy of the above and foregoing document was deposited with the United States Postal Service with sufficient postage affixed thereto, and addressed to the following recipient(s):

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DON E. NEWBERRY
TULSA COUNTY COURT CLERK

Deputy Court Clerk

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PC 2021 597

KENNETH L. FUNKHOUSER,
Petitioner,

-vs-

THE STATE OF OKLAHOMA,
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF POST-CONVICTION APPEAL FROM AN APRIL 30, 2021, ORDER DENYING POST-CONVICTION RELIEF IN THE DISTRICT COURT OF TULSA COUNTY CASE NO. CRF-1983-133

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KENNETH L. FUNKHOUSER,	)	
Petitioner,	)	
	)	
-vs-	)	
	)	
THE STATE OF OKLAHOMA,	)	**District Court of Tulsa County**
Respondent.	)	**Case No. CRF-1983-133**

BRIEF IN SUPPORT

COMES NOW, the Petitioner, **KENNETH L. FUNKHOUSER**, through counsel, Debra K. Hampton, and submits his Brief in Support of Post-Conviction of his Petition in Error.

JURISDICTION

Jurisdiction is invoked under 22 O.S. § 1087 under the Oklahoma Uniform Post-Conviction Procedures Act. The Petition in Error and Brief in Support have been timely filed.

STATEMENT OF THE CASE

Petitioner was charged for the offense of Murder in the First Degree, three counts of Robbery with Firearms, and Attempted Robbery with a Firearm. A demurrer was sustained as to the allegation of Attempted Robbery, but Petitioner was convicted by a jury on the other four counts. Pursuant to an agreement with the State, Petitioner waived his right to jury sentencing and agreed to a sentence of life imprisonment on the murder conviction and sentences of 50 years each on the robbery conviction, all running consecutively. The District Court imposed Judgment and Sentence under this agreement. The OCCA affirmed the Judgment and Sentence on March 11, 1987. *Funkhouser v. State*, 1987 OK CR 44, 734 P.2d 815. Petitioner's co-defendant, and brother, Garland Funkhouser, was acquitted by the jury.

Petitioner, pro se, filed a Petition for Certiorari to the United States Supreme Court in *Funkhouser v. Oklahoma*, Case No. 86-6902, *cert* was denied. Petitioner has sought further relief,

but it is irrelevant. This Court has held that "no procedural bar applies." See *Bosse v. State*, 2021 OK CR 3, ¶¶ 21-22, ___ P.3d ___; *Cole v. State*, 2021 OK CR 10, ¶ 16, ___ P.3d ___.

STATEMENT OF FACTS

The Petitioner is not an enrolled tribal member, nor is Petitioner an Indian but the alleged offense occurred in Tulsa, Oklahoma, within Tulsa County. This land is considered Indian Country belonging to the Muscogee (Creek) Nation, Osage Nation and Cherokee Nation according to the United States Supreme Court.

PROPOSITION I

THE DISTRICT COURT ABUSED ITS DISCRETION DENYING THE PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF AS THE COURT FAILED TO SET FORTH AN ACURATE FINDINGS OF FACT AND CONCLUSIONS OF LAW INFRINGING UPON THE PETITIONER'S STATUTORY RIGHT TO REDRESS ON APPEAL IN A POST-CONVICTION PROCEEDING, *RULES OF THE COURT OF CRIMINAL APPEALS*, RULE 5.4.

STANDARD OF REVIEW

The correct standard of review is defined by Rule 5.2(C)(6)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 Ch. 18, App. (2012). *Logan v. State*, 2013 OK CR 2, 293 P.3d 969, 977. (Footnote omitted) (District Court denial of post-conviction relief must include "findings of fact and conclusions of law entered by the District Court, setting out the specific portions of the record and transcripts considered by the District Court in reaching its decision or setting forth whether the decision was based on the pleadings presented"). Rule 5.4(A), *Rules of the Oklahoma Court of Criminal Appeals*.

ARGUMENT AND AUTHORITY

The District Court abused its discretion as this has been defined as any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170; *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___. The

District Court must make "specific findings of fact and conclusions of law" involving the issue presented. Rule 5.2(C)(6)(b), *Rules of the Oklahoma Court of Criminal Appeals*, *Logan v. State*, 2013 OK CR 2, 293 P.3d 969, 977. The duty of the District Court is not discretionary under 22 O.S. § 1084 provides in part: "The Court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This Order is a final judgment." *See also* Rule 5.4(A) the *Rules of the Oklahoma Court of Criminal Appeals* which provides:

> The judge assigned to adjudicate the application for post-conviction relief shall prepare a detailed order setting out specific findings of fact and conclusions of law on each proposition for relief presented in the application. The order shall also specify the pleadings, documents, exhibits, specific portions of the original record and transcripts, considered in adjudicating the application, which shall then become a part of the record on appeal as defined by Rule 5.2(C)(6)

Petitioner's "Application for Post-Conviction Relief" was filed April 28, 2021, the District Court's Order denying the application was filed on April 30, 2021. The District Court found that: "The Court has reviewed Petitioner's application, the docket sheet in this matter, as well as the pleadings filed by the Petitioner subsequent thereto requesting post-conviction relief based on the recent decision of the United Supreme Court in *McGirt v. Oklahoma,* 591 U.S. ____, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020) ... This matter will therefore be decided based on records the Court has stated it has reviewed." (Order at 1) The record clearly demonstrates that no pleadings were filed by State or the Petitioner "subsequent" to his application filed on April 28, 2021, therefore the District Court decided Petitioner's case—in part—on pleadings outside the record therefore requiring this Court to remand this action to the District Court.

Further, because 22 O.S. § 1083 would require the State to respond, "within thirty (30) days after the docketing of the application, or within any further time the Court may fix, the state shall respond by answer or by motion which may be supported by affidavits...." The District Court abused its discretion adjudicating a claim before the State responded. The language under § 1083

(B) provides "[w]hen a Court is satisfied, on the basis of the application, the answer or motion of respondent, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may order the application dismissed or grant leave to file an amended application. Disposition on the pleadings and record is not proper if there exists a material issue of fact...."

The language of these statutes is plain and unambiguous, a fundamental principle of statutory construction requires this Court to determine and give effect to the intention of the Legislature. Title 12 O.S. § 2. See *State v. Iven*, 2014 OK CR 8, ¶ 13, 335 P.3d 264, 268. Legislative intent is determined first by the plain and ordinary language of the statute. *Johnson v. State*, 2013 OK CR 12, ¶ 10, 308 P.3d 1053, 1055. "A statute should be given a construction according to the fair import of its words taken in their usual sense, in conjunction with the context, and with reference to the purpose of the provision." *Id.* When language of a statute is unambiguous, resort to additional rules of construction is unnecessary. *Barnard v. State*, 2005 OK CR 13, ¶ 7, 119 P.3d 203, 205-06. "We must hold a statute to mean what it plainly expresses and cannot resort to interpretive devices to create a different meaning." *Johnson, supra. See also Newlun v. State*, 2015 OK CR 7, ¶ 8, 348 P.3d 209, 211. This Court should reverse and remand the action to the District Court.

PROPOSITION II

THE DISTRICT COURT ABUSED ITS DISCRETION DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF BECAUSE PETITIONER'S CLAIM INVOLVE FUNDAMENTAL ERROR BECAUSE THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION OVER "INDIAN LANDS," WHERE EXCLUSIVE JURISDICTION WAS CEDED TO THE UNITED STATES UNDER OKLA. CONST., ART. I, § 3, THUS PETITIONER'S CONVICTIONS ARE VOID *AB INITIO*, AS THIS CASE RAISES AN ISSUE OF FIRST IMPRESSION.

STANDARD OF REVIEW

This Court reviews the District Court's determination of an application for post-conviction relief for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. *Compare McGirt v. Oklahoma,* 591 U.S. ____, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), but this case presents a matter of first impression, *Murphy v. Royal*, 875 F.3d 896, 907–909, 966 (2017), *cert. granted,* 589 U.S. ___ (2019); *Sharp v. Murphy*, 591 U.S. ___ 2020)(Per Curiam)(affirming the Tenth Circuit); *Cox v. State*, 2006 OK CR 51, ¶ 6, 152 P.3d 244, 247 ("a lack of subject-matter jurisdiction upon the trial Court cannot be waived."); *Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 372; *Triplet v. Franklin*, 365 Fed. Appx. 86, 95 (10th Cir. 2010); and *Wackerly v. State*, 2010 OK CR 16, 237 P.3d 795, 797.

ARGUMENT AND AUTHORITY

Petitioner argues because the District Court's Order was ambiguous and rested on thin air as there was "no reasonable basis for the State Court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Federal Courts have held "If a State Court's finding rests on thin air, the petition will have little difficulty satisfying the standards for relief under § 2254." *Mendiola v. Schomig*, 224 F.3d at 592; *Lambert v. Blackwell*, 387 F.3d 210 (3rd Cir. 2004); *Merzbacher v. Shearin*, 706 F.3d 356, 368 (4th Cir. 2013) (We do not disagree with this suggestion.) The Supreme Court has instructed, "[e]ven in the context of Federal habeas, deference does not imply abandonment or abdication of judicial review," *Miller-El v. Cockrell*, 537 U.S. at 340; *Stermer v. Warren*, 360 F. Supp. 3d 639, 653 (E.D. Mich. 2018) *affirmed Stermer v. Warren*, 959 F.3d 704 (6th Cir. 2020).

The District Court determined that "Petitioner has failed to offer any proof that he is an Indian" (Order at 2), and incorrectly concludes this failure is a prerequisite to a viable claim for post-conviction relief. This case has nothing to do with being an "Indian" or having an Indian victim. This case is not about the Major Crimes Act ("MCA") 18 U.S.C. § 1153, or the General

Crimes Act ("GCA") 18 U.S.C. § 1152; rather this cases involves a pure subject-matter jurisdiction claim because of Oklahoma's Enabling Act [59th Congress, Session I, Chapter. 3335, pg. 279, (1906)]. *See also* Okla. Const., art. 1, § 3; the history of relevant Indian Treaties; clearly established Supreme Court, Tenth Circuit, and State precedent. *McGirt* and its progeny.

The District Court's failure to analyze the subject-matter jurisdictional claims under Oklahoma's Enabling Act is crucial because of the federal nature of the claim that cannot be overlooked. When a State obtains a conviction in violation of a 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, 73 S.Ct. 397, 97 L.Ed. 469 (1953). The District Court's factual determination was not only erroneous it was objectively unreasonable because the State ceded jurisdiction to the United States upon entry into the Union. Okla. Const. art. I § 3, the Enabling Act,[1] which must be interpreted by a plain language reading of the text to arrive at a meaning of what the framers intended. These assertions are reinforced with text where there can be no other meaning when analyzed by a plain language reading of the text. Important to the claims raised is the Enabling Act embodied into art. I, § 3 and was not addressed in *McGirt* or *Murphy v. Royal,* 866 F.3d 1164 (10th Cir. 2017).[2] Art. I, § 3 reads:

> 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**. ..

[1] *In re Initiative Petition No.* 363, 1996 OK 122, 927 P.2d 558.

[2] (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.")

Indian Country and Art. 1 § 3

Before *McGirt*, Okla. Const., art. 1, § 3 was of no consequence, rather it was simply an imposition upon the State under the Enabling Act, *supra*. Oklahoma has existed for a little over 114 years, with little credence given to this constitutional provision and appears to be a forgotten article which remains in effect today and represents a congressional prohibition of State jurisdiction. After the Supreme Court's decision in *McGirt*, and understanding that Oklahomans believed "reservations," or "Indian lands" to be things of the past. *See Cole v. State*, 2021 OK CR 10, fn. 1, (Lumpkin, Judge: "I continue to share the position of Chief Justice Robert's dissent in *McGirt*, that at the time of Oklahoma statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed.").

Now looking at *McGirt,* the Court addressed Oklahoma's points on the merit and rejected every attempted defense and rejected the history relied upon by the State finding it unconvincing:

> [t]his history proves no more helpful in discerning statutory meaning. Maybe, as Oklahoma supposes, it suggests that some white settlers in good faith thought the Creek lands no longer constituted a Reservation. **But maybe, too, some didn't care, and others never paused to think about the question.** Certain historians have argued, for example, that the loss of Creek land ownership was accelerated by the discovery of oil in the region during the period at issue here. 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. A. Debo, And Still the Waters Run 86-87, 117-118 (1940). And for a time, Oklahoma's Courts appear to **have entertained *sham* competency and guardianship proceedings** that divested Tribe members of oil rich allotments. *Id.*, at 104-106, 233-234; Brief for Historians et al. as Amici Curiae 26-30. Whatever else might be said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for tribal interests.

McGirt, supra, at 2473

Using the framework set out in *McGirt* which relied on *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), defining "Indian lands," this Court has extended the ruling to the Eastern half of the State. *See Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ (Chickasaw

Reservation); *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___ (Cherokee Reservation); *Sizemore v. State,* 2021 OK CR 6, ___ P.3d ___ (Choctaw Reservation); *Spears v. State*, 2021 OK CR 7, ___ P.3d ___ (Cherokee Reservation); *Grayson v. State*, 2021 OK CR 8, ___ P.3d ___ (Seminole Reservation); *Cole v. State*, 2021 OK CR 10, ___ P.3d ___ (Cherokee Reservation); *Ryder v. State*, 2021 OK CR 11, ___ P.3d ___ (Choctaw Reservation); and *Bench v. State*, 2021 OK CR 12, ___ P.3d ___ (Chickasaw Reservation).

Oklahoma Supreme Court's Interpretation of the Enabling Act.

The Oklahoma Supreme Court addressed the Enabling Act in *Higgins v. Brown*, 1908 OK 28, 20 Okla. 355, 94 P. 703, and applying *stare decisis,* the Court discussed in great detail a comparison of laws with other states and determined the lands were exclusively under the jurisdiction of the United States. The Oklahoma Enabling Act and State Constitution remain the same today as from their inception as addressed in *Higgins*:

> ¶ 164 By the same process of reasoning followed by the Supreme Court of the United States in cases of *U.S. v. McBratney,* 104 U.S. 621, [26 L.Ed. 869, 21 S.Ct. 924] (1882), and *Draper v. U.S.,* 164 U.S. 240, [17 S.Ct. 107, 41 L.Ed. 419] (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. *See, also,* the following authorities heretofore cited: *Moore v. U.S.*, 85 F. 465 (8th Cir. 1898); *U.S. v. Kagama*, 118 U.S. 375, (1886); *Ward v. U.S.*, 28 F. Cas. 397, 1 Kan.

> 601 (1863); *Ward v. Race Horse*, 163 U.S. 504 (1896); *U.S. v. Bailey*, 1 McLean 234, 24 F. Cas. 937 (1834); *State v. Doxtater*, 47 Wis. 278, 2 N.W. 439.

Id.

The Tenth Circuit's interpretation of the Oklahoma Enabling Act is that the Enabling Act preserved the authority of the Federal Government over Indians and their lands and required the State to disclaim "all right and title" to such lands. See §§ 1, 3, 34 Stat. at 267-68, 270. *Indian Country, USA v. Oklahoma Tax Com'n*, 829 F.2d 967, 978 (10th Cir. 1987). The Tenth Circuit rejected the State's interpretation of Oklahoma's Enabling Act because the State's construction ignored the effect of section one of the Act, in which Congress explicitly preserved Federal authority. Section one provides 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.

Indian Country, USA v. Oklahoma Tax Com'n, 829 F.2d at 979.

Oklahoma Enabling Act, § 1, 34 Stat. at 267-68. Section one is a general Reservation of Federal and tribal jurisdiction over "Indians, their lands, [and] property," except as extinguished by the tribes or the Federal—not state—government. *Id.* Further, the Court held that "[t]he language of the Oklahoma Act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally-owned land base—events that never occurred and goals that Congress later expressly repudiated. The State has failed to cite any acts of Congress

that clearly reveal an intent to divest the Federal and tribal governments of jurisdiction over Creek tribal lands and to confer such authority on the State of Oklahoma." *Id.* at 979-980.

> Our interpretation of Oklahoma's Enabling Act is consistent with the way in which Congress interpreted the Act in 1953 when it addressed the matter of state jurisdiction over Indian Country. In that year, Congress enacted Public Law 83-280 to permit states to assert limited civil and broad criminal jurisdiction in Indian Country. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Public Law 280) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360 (1982 & Supp.1985)). Congress included a provision that operated to "give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws." See S. Rep. No. 699, 83d Cong., 1st Sess., reprinted in 1953 U.S. Code Cong. & Admin. News 2409, 2412; *see also* Public Law 280, § 6, 67 Stat. at 590 (codified as amended at 25 U.S.C. § 1324). The Committee Report listed Oklahoma among the states with such disclaimers and stated that the "[e]ffect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished." S. Rep. No. 699, 1953 U.S. Code Cong. & Admin. News at 2412; *cf. McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175, 93 S.Ct. 1257, 1264, 36 L.Ed.2d 129 (1973) (Court noted that Congress had acted on the assumption that the states lacked jurisdiction over the Navajos on their Reservation). Creek Nation title to the Mackey site has never been extinguished.

The Court concluded that the series of Federal laws enacted before statehood and the Oklahoma Enabling Act do not divest the Federal Government of authority over Creek tribal lands, do not abolish the Creek Nation's legislative and regulatory authority over such lands, and do not evince a clear intent by Congress to permit the State to assert jurisdiction. *Indian Country,* 829 F.2d at 979. The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, applies only within the territorial jurisdiction of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 69 S.Ct. 575, 93 L.Ed. 680 (1949) (citing *Blackmer v. United States*, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932)) Thus the Oklahoma Enabling Act is not silent as it created a congressional prohibition of state jurisdiction.

McBratney[3]/Draper[4] Rule

In *McBratney*, a non-Indian was convicted in Federal Court of murdering another non-Indian on a Colorado Indian Reservation. *McBratney*, *supra*, at 621. In a highly suspect application of statutory construction, the Supreme Court first observed that Federal Courts could only exercise criminal jurisdiction over places—including Indian Country—within the exclusive jurisdiction of the United States. According to the Court, if Colorado had jurisdiction over the offense, then the Federal Government did not. Colorado had jurisdiction, the Court said, because Congress had admitted it to the Union "upon an equal footing with the original States" and no exception was made for jurisdiction over the Reservation. *McBratney*, *supra*. Thus, the Court reasoned, Colorado law extended throughout the State, and to the Reservation, insofar as that law related to non-Indian against non-Indian crimes.

McBratney's holding was later shoehorned in *Draper, supra*. There, the murder of a non-Indian by a non-Indian occurred on a Montana Reservation. *Draper*, *supra*. The Court in *Draper* addressed the State of Montana's Enabling Act which provided that the people "agree and declare that they forever disclaim" all title to Indian lands and that "said lands shall remain under the absolute jurisdiction and control of the Congress of the United States." The Supreme Court ruled that the State, and not the Federal Government, had jurisdiction over the homicide. Despite what commentators believe to be untenable underpinnings, *McBratney and Draper* are, and remain, the accepted rule of law. In *Higgins v. Brown, supra*, the Oklahoma Supreme Court specifically concluded "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**." Because Oklahoma's Constitution ceded

[3] *U.S. v. McBratney,* 104 U.S. 621, 26 L.Ed. 869, 21 S.Ct. 924 (1882)
[4] *Draper v. U.S.,* 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896)

jurisdiction to the United States, the *McBratney/Draper* rule is inapplicable to Indian lands in Oklahoma or any land that the United States is a party of interest to the land based on the jurisdictional agreement the State and Federal Government entered and put in place.

In *Hollister v. U.S.*, 145 F. 773 (8th Cir. 1906), the Eighth Circuit held that South Dakota had, by consent of its people, ceded criminal jurisdiction over Indian land on the Rosebud and other reservations within the State which the United States had acquired before statehood. *Id.* at 778. The Court said that the consent and cession of jurisdiction, on the part of the State, and the Federal Government's assumption of the same, **were sufficiently expressed in state constitutional provisions** and State and Federal enactments. *Id.*

A few months afterward, the Eighth Circuit Court of Appeals specifically addressed the *McBratney/Draper rule*, concluding that it only applied to crimes committed "in a sovereign state, the admission of which into the Union, without any exception with respect to the Indian reservations therein or the jurisdiction over them, removed those reservations from the plenary authority of the United States." *U.S. v. Sadekni,* No. 3: 16-CR-30164-MAM (D.S.D. Mar. 1, 2017) (citing *Brown v. U.S.*, 146 F. 975, 977 (8th Cir. 1906)). The Appeals Court also cited with approval, the case just mentioned, pointing out that the case "related to a crime [larceny] committed in an Indian Reservation [Rosebud] in South Dakota, jurisdiction to punish which had been completely ceded to the United States by the state and accepted by Congress before its commission." *Id.* The Court determined that Federal jurisdiction applied to the entire Reservation even though the Federal Government's title to certain Reservation tracts had already been extinguished. Later the Tenth Circuit addressed an appellate case where a man, who had been convicted of murder that occurred on the Rosebud Reservation, sought habeas relief on the ground that the Federal District Court in South Dakota had no jurisdiction to sentence him. *Hatten v. Hudspeth*, 99 F.2d 501 (10th

Cir. 1938) The Tenth Circuit determined that the United States District Court had jurisdiction over the crime and denied the writ. *Id.* at. 502-03.

The Eighth Circuit Appeals Court later followed, in step, the preceding cases and held that it was the intention of South Dakota, in 1901, to cede to the United States jurisdiction over certain criminal offenses committed within the territorial limits of State Indian reservations so long as they remained reservations. *Kills Plenty v. U.S.,* 133 F.2d 292 (8th Cir. 1943) The Court further held that it was the intention of the Federal Government, in 1903 and thereafter, to assume and exercise that jurisdiction with respect to assault and other specifically enumerated offenses. *Id.* Again, Oklahoma's Enabling Act is clear that jurisdiction was ceded to the United States.

In *State ex rel. May v. Seneca-Cayuga Tribe*, 1985 OK 54, ¶ 17, 711 P.2d 77, 86-87[5], the Oklahoma Supreme Court held "Although Oklahoma has not taken formal steps to remove its constitutional disclaimer, recent cases suggest that repeal of the disclaimer may not be necessary. Even should state law indicate repeal, it has been held that the barrier posed by constitutional amendment may be removed by other state action. [The Oklahoma Supreme Court] has adopted this principle emphasizing that the disclaimer is one of 'proprietary' rather than 'governmental' interest." The Oklahoma Supreme Court further determined in *Seneca-Cayuga Tribe, supra,* ¶ 19, holding, "We are unable to identify and isolate any state governmental action which amounts to an assumption of cognizance over Indian Country." Petitioner argues that Oklahoma's Constitution differs from Alaska's Constitution, but the majority recognizes the case of *Organized Village of Kake v. Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), which is derived from Public Law 83-280. The Supreme Court recognized even the difference in the text between Oklahoma and Alaska's Constitution where Oklahoma establishes that Indian lands remain

[5] ¶ 37 KAUGER, J., concurs in part and dissents in part.

"**subject to the *jurisdiction*, disposal, and control of the United States**." *Id.* at 69. While "[m]ost statehood bills contained the more common phrasing ***'absolute jurisdiction and control'*** rather than the Oklahoma phrase." *Id. at 70.* Although this was the usual language employed to retain Federal power in statehood acts, the Senate Committee in 1958 out of an abundance of caution deleted the word "jurisdiction" so no one might construe the statute as abolishing state power entirely. (emphasis added) In *Higgins, supra*, the Court's interpretation did not allow for the State of Oklahoma to claim arbitrary jurisdiction over Indian land, to do so in 1908 would have ignored the congressional intent of Oklahoma's Enabling Act and nothing has altered that language.

Petitioner then points to *Hoover v. Kiowa Tribe of Oklahoma*, 1998 OK 23, 957 P.2d 81,[6] wherein the Tenth Circuit upheld dissenting opinions by reversing the majority's opinion. The dissent determined: ¶ 9 Despite the language of Oklahoma's enabling legislation, specifically protecting the rights of Native Americans in Indian territory, section 6 of P.L. 280, 67 Stat. 590 (1953) provides:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State Constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State Constitution or statutes as the case may be."
>
> Oklahoma has not amended its Constitution, nor has it complied with the conditions set forth in P.L. 280 to invoke jurisdiction over Indian tribes. It also has not assumed economic responsibility for tribal services currently provided by Indian nations, i.e., health care, indigent relief, road improvements, etc. The majority's reliance on a statement by Governor Johnston Murray, who served from 1951 to 1955, for the

[6] *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163 (10th Cir. 1998) the Court *reversed*: (The District Court's decisions to dismiss the Tribe's § 1983 action pursuant to the *Rooker-Feldman* doctrine and to deny the Tribe a preliminary injunction pending prosecution of the claim are REVERSED. The case is REMANDED to the District Court for further consideration consistent with this opinion and in light of any subsequent action taken by the Oklahoma State Courts in response to the Supreme Court's holding in Manufacturing Tech.)

> proposition that adoption of P.L. 280 in Oklahoma would make no difference to Native Americans in Oklahoma is unconvincing. Had the State passed legislation or amended its Constitution in conjunction with the Federal statute—**which it has not, civil and criminal jurisdiction could have been extended over Indian Country**. However, the window has closed on Oklahoma's opportunity to assume jurisdiction under P.L. 280 as originally enacted. The portion of the Federal statute allowing for the assumption of jurisdiction was repealed in 1968."

Then the Tenth Circuit in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), recognized that 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, USA, supra.* 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. U.S. v. Burnett*, 777 F.2d 593 (10th Cir.1985), *cert. denied*, 476 U.S. 1106, 106 S.Ct. 1952, 90 L.Ed.2d 361 (1986); *Ahboah v. Housing Auth. of the Kiowa Tribe*, 1983 OK 20, 660 P.2d 625; *State v. Burnett, supra*; *C.M.G. v. Oklahoma,* 1979 OK CR 39, 594 P.2d 798, *cert. denied*, 444 U.S. 992, 100 S.Ct. 524, 62 L.Ed.2d 421 (1979); *Littlechief, supra.* Oklahoma has not obtained tribal consent following the 1968 amendment and **has thus never acquired jurisdiction over Indian Country through Public Law 280**. *See Cravatt v. State*, *supra*, ("The State of Oklahoma has never acted pursuant to Public Law 83-280." *quoting State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403); *See* Felix S. Cohen's Handbook of Federal Indian Law 60 at 537-38 & n.47 (Nell Jessup Newton ed., 2012).

The District Court of Seminole County addressed the Enabling Act in *Grayson,* F-2018-1229,[7] *on remand and affirmed* in *Grayson v. State*, 2021 OK CR 8. The District Court held: **(iii) Oklahoma's statehood did not disestablish the Reservation.**

> Shortly after Congress expressly preserved the Seminole Nation's Government, it passed the Oklahoma Enabling Act, 34 Stat. 267 (1906), paving the way for Oklahoma statehood. But like every other congressional statute that might

[7] 12 O.S. § 2202 (D) mandates that this this Court must take judicial notice of this Court's docket.

> potentially be cited by the State, nothing in the Oklahoma Enabling Act contained any language suggesting that Congress intended to terminate the Seminole Reservation.
>
> In fact, if anything, the Oklahoma Enabling Act shows that Congress intended that Oklahoma statehood shall not interfere with existing treaty obligations (i.e., reservations). The Act explicitly prohibited Oklahoma's forthcoming Constitution from containing anything that could be construed as limiting the Federal Government's role in Indian affairs, *e.g.*, its authority "to make any law or regulation respecting such Indians." 34 Stat. at 267.
>
> Ultimately, because no Act of Congress bears any of the textual evidence of intent to disestablish the Seminole Reservation, it simply does not matter that Oklahoma has undergone changes since 1866. Nor does it matter that State officials might have presumed for the last hundred or so years that the Seminole Reservation no longer exists.

Because Oklahoma forever disclaimed all right and title in the limits owned or held by any Indian, Tribe, or Nation; and that until the title to any such lands 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. When Oklahoma entered the Union, it disclaimed any right to the jurisdiction which lies solely within the United States regardless of the MCA or GCA because the State never sought to change the State Constitution which deprives the State from exercising jurisdiction over those lands **regardless of race**, Indian or non-Indian. The State often asserts that it has concurrent jurisdiction over non-Indians but that is blatantly false according to the State Constitution. Therefore, the State lacked subject-matter jurisdiction over the offense because exclusive jurisdiction was ceded to the United States under the Enabling Act.

Congressional Intent and Prohibition

It is clear and unequivocal that the Oklahoma Enabling Act, *supra*, was a congressional mandate, said Enabling Act created Statehood for Oklahoma **under certain conditions and restraints:**

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a Constitution and become the State of Oklahoma, as hereinafter provided: *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. ...

Id. at § 1. p. 267-68, and § 25. Second. p. 279 (emphasis added).

When comparing the foregoing text to relevant well-settled law, it unequivocally demonstrates that Congress explicitly **prohibited** jurisdiction of the State (Oklahoma) in Indian Country; *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). The Supreme Court's decision in *McBratney* that states have exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian Country was based on the idea that when admitted to the Union a state "has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, ... and that [a] Reservation is no longer within the sole and exclusive jurisdiction of the United States," **unless Congress expressly provides otherwise**. *McBratney*, *supra*, at 623-24 (emphasis added).

While *McGirt*, 140 S.Ct. at 2460, states: "[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. *United States v. McBratney*, 104 U.S. 621, 624, 26 L.Ed. 869 (1882)." This would be correct only absent a congressional prohibition. Petitioner presents an issue of first impression in the context of his claims, because the congressional prohibition deprives the State of subject-matter

jurisdiction over crimes committed—despite race—in Indian Country. Further to demonstrate an abuse of discretion, which is clearly an erroneous conclusion in the judgment from the facts presented. The District Court relied on Okla. Const., art 7, § 7 (a) to vest itself with jurisdiction stating in part: ("The District Court shall have unlimited original jurisdiction of all justiciable matters in Oklahoma.") the Court omitted "**except as otherwise provided in this Article, and such powers of review of administrative action as may be provided by statute**" (emphasis added). Petitioner states because Okla. Const., art. 1, § 3 establishes this is the exclusive jurisdiction of the United States then art. 7, § 7 (a) is not applicable to Indian Country.

The law does not allow for a Court to assume "arbitrary jurisdiction" over subject-matter because it is clearly established law that "**[s]ubject-matter jurisdiction can never be waived or forfeited.**" *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012); *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), quoting *U.S. v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). *See also Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

Further, because the violations discussed herein are structural error and it is clearly established that structural error may occur at any critical stage of a criminal proceeding. See *U.S. v. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). An error cannot be both structural and subject to harmless-error review. See *Neder v U.S.*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). "[A]n error has been deemed structural if the error always results in fundamental unfairness. ..." *Weaver v. Massachusetts*, 582 U.S.___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). "An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental

unfairness...." *McCoy v. Louisiana,* 584 U.S.___, 138 S.Ct. 1500, 1511, 200, L.Ed.2d 821 (2018). Structural errors, as opposed to trial errors, affect the conduct of the entire trial and employee a separate analysis. *Robinson v. State*, 2011 OK CR 15, ¶ 3, 255 P.3d 425, 428. Structural errors "undermine the fairness of a criminal proceeding as a whole." *Id.* quoting *U.S. v. Dominguez Benitez*, 542 U.S. 74, 81, 124 S.Ct. 2333, 2239, 159 L.Ed.2d 157 (2004). They are constitutional deprivations affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991); *Duclos v. State,* 2017 OK CR 8, ¶ 10, 400 P.3d 781, 784.

CONCLUSION

WHEREFORE, the Petitioner respectfully prays upon the Honorable Court to reverse and remand this action to the District Court with instructions to Dismiss because Petitioner's judgment is *void ab initio.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the day of filing, I requested the Clerk to place one file-stamped copy of this instrument in the Notice Receptacle of the Attorney General.

DEBRA K. HAMPTON

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DEBRA K. HAMPTON

APPENDIX C

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY DISTRICT COURT
STATE OF OKLAHOMA

FILED
APR 30 2021
DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

Kenneth Funkhouser,	)	
	)	
Petitioner,	)	
vs.	)	**CF-1983-133**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S "APPLICATION FOR POST-CONVICTION RELIEF" FILED April 28, 2021

Comes on for consideration of Petitioner's "Application for Post-Conviction Relief" filed April 28, 2021. The Court has reviewed Petitioner's application, the docket sheet in this matter, as well as the pleadings filed by the Petitioner subsequent thereto requesting post-conviction relief based on the recent decision of the United Supreme Court in *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020). Petitioner's application does not present a genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony. *Johnson v. State*, 1991 OK CR 124, 823 P.2d 370. This matter will therefore be decided based on records the Court has stated it has reviewed.

Petitioner claims, based on the recent decision by the United States Supreme Court in *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020), that the offenses for which he was convicted were committed in portions of Oklahoma located in Indian Country, prohibiting Oklahoma courts from exercising jurisdiction over his crimes. However, the prosecution of Petitioner's offenses were justiciable matters, and Petitioner has not

established that the trial court lacked jurisdiction. *See,* Okla. Const. Art. VII, § 7 (District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma).

Additionally, Petitioner has failed to offer any proof that he is an "Indian" for purposes of invoking an exception to state jurisdiction. *See Goforth v. State,* 1982 OK CR 48, 644 P.2d 114 (Two elements must be satisfied before it can be found that appellant is an Indian under federal law. Initially, it must appear that he has a significant percentage of Indian blood. Secondly, the appellant must be recognized as an Indian either by the federal government or by some tribe or society of Indians.) The Petitioner has not presented this Court with any affirmative evidence that he has any significant degree of Indian blood and that he is recognized as an Indian by the federal government or by some tribe or society of Indians. In *Russell v. Cherokee Cty. Dist. Court,* 1968 OK CR 45, 438 P.2d 293, 294, the Court stated:

> "It is fundamental that where a petition for writ of habeas corpus, or for post-conviction appeal is filed, the burden is upon the Petitioner to sustain the allegations of his petition, and that every presumption favors the regularity of the proceedings had in the trial court. Error must affirmatively appear, and is never presumed."

Based on the foregoing, the Court finds that Petitioner's application for post-conviction relief filed April 28, 2021, should be, and is hereby DENIED.

IT IS SO ORDERED this 30 day of April, 2021.

DAWN MOODY
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I certify that on the date of filing a true and correct certified copy of the above and foregoing document was deposited with the United States Postal Service with sufficient postage affixed thereto, and addressed to the following recipient(s):

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DON E. NEWBERRY
TULSA COUNTY COURT CLERK

Deputy Court Clerk

APPENDIX D

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

CASE NO. CRF-1983-133

KENNETH L. FUNKHOUSER,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF AND REQUEST TO VACATE AND SET ASIDE HIS JUDGMENT AND SENTENCE BASED UPON THE COURT'S LACK OF SUBJECT-MATTER JURISDICTION AND REQUEST FOR AN EVIDENTIARY HEARING

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vs.	)	**Case No. CRF-1983-133**
THE STATE OF OKLAHOMA, **Respondent.**	)	

PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF AND REQUEST TO VACATE AND SET ASIDE HIS JUDGMENT AND SENTENCE BASED UPON THE COURT'S LACK OF SUBJECT-MATTER JURISDICTION AND REQUEST FOR AN EVIDENTIARY HEARING

COMES NOW, the Petitioner, KENNETH L. FUNKHOUSER, by and through his attorney, Debra K. Hampton, and brings this cause of action for relief under the Oklahoma Uniform Post-Conviction Procedure Act, 22 O.S. § 1080 *et seq.* Petitioner moves to vacate and set aside his Judgment and Sentence because the State Court lacked jurisdiction.

PART A

The sentence from which I seek relief is as follows:

1.	(a) Court in which sentence was rendered: (b) Case number:	**Tulsa County** **CRF-1983-133**
2.	Date of sentence:	**July 8, 1983**
3.	Offenses and Terms of sentence:	
	Count 1: Murder I, 21 O.S. § 701.7 Count 2: Robbery with a firearm, 21 O.S. § 801 Count 3: Robbery with a firearm, 21 O.S. § 801 Count 4: Robbery with a firearm, 21 O.S. § 801	**Life CS** **50 years CS** **50 years CS** **50 years CS** **all counts run consecutively each with the other**
4.	Name of Presiding Judge:	**Honorable Joe Jennings**
5.	Are you now in custody serving this sentence? Where?	**Yes** **Oklahoma State Penitentiary**

6.	Check whether the finding of guilty was made:	**After plea of not guilty**
7.	If found guilty after plea of not guilty, check whether the finding was made by:	**Jury**
8.	Name of lawyer who represented you in trial court:	**Frank McCarthy Public Defender**
9.	Was your lawyer hired by you or your family? Appointed by the Court?	**No Yes**
10.	Did you appeal the conviction? To what court or courts?	**Yes Oklahoma Court of Criminal Appeals ("OCCA")**
11.	Did a lawyer represent you for the appeal?	**Yes**
12.	Was it the same lawyer as in No. 9 above? If "No," what was this lawyer's name? Address?	**No Johnnie O'neal Tulsa public defender's office**
13.	Was an opinion written by the appellate court? If "yes," give citations if published: appellate case no.:	**Yes *Funkhouser v. State*, 1987 OK CR 44 , 734 P.2d 815 F-1984-20**
14.	Did you seek any further review of or relief from your conviction at any other time in any court?	**Yes**

If "Yes," state when you did so, the nature of your claim and the result (include citations to any reported opinions):

PART B

I believe that I have one (1) proposition for relief from the convictions and sentences described in PART A.

I. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION OVER "INDIAN LANDS," WHERE EXCLUSIVE JURISDICTION WAS CEDED TO THE UNITED STATES UNDER OKLA. CONST., ART. I, § 3, THUS PETITIONER'S CONVICTIONS ARE VOID *AB INITIO*.

1. Of what legal right or privilege do you believe you were deprived in your case?
Due process of law under the Oklahoma and United States Constitutions

2. In the facts of your case, what happened to deprive you of that legal right or privilege and who made the error of which you complain? **SEE BELOW**

3. List by name and citation any case or cases that are very close factually and legally to yours as examples of the error you believe occurred in your case. **SEE BELOW**

4. How do you think you could now prove the facts you have stated in answer to Question No. 2, above? **SEE BELOW**

5. If you did not timely appeal the original conviction, set forth facts showing how you were denied a direct appeal through no fault of your own. **SEE BELOW**

6. Is this a proposition that could have been raised on Direct Appeal? **NO**
Explain: **SEE BELOW**

PART C

I understand that I have an absolute right to appeal to the Court of Criminal Appeals from the trial court's order entered in this case, but unless I do so within thirty (30) days after the entry of the trial judge's order, I will have waived my right to appeal as provided by Section 1087 of Title 22.

PART D

I have read the foregoing application and assignment(s) of error and hereby state under oath that there are no other grounds upon which I wish to attack the judgment and sentence under which I am presently convicted. I realize that I cannot later raise or assert any reason or ground known to me at this time or which could have been discovered by me by the exercise of reasonable diligence. I further realize that I am not entitled to file a second or subsequent application for post-conviction relief based upon facts within my knowledge or which I could discover with reasonable diligence at this time.

PART E (As Applicable)

The Petitioner is represented by counsel.

BRIEF IN SUPPORT

JURISDICTION

A District Court reacquires jurisdiction of a case through post-conviction proceedings. "Excluding a timely appeal, the Uniform Post-Conviction Procedure Act (22 O.S. § 1080 et seq.) encompasses and replaces all common law and statutory methods of challenging a conviction or sentence." See *Jones v. State*, 1985 OK CR 99, ¶ 4, 704 P.2d 1138, 1140; *Webb v. State*, 1983 OK CR 40, ¶ 3, 661 P.2d 904, 905. "Post-Conviction review provides petitioners with very limited

grounds upon which to base a collateral attack on their judgments." *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973, citing 22 O.S. 2001, § 1086. An exception to this rule exists where a Court finds sufficient reason for not asserting or inadequately presenting an issue in prior proceedings or when an "intervening change in constitutional law impacts the judgment and sentence." *Bryson v. State,* 1995 OK CR 57, 903 P.2d 333, 334; *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741. Petitioner is unlawfully restrained of his liberty and his sentence must be vacated because this Court did not have jurisdiction; 22 O.S. § 1080 (b) provides an enumerated provision "that the Court was without jurisdiction to impose sentence," *accord* § 1080 *et seq.* is the proper vehicle within which to seek relief.

STATEMENT OF CASE

Petitioner was charged for the offense of Murder in the First Degree, three counts of Robbery with Firearms, and Attempted Robbery with a Firearm. A demurrer was sustained as to the allegation of Attempted Robbery, but Petitioner was convicted by a jury on the other four counts. Pursuant to an agreement with the State, Petitioner waived his right to jury sentencing and agreed to a sentence of life imprisonment on the murder conviction and sentences of 50 years each on the robbery conviction, all running consecutively. The District Court imposed Judgment and Sentence pursuant to this agreement. Petitioner's co-defendant, and brother, Garland Funkhouser, was acquitted by the jury The OCCA affirmed the judgment and sentence on March 11, 1987. *Funkhouser v. State*, 1987 OK CR 44, 734 P.2d 815.

Petitioner, pro se, filed a Petition for Certiorari to the United States Supreme Court in *Funkhouser v. Oklahoma*, Case No. 86-6902, *cert* was also denied. Petitioner has sought further relief but it is irrelevant.

STATEMENT OF FACTS

The Petitioner is not an enrolled tribal member, but the alleged offense occurred in Tulsa, Oklahoma, within Tulsa County. This land is considered Indian land belonging to the Muscogee (Creek) Reservation, Osage Nation and Cherokee Nation according to the United States Supreme Court.

PPROPOSITION I

THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION OVER "INDIAN LANDS," WHERE EXCLUSIVE JURISDICTION WAS CEDED TO THE UNITED STATES UNDER OKLA. CONST., ART. I, § 3, THUS PETITIONER'S CONVICTIONS ARE VOID *AB INITIO.*

STANDARD OF REVIEW

The correct standard of review is comparable under *McGirt v. Oklahoma,* 591 U.S. ____, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), but this case presents a matter of first impression, *see e.g. Murphy v. Royal*, 875 F.3d 896, 907 - 909, 966 (2017), *cert. granted,* 589 U. S. ___ (2019); *see also Sharp v. Murphy*, 591 U.S. ____ (2020) (Per Curiam)(affirming the Tenth Circuit); *Cox v. State*, 2006 OK CR 51, ¶ 6, 152 P.3d 244, 247 ("a lack of subject-matter jurisdiction upon the trial Court cannot be waived."); *Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 372; *Triplet v. Franklin*, 365 Fed. Appx. 86, 95 (10th Cir. 2010); and *Wackerly v. State*, 2010 OK CR 16, 237 P.3d 795, 797.

ARGUMENT AND AUTHORITY

McGirt was clear that no matter how many other promises to a tribe the Federal Government has already broken, if Congress wishes to break the promise of a reservation, it must say so. *McGirt v. Oklahoma,* 591 U.S. ____, 140 S.Ct. 2452, 2462, 207 L.Ed.2d 985 (2020); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). *See also Murphy v. Royal,* 875 F.3d 896, 907-909, 966 (2017) *cert. granted,* 589 U. S. ___, 138 S.Ct. 2026, 201 L.Ed.2d 277 (2018); *Sharp v. Murphy*, 591 U.S. ____, 140 S.Ct. 2412 (2020) (Per Curiam) (The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed

in *McGirt v. Oklahoma*, *ante*, p.). *See Grayson,* F-2018-1229[1], *on remand and affirmed* in *Grayson v. State*, 2021 OK CR 8.

> **Oklahoma is not a Public Law 83-280 State and *stare decisis* is controlling to the Oklahoma Courts interpretation of the Oklahoma Enabling Act which deprives the State District Courts of subject-matter jurisdiction regardless of race if an alleged offense is committed on Indian land.**

Petitioner argues that any Oklahoma State District Court in Indian territory is deprived of subject-matter jurisdiction to hear any claim, civil or criminal, because the State ceded jurisdiction to the United States upon entry into the Union. These assertions are reinforced with text where there can be no other meaning when analyzed by a plain language reading of the text. Important to the claims raised is the Enabling Act [59th Congress, Session I, Chapter. 3335, pg. 279, (1906)] which provides in part:

> **Second.** That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated lands and ungranted public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian tribes, except as hereinafter provided, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and such Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands and other Equality of tax a property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and ...

The Enabling Act is embodied into Okla. Const., art. I, § 3 which is the Enabling Act[2], and was not addressed in *McGirt* or *Murphy*[3], and until the United States Supreme Court's determination in *McGirt* these claims were truly unavailable. Okla. Const. art. I, § 3 reads:

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[1] 12 O.S. § 2202 (D) mandates that this this Court must take judicial notice of this Court's docket.

[2] *In re Initiative Petition No.* 363, 1996 OK 122, 927 P.2d 558.

[3] *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) as modified recognized that (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.")

> 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** ...

There are three methods by which the United States obtains exclusive or concurrent jurisdiction over Federal lands in a State; the third method is that clarified by Okla. Const., art. I, § 3 **a reservation of Federal jurisdiction upon the admission of a State into the Union**. *See Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938). The Courts in this State have addressed the Enabling Act since as early as statehood, Petitioner points to *Higgins v. Brown*, 1908 OK 28, 20 Okla. 355, 94 P. 703, and applying *stare decisis,* the Court discussed in great detail a comparison of laws with other states and determined the lands were exclusively under the jurisdiction of the United States. The Oklahoma Enabling Act and State Constitution remain the same today as from their inception as was addressed in *Higgins*:

> ¶ 164 By the same process of reasoning followed by the Supreme Court of the United States in cases of *U.S. v. McBratney,* 104 U.S. 621, 26 L.Ed. 869, 21 S.Ct. 924 (1882), and *Draper v. U.S.,* 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (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. *See, also,* the following authorities heretofore cited: *Moore v. U.S.*, 85 F. 465, 29 C. C. A. 269; *U.S. v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228; *Ward v. U.S.*, 28

F.Cas. 397, No. 16,639; *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244; *U.S. v. Bailey*, 24 F.Cas. 937, No. 14,495; *State v. Doxtater*, 47 Wis. 278, 2 N.W. 439.

The Oklahoma Constitution was created by an Act of Congress which defined the congressional intent as determined in *Higgins*. Public Law 280 was an Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), which provided the States' permission to assume criminal and civil jurisdiction over any "Indian Country" within the borders of the States. Under this Public Law, Oklahoma could have, without the consent of the affected Indians, assumed jurisdiction over any Indian Country in the State by constitutional amendment. The State of Oklahoma has never acted pursuant to Public Law 83-280 or Title IV of the Civil Rights Act to assume jurisdiction over the "Indian Country" within its borders. *See C.M.G. v. State*, 1979 OK CR 39, ¶ 2, 594 P.2d 798, *cert. denied*, 444 U.S. 992, 100 S.Ct. 524, 62 L.Ed.2d 421 (1979) "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**...." *Id.* citing *State v. Littlechief*, 1978 OK CR 2, 573 P.2d 263; *State v. Burnett*, 1983 OK CR 153, ¶ 10, 671 P.2d 1165. "The land in question is Indian Country within the meaning of 18 U.S.C. § 1151(c), and outside the jurisdiction of the District Court." *State v. Burnett, supra,* at ¶ 11. *Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277.

In *State ex rel. May v. Seneca-Cayuga Tribe*, 1985 OK 54, ¶ 17, 711 P.2d 77, 86-87[4], the Oklahoma Supreme Court held "Although Oklahoma has not taken formal steps to remove its constitutional disclaimer, recent cases suggest that repeal of the disclaimer may not be necessary. Even should state law indicate repeal, it has been held that the barrier posed by constitutional amendment may be removed by other state action. This Court has adopted this principle

[4] ¶ 37 KAUGER, J., concurs in part and dissents in part.

emphasizing that the disclaimer is one of 'proprietary' rather than 'governmental' interest." The Oklahoma Supreme Court further determined in *Seneca-Cayuga Tribe, supra,* ¶ 19, holding, "We are unable to identify and isolate any state governmental action which amounts to an assumption of cognizance over Indian Country." Oklahoma's Constitution differs from Alaska's Constitution, but the majority recognizes the case of *Organized Village of Kake v. Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) which is derived from Public Law 83-280. The Supreme Court recognized even the difference in the text between Oklahoma and Alaska's Constitution where Oklahoma establishes that Indian lands should remain "**subject to the *jurisdiction*, disposal, and control of the United States.** *Id. at* 69. While "[m]ost statehood bills contained the more common phrasing ***'absolute jurisdiction and control'*** rather than the Oklahoma phrase." *Id. at* 70. Although this was the usual language employed to retain Federal power in statehood acts, the Senate Committee in 1958 out of an abundance of caution deleted the word "jurisdiction" in order that no one might construe the statute as abolishing state power entirely. (emphasis added) In *Higgins, supra,* the Court's interpretation did not allow for the State of Oklahoma to claim arbitrary jurisdiction over Indian land, to do so in 1908 would have ignored the congressional intent of Okla. Const., art. I, § 3. To date, nothing has altered the language of art. I, § 3.

Petitioner then points to *Hoover v. Kiowa Tribe of Oklahoma,* 1998 OK 23, 957 P.2d 81[5], wherein the Tenth Circuit upheld dissenting opinions by reversing the majorities opinion. The dissent determined: ¶ 9 Despite the language of Oklahoma's enabling legislation, specifically protecting the rights of Native Americans in Indian territory, section 6 of P.L. 280, 67 Stat. 590

[5] *Kiowa Indian Tribe of Oklahoma v. Hoover,* 150 F.3d 1163 (10th Cir. 1998) the Court *reversed*: (The District Court's decisions to dismiss the Tribe's § 1983 action pursuant to the *Rooker-Feldman* doctrine and to deny the Tribe a preliminary injunction pending prosecution of the claim are REVERSED. The case is REMANDED to the District Court for further consideration consistent with this opinion and in light of any subsequent action taken by the Oklahoma State Courts in response to the Supreme Court's holding in Manufacturing Tech.)

(1953) provides:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State Constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State Constitution or statutes as the case may be."
>
> Oklahoma has not amended its Constitution, nor has it complied with the conditions set forth in P.L. 280 to invoke jurisdiction over Indian tribes. It also has not assumed economic responsibility for tribal services currently provided by Indian nations, i.e., health care, indigent relief, road improvements, etc. The majority's reliance on a statement by Governor Johnston Murray, who served from 1951 to 1955, for the proposition that adoption of P.L. 280 in Oklahoma would make no difference to Native Americans in Oklahoma is unconvincing. Had the State passed legislation or amended its Constitution in conjunction with the Federal statute—**which it has not, civil and criminal jurisdiction could have been extended over Indian Country**. However, the window has closed on Oklahoma's opportunity to assume jurisdiction under P.L. 280 as originally enacted. The portion of the Federal statute allowing for the assumption of jurisdiction was repealed in 1968."

More recently in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), the Court also recognized that 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, USA v. Oklahoma Tax Com'n,* 829 F.2d 967, 980 n.6 (10th Cir. 1987). 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. U.S. v. Burnett*, 777 F.2d 593 (10th Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1952, 90 L.Ed.2d 361 (1986); *Ahboah v. Housing Auth. of the Kiowa Tribe*, 1983 OK 20, 660 P.2d 625; *State v. Burnett, supra*; *C.M.G., supra*; *Littlechief, supra.* Oklahoma has not obtained tribal consent following the 1968 amendment and **has thus never acquired jurisdiction over Indian Country through Public Law 280**. *See Cravatt v. State, supra,* ("The State of Oklahoma has never acted pursuant to Public Law 83-280."

quoting State v. Klindt, 1989 OK CR 75, 782 P.2d 401, 403); *See* Felix S. Cohen's Handbook of Federal Indian Law 60 at 537-38 & n.47 (Nell Jessup Newton ed., 2012).

The District Court of Seminole County addressed the Enabling Act in *Grayson,* F-2018-1229[6], *on remand and affirmed* in *Grayson v. State*, 2021 OK CR 8. The District Court held: **(iii) Oklahoma's statehood did not disestablish the Reservation.**

> Shortly after Congress expressly preserved the Seminole Nation's Government, it passed the Oklahoma Enabling Act, 34 Stat. 267 (1906), paving the way for Oklahoma statehood. But like every other congressional statute that might potentially be cited by the State, nothing in the Oklahoma Enabling Act contained any language suggesting that Congress intended to terminate the Seminole Reservation.
>
> In fact, if anything, the Oklahoma Enabling Act shows that Congress intended that Oklahoma statehood shall not interfere with existing treaty obligations (i.e., reservations). The Act explicitly prohibited Oklahoma's forthcoming Constitution from containing anything that could be construed as limiting the Federal Government's role in Indian affairs, *e.g.,* its authority "to make any law or regulation respecting such Indians." 34 Stat. at 267.
>
> Ultimately, because no Act of Congress bears any of the textual evidence of intent to disestablish the Seminole Reservation, it simply does not matter that Oklahoma has undergone changes since 1866. Nor does it matter that State officials might have presumed for the last hundred or so years that the Seminole Reservation no longer exists.

Similarly, in *Rogers County Board of Tax Roll Corrections, et al, v. Video Gaming Technologies, Inc*, ___ U.S. ___ 141 S.Ct. 24 (2020), the United States Supreme Court faced a question in a Petition for Certiorari with one justice dissenting recognizing: "Does Federal law silently pre-empt State laws assessing taxes on ownership of electronic gambling equipment when that equipment is located on tribal land but owned by non-Indians? Here, the Oklahoma Supreme Court said yes." Petitioner argues this can be easily ascertained by a plain language reading of Okla. Const., art. I, § 3 that forever disclaimed any right to the land and precludes taxation of the

[6] 12 O.S. § 2202 (D) mandates that this this Court must take judicial notice of this Court's docket.

land. Certainly, *McGirt* at 2478 clarified, "[n]or has Congress ever passed a law conferring jurisdiction on Oklahoma." The Creek, Cherokee, and all federally recognized nations can now impose their own taxes and regulations on Indians and non-Indians living within a reservation. *See Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 198, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985) (upholding tribal tax on business activity within reservation). Therefore, the State of Oklahoma is deprived of criminal subject-matter jurisdiction over offenses committed by non-Indians on Indian land.

Petitioner argues that understanding the history of the State of Oklahoma is important. Unique to Oklahoma is the Murray family, William Henry Davis ***"Alfalfa Bill"*** Murray moved to Oklahoma from Texas. "Alfalfa Bill" became active in Oklahoma before statehood as legal adviser to Governor Douglas H. Johnston of the Chickasaw Nation. Although not American Indian, he was appointed by Johnston as the Chickasaw delegate to the 1905 Convention for the proposed State of Sequoyah. Later he was elected as a delegate to the 1906 Constitutional convention for the proposed State of Oklahoma; it was admitted in 1907.

After statehood, "Alfalfa Bill" was elected as a representative and the first Speaker of the Oklahoma House of Representatives. He was also elected as U.S. Representative (D-Oklahoma), and later as the ninth Governor of Oklahoma (1931–1935). During his tenure as Governor in years of the Great Depression, he established a record for the number of times he used the National Guard to perform duties in the State and for declaring martial law at a time of unrest.

"Alfalfa Bill" married Gov. Johnston's niece, Alice Hearrell, on June 19, 1899, and had five children, Johnston Murray was their son. Johnston Murray was later elected the fourteenth Governor of Oklahoma in November 1950 and sworn into office on January 21, 1951. "Alfalfa Bill," 81-years old, administered the oath of office to his son and he was the only Governor to have his oath given by his father. Johnston Murray was the first person of Native American descent to

be elected as Governor in the United States; his mother was one-eighth Chickasaw, but he never enrolled in the Nation. This is important to what determines what the framers of the Constitution intended.

In 1905, "Alfalfa Bill" was involved in the unsuccessful movement to establish a separate Indian Territory State called Sequoyah. As vice president of the 1905 Sequoyah Convention, he worked tirelessly on a Constitution. The work of the Sequoyah State Constitutional Convention was not lost because representatives from Indian Territory joined the Oklahoma State Constitutional Convention in Guthrie the next year, they brought their experience with them. The Sequoyah Constitution served largely as the basis for the Constitution of the State of Oklahoma, which came into being with the merger of the two territories in 1907. Johnston Murray certainly spent time with his father growing up and who better to understand the framer's intent behind the Oklahoma Constitution, it is suspected that he did not want to nullify the tribes' sovereign rights.

The disclaimer language of the State Constitution must be interpreted by the congressional intent.

Petitioner argues the disclaimer language found in the State Constitution reinforces his assertions that Oklahoma has no subject-matter jurisdiction over Indian Country even considering the Equal Footing Doctrine because it cannot operate as a saving grace where it is unconvincing in the spirit of the law. Enabling acts cannot require that newly admitted states surrender their sovereign rights, *See Coyle v. Smith* 221 U.S. 559, 573, 31 S.Ct. 688, 55 L.Ed. 853 (1911). No State has ever argued that the percentage of Federal land within its borders impinges upon its sovereign powers in violation of the Equal Footing Doctrine. This is important because not only did the State arbitrarily take the land belonging to the Indians, but it also took land held in Federal trust exercising jurisdiction it had forever disclaimed any interest in doing so. In an Alabama case, *Lessee of Pollard v. Hagan,* 44 U.S. 212, 223, 11 L.Ed. 565, (1845), addressing when Alabama

entered into the Union the Court wrote:

> When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, **but the public lands.**

This appears to suggest that the United States had the power to retain the public lands after Alabama's admission to the Union. The *Pollard* Court observed that:

> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the Constitution but is inconsistent with the spirit and intention of the deeds of cession.

What is not left to the imagination is the Federal land patents issued to the homesteaders which were the same as the allotments given to the Indians. The allotments came by way of land patent. With the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA) Congress expressly declared that the remaining public domain lands generally would remain in Federal ownership. *See* 43 U.S.C. §§ 1701, *et seq*. Simply because the United States could dispose of their land it was not any different than allowing allotments and did nothing to alter the fact that the United States retained jurisdiction over those lands, because Oklahoma claimed no ownership over those lands at the time of statehood where the disclaimers were clear in the Oklahoma Constitution.

In *Light v. U.S.*, 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911), the Court held that the United States has the right to manage and dispose of "its" land in whatever manner it pleases, as

would any private landowner. The issue in *Light* was the Government's charge of trespass against a cattle rancher who turned his cattle out onto public land and then allowed them to wander into unfenced Federal lands where grazing was prohibited. Colorado State law provided that damages were not answerable regarding unfenced land and *Light,* therefore, believed he could allow his cattle to graze on federally claimed land without consequence. The Court disagreed, finding that Colorado State law did not apply to land claimed by the Federal Government and that the Government could seek damages for trespass and equitable relief to exclude *Light's* cattle. In deciding, the Court reasoned:

> 'Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.' *Butte City Water Co. v. Baker,* 196 U.S. 119, 126, 25 S.Ct. 211, 49 L.Ed. 409 (1905). 'The Government has with respect to its own land the rights of an ordinary proprietor to maintain its possession and prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale.' *Camfield v. U.S.,* 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed. 260 (1897). And if it may withhold from sale and settlement, it may also as an owner object to its property being used for grazing purposes, for 'the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.' *U.S. v. Beebe,* 127 U.S. 338, 8 S.Ct. 1083, 32 L.Ed. 121 (1888).
>
> The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely (citation omitted) ... *Id.*

As in the other cases cited for the proposition that the Federal Government has the right and power to retain unappropriated public land within the borders of states after admission, the issue of the fundamental legitimacy of Federal ownership was neither joined nor decided in *Light.* The *Light* Court assumed, without deciding, that Federal ownership was proper and that, as such, the Federal Government had the unreserved right to manage its land under its discretion. It is an unsurprising opinion and does not address whether the Equal Footing Doctrine, in the first instance, required State succession to Federal ownership upon statehood. Petitioner reiterates that

Okla. Const., art. I, § 3, specifically reads "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." Justice Gorsuch was clear in *McGirt* and this Court must uphold the United States Constitution. For Oklahoma to retain jurisdiction it would take an Act of Congress and require a cession of land to the State. "To be fair, Oklahoma is far from the only State that has overstepped its authority in Indian Country. Perhaps often in good faith, perhaps sometimes not, others made similar mistakes in the past." *McGirt, supra*, at 2471.

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 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, Circuit Judge writing for the panel). Our tradition suggests that we can and should usually expect more from the sovereign than deliberate indifference to fundamental rights like **life, liberty, and property**. *Browder* at 1080. (emphasis added). *See also Davidson v. New Orleans*, 96 U.S. 97, 24 L.Ed. 616, 11 S.Ct. 97 (1878) (assessment of real estate).

> **Any defenses of laches, acquiescence, equitable estoppel, estoppel or otherwise do not bar Petitioner's claims because they involve an intentional infringement which prevents the Government from raising the claim, but also violates the Separation of Powers Clause of the United States Constitution.**

The OCCA's decision in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___, was clear regarding the claim of subject-matter jurisdiction because it is not waivable. The State of Oklahoma cannot prevail on any defenses of laches, acquiescence, equitable estoppel, estoppel or otherwise because

any argument that a claim was previously available demonstrates bad faith from the Government where there is an intentional infringement then turning to the doctrine of "unclean hands." The general rule of law is that an act done in violation of a constitutional or statutory prohibition is void and confers no right upon the wrongdoer, but this rule is subject to the qualification that when, upon a survey of the statute, its subject-matter and the mischief sought to be prevented, it appears that the legislature intended otherwise, effect must be given to that intention. *See Waskey v. Hammer*, 223 U.S. 85, 94, 56 L.Ed. 359, 32 S.Ct. 187 (1912); *Miller v. Ammon*, 145 U.S. 421, 426, 12 S.Ct. 884, 36 L.Ed. 759 (1892); *Burck v. Taylor*, 152 U.S. 634, 649 14 S.Ct. 696, 38 L.Ed. 578 (1894); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 548, 22 S.Ct. 431, 46 L.Ed. 679 (1902). *See also Ewert v. Bluejacket*, 259 U.S. 129, 138, 42 S.Ct. 442, 66 L.Ed. 858 (1922).

Laches or estoppel is not available to defeat Indian treaty rights or statutes that specifically confer no right on the wrongdoer. "[T]he equitable doctrine of laches ... cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." *Ewert, supra,* (citing *Northern Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 500, 33 S.Ct. 554, 57 L.Ed. 931 (1913); *Halstead v. Grinnan*, 152 U.S. 412, 417, 14 S.Ct. 641, 38 L.Ed. 495 (1894); *Galliher v. Cadwell*, 145 U.S. 368, 372 12 S.Ct. 873, 36 L.Ed. 738 (1892). Nor can the State ignore Congress's intent of Okla. Const. art. I, § 3.

This is true even where the Indians have long acquiesced in use by others of affected lands or have purported to grant away their occupancy and use rights without Federal authorization. *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983); *Board of Commissioners v. U.S.*, 308 U.S. 343, 351, 60 S.Ct. 285, 288, 84 L.Ed. 313 (1939); *U.S. v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir.1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957); *U.S. v. Southern Pacific Transportation Co.*, 543 F.2d 676, 699 (9th Cir.1976). "It is beyond the power of the State, either through statutes of limitation or adverse possession, to affect the interest of the

United States; and the United States manifestly has an interest in preserving the property of these wards of the Government for their use and benefit." *U.S. v. 7,405.3 Acres of Land*, 97 F.2d 417, 423 (4th Cir. 1938). The Court in *Canadian St. Regis Band of Mohawk Indians v. New York*, 278 F. Supp. 2d 313, 330-33 (N.D.N.Y. 2003) chastised the State defendants for continuing to argue laches against the tribe's claims because "[l]aches has no place in Indian land claim actions." In a Connecticut case, *Schaghticoke Tribe of Indians v. Kent Sch. Corp.*, 423 F. Supp. 780, 784-85 (D. Conn. 1976), the Court determined: "The cases make plain that limitations, adverse possession, laches and estoppel cannot bar recovery of Indian lands in a suit brought to recover protected territory.... [T]he inapplicability of these affirmative defenses extends to suits by individual Indians and is not solely a product of the sovereign immunity of the United States. The determination is rooted in the language and purpose of Federal protective statutes like the Nonintercourse [sic] Act." Further, because the MCA and GCA are congressional mandates, the State nor the judiciary can deprive Congress of its constitutional authority because it establishes exclusive jurisdiction on *the United States thus depriving the State of subject-matter jurisdiction.*

Subject-matter jurisdiction is not waivable, nor can there be a bar to raise a claim when a judgment is void *ab initio.*

The law does not allow for a court to assume "arbitrary jurisdiction" over subject-matter because it is clearly established law that "**[s]ubject-matter jurisdiction can never be waived or forfeited.**" *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012); *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), quoting *U.S. v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). *See also Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). The Tenth Circuit has also determined that a litigant "cannot waive the argument that the District Court

lacks subject-matter jurisdiction," *U.S. v. Green*, 886 F.3d 1300, 1304 (10th Cir. 2018); *See also U.S. v. Garcia*, 936 F.3d 1128, 1140-41 (10th Cir. 2019). The OCCA has repeatedly held that the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction. *Wackerly* at ¶ 4; *Wallace* at ¶ 15; *See also Murphy v. State*, 2005 OK CR 25, ¶¶ 5-7, 124 P.3d 1198, 1200. In *Wackerly*, the Court also held the time limit on newly raised issues in Rule 9.7 did not apply to jurisdictional questions. *Wackerly. See also Hogner v. State*, 2021 OK CR 4, ___ P.3d ___; *Sizemore v. State*, 2021 OK CR 6, ___ P.3d ___; and *Grayson, supra.*

CONCLUSION

WHEREFORE, premises considered this Court must VACATE AND SET ASIDE the Judgment and Sentence in the interest of justice as it is void *ab initio* for a lack of subject-matter jurisdiction. IT IS SO PRAYED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on April 26, 2021, the original and copies were mailed for filing to the Tulsa County Court Clerk's Office with a request that the Clerk place a file-stamped copy in the **Notice Receptacles of the assigned Judge and Tulsa County DA's office.**

DEBRA K. HAMPTON

VERIFICATION

STATE OF OKLAHOMA)
) ss.
COUNTY OF PITTSBURG)

I, KENNETH L. FUNKHOUSER # 91752, being first sworn under oath, state that I have read and reviewed the foregoing Application for Post-Conviction Relief, and the statements therein are true to the best of my knowledge and belief.

Pursuant to Oklahoma Statutes, Title 12, Section 426, I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct. I have executed this Verification on the 23rd day of April, 2021, in McAlester, Oklahoma.

Kenneth L. Funkhouser

KENNETH L. FUNKHOUSER # 91752
P.O. Box 97
McAlester, OK 74502-0097

APPENDIX E

The Indian Commerce Clause provides:

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

The Supremacy Clause to the U.S. Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides: No state shall . . . deprive any person of life, liberty, or property, without due process of law.

18 U.S.C. § 1151

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(June 25, 1948, ch. 645, 62 Stat. 757; May 24, 1949, ch. 139, § 25, 63 Stat. 94.)

18 U.S.C. § 1153(a)

(a)Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.