NO. 21-7251

IN THE

SUPREME COURT OF THE UNITED STATES

MAJOR HUDSON III, - PETITIONER,

VS.

SCOTT NUNN, WARDEN, - RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE OKLAHOMA COURT OF CRIMINAL APPEALS

FOR THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR PETITIONER

MAJOR HUDSON III, # 264410
JCCC 216 N. MURRAY STREET
HELENA, OKLAHOMA 73741

PRO SE.

QUESTION(S) PRESENTED

1. Whether Oklahoma Court's can continue to unlawfully exercise under state law, criminal jurisdiction over the lands formerly known as the Unassigned Lands, where the Oklahoma Constitution Article 1§3 states in part that they forever disclaim all right and title...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.

2. Whether the United States still owns the patent and title to the Unassigned Lands ceded to the United States by the Muscogee (Creek) Nation and Seminole Indians following the Civil War, leaving the area exclusively under federal jurisdiction.

3. Did the Oklahoma Court of Criminal Appeals impose an improper and unduly burdensome bar to deny petitioner, in an effort to circumvent and contravene the Supreme Court's precedent, that Subject-Matter Jurisdiction can "never" be forfeited or waived.

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HUDSON V. STATE, NO. PC-2121-944 OKLA.COURT.OF CRIMINAL APPEALS, JUDGMENT ENTERED ON DECEMBER 3, 2021.

TABLE OF AUTHORITIES CITED

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THE OPINION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS APPEARS AT APPENDIX (A), UNPUBLISHED.

JURISDICTION

THE DATE ON WHICH THE OKLAHOMA COURT OF CRIMINAL APPEALS DECIDED THE CASE WAS December 3, 2021.

THE JURESDICTION OF THE COURT IS INVOKED UNDER 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

• U.S. CONSTITUTION AMENDMENT FOURTEEN: PROVIDES IN PART NOR SHALL ANY STATE DEPRIVE ANY PERSON LIFE, LIBERTY... WITHOUT DUE PROCESS OF LAW. 19

• TREATY OF CUSSETA, MARCH 24, 1832

•ACT OF JUNE 30, 1834

•ACT OF AUGUST 7, 1856

•RECONSTRUCTION TREATIES OF 1866

•ACT OF MARCH 3, 1885 [48TH CONGRESS, SESSION 2, CHAPTER 341, SEC. 3]

•OKLAHOMA CONSTITUTION ARTICLE 1§3 6

TITLE 21 O.S. 1991§1111 AND 1114

•TITLE 21 O.S. 1991§1431

•TITLE 10 O.S. 1995§7115

•TITLE 21 0.S. 1991§455

•TITLE 21 O.S. §1577

•ACT OF 1976 (FLPMA) FEDERAL LAND POLICY AND MANAGEMENT ACT.

STATEMENT OF THE CASE

Petitioner, Major Hudson III, was tried by jury before the honorable Richard Freeman, district court judge, in Oklahoma County. Mr. Hudson was charged with count (1) rape in the first degree 21 O.S. 1991§1111 and 1114; count (2) Burglary in the first degree 21 O.S. 1991§1431; count (3) child abuse 10 O.S. 1991 Supp. 1995§7115 and count (4) threatening a witness 21 O.S. §1577. In the case at bar, "both" the state and the Oklahoma Court of Criminal Appeals misconstrued petitioner's appeal as coming under *McGirt v. Oklahoma*. When in fact it's about the federal government owning the Title and Patent to the Land in question with exclusive jurisdiction. Petitioner was arrested at 5909 S. Lee Ave, Oklahoma City, Oklahoma, the area formerly known as the **Unassigned Lands.**

Due process was violated because the state lacked subject-matter jurisdiction to prosecute in this case. This federal question was raised in the following manner at the trial court level and at the Oklahoma Court of Criminal Appeals: THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION TO PROSECUTE IN THIS CASE WHERE THE UNITED STATES OWNS OR RETAINS EXCLUSIVE JURISDICTION ON SUCH LAND. The opinion of the OCCA is found in appendix (A) and the opinion of the trial court is found in appendix (B).

In addition petitioner waives any right to having the honorable Justice Gorsuch recuse himself; petitioner would like all of the Justices of the Court to participate in the decision making of this case. See appendix (C) affidavit of petitioner with declaration.

REASONS FOR GRANTING THE PETITION

Petitioner asks for this Court's discretionary jurisdiction not only because his due process rights are at stake, but also for those similarly situated. Moreover, the OCCA's ruling was contrary to Supreme Court law.

The Oklahoma court of criminal appeals, **unreasonably** construed petitioner's appeal as coming under McGirt v. Oklahoma, 140 S.Ct 2452 (2020), and applied state ex

rel. Matloff v. Wallace, 2021 Ok Cr 21__,p.3d __, 27-28, 40 in an effort to circumvent the Supreme Court's precedents on subject-matter jurisdiction, "that it can never be forfeited or waived. U.S. v. Cotton (2002).

Petitioner argues that this case is about land status and it must be analyzed under treaty law because it involves the issuance of a land patent before statehood. Petitioner points to a case that is materially indistinguishable regarding patents before statehood. See Brewer Elliott Oil and Gas Co. v. United States, 77, 43 S.Ct. 60, 67, L.Ed. 140 (1922), where the Court concluded: "the question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made and that was 35 years before Oklahoma was taken into the union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the federal government had complete sovereignty over the territory in question. Oklahoma when she came into the union took sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a non-navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title. It's not for a state by courts or legislature, in dealing with the general subject of bed of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal admission, under the constitutional rule of equality here invoked. Id at 87088 (emphasis added"). In U.S. v. Champlin Refining Co., 156 F.2d 769 (10th Cir. 1946), the Court held: The question here presented is what title passed by the patents when they were issued in 1906 and 1907, prior to the admission of Oklahoma into the union...Oklahoma cannot adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant, or would enlarge what actually passed to Oklahoma at the time or her admission under the rule of equality. Id. at 773-774. Petitioner argues that Oklahoma **could not** divest the title of the land upon entry into the union in 1907 and because it assumed authority over the land is slandered titles and deprived the United States of its sovereignty violating the separation of powers.

The history of Oklahoma County, Oklahoma refers to the history of a county in the U.S. State of Oklahoma, and the land on which it developed before 1907 statehood. Before European colonization, the land represented the edge of the domain of the Plains Indians. France and Spain both colonized and explored the area before it became part of the United States via the Louisiana Purchase. It became part of the territory of the United States and tribal land.

On March 24, 1832, with the Treaty of Cusseta, the area now Oklahoma County was ceded to the Muscogee (Creek) Nation, one of the Five Civilized Tribes. On June 30, 1834, Indian Territory, which included present-day Oklahoma County, was officially created by Congress. On August 7, 1856, the area now Oklahoma County was ceded to the Seminole Tribe. There came Reconstruction Treaties of 1866, the Seminoles were forced to sell their lands in present Oklahoma County to the U.S. Government for .15 per acre for siding with the Confederacy during the Civil War. The Seminoles felt no other option than to side with the confederate. This left an area open that became known as the Unassigned Lands.

The Unassigned Lands in Oklahoma were in the center of the lands ceded to the United States by the Muscogee (Creek) Nation and Seminole Indians following the Civil War and on which no other tribes had been settled. By 1883, it was bounded by the Cherokee Outlet on the north, several relocated Indian reservations on the east, the Chickasaw lands on the south, and the Cheyenne-Arapaho reserve on the west. The area amounted to 1, 88,796 acres (2,950 sq mi; 7,640 km).

In 1889, this territory was offered by the Federal Government to non-Native Americans for settlement in the Oklahoma Land Rush. When the U.S. wanted to open the Unassigned Lands not reallocated to other Native peoples- for non-Native settlement-they had to get permission from the Creek and Seminole Nation, because the 1866 treaty only allowed for other Native tribes and

Freedmen to be assigned reservations within the ceded land.

In 1885, Congress authorized new negotiations to remove the deed restriction on the land because most of the enthusiastic home seekers did not know of that clause in the treaty of 1866—whereby the surplus lands of both the Creeks and Seminoles were ceded back to the United States for the purpose of "locating other friendly tribes of Indians and Freedmen." While no other Indians or Freedmen were to be located on the land, yet the Government claimed that while the cloud was on the title, no white citizen could make settlement. By an Act of March 3, 1885 [48th Congress, Session 2, Chapter 341, Section 8], a commission was appointed to negotiate a new deal with these two tribes whereby the clause as to the "friendly Indians and Freedmen" was stricken from the treaty of 1866 and the Unassigned Lands would be, without question, public domain and opened to homestead settlement. This is important because the land opened for settlement for non-Natives only operated to remove the cloud on the land for the United States disposal not a release of jurisdiction or sovereignty over land rightly belonging to the United States.

The State ceded jurisdiction to the United States upon entry into the Union. Okla. Const. art. I § 3 cannot be mistaken as the Enabling Act[1] and must be interpreted by a plain language reading of the text to arrive at a meaning of what the framers intended. This Constitutional article was not addressed in *McGirt* or *Murphy*[2] and until the United States Supreme Court's determination in *McGirt* these claims were unavailable. Okla. Const art. 1 § 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.** Land belonging to citizens of the United States residing without the limits of the State shall never be

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

[2] *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.")

taxed at a higher rate than the land belonging to residents thereof. No taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

This disclaimer language has been asserted as a bar to any claim for ownership of public lands by western States. However, under the Equal-Footing Doctrine, 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). However, in *Van Brocklin v. Tennessee,* 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845 (1886), decided three years before Utah was admitted, the Court examined the enabling and admissions acts of most of the States admitted to that date, virtually all of which contained either the "never interference with disposal of the soils" or "forever disclaim" clauses, and determined these clauses "are but declaratory, and confer no new right or power upon the United States." This follows the conclusion they merely operate to clear any clouds upon title to the land so the United States can convey it to bona fide purchasers. The effort to transfer the public lands has been the topic of legal debate for some years.

Further, assuming the Government would argue about equal footing applying the Equal-Footing Doctrine cannot support a position that the State took the land from the United States upon entry into the Union because the land was opened to settlement before statehood which would require the United States to cede the land to Oklahoma and no Court has ever held that the Equal-Footing Doctrine applies to the unappropriated dry public lands within the borders of admitted states whose ownership was retained by the United States. 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.

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.

In *Gratiot v. U.S.*, 39 U.S. 526, 537, 538, 10 L.Ed. 573 (1840), the Court was called upon to resolve whether or not the Federal Government had the power to lease rather than "dispose of" unappropriated land by grant or sale. The Court decided that while the land was in territorial condition, the United States had the power to do so and not just the obligation to sell. The opinion said:

> The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest. In the case of *McCulloch v. State of Maryland,* 17 U.S. 316, 4 L.Ed. 579, 4 L.Ed.2d 579 (1819)., the Chief Justice, in giving the opinion of the Court, speaking of this article and the powers of Congress growing out of it, applies it to territorial governments, and says all admit their constitutionality.

> And again, in the case of *American Insurance Company v. Canter,* 26 U.S. 511, 7 L.Ed. 242, 7 L.Ed.2d 242 (1828), in speaking of the cession of Florida under the treaty with Spain, he says that Florida, until she shall become a state, continues to be a territory of the United States Government by that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of Congress over the lands belonging to the United States, the words "dispose of" cannot receive the construction contended for at the bar–that they vest in Congress the power only to sell and not to lease such lands. The disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument. The law of 1807, authorizing the leasing of the lead mines, was passed before Illinois was organized as a State, and she cannot now complain of any disposition or regulation of the lead mines previously made by Congress. She surely cannot claim a right to the public lands within her limits."

The opinion simply states that while land–in this case land within the Indiana territory–is in territorial condition (and, hence, owned by the United States) the Federal Government has the power to manage it as it sees fit, just as any other landowner might. The *Gratiot* Court was not asked to decide whether or not the Equal-Footing Doctrine demanded that States succeed to ownership of the public lands on statehood, nor did it decide they did not. But the Oklahoma Constitution is clear that "[t]he 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....."

The *Gratiot* Court assumed, for the dispute before it (which did not involve lands in a State but lands in a territory during territorial condition) that the public lands belonged to the Federal Government. In *Coyle* at 573, perhaps the Court's most complete analysis of the political branch of the Equal-Footing Doctrine, the Court ruled that Oklahoma could decide where to put its State capital, despite contrary language in the Enabling Statute.

In *Coyle*, the Court expanded on the nature of sovereignty and the sovereign rights to which each new State succeeds when admitted to the Union on an equal footing with the original thirteen, the question was whether or not the people of Oklahoma could move their capital from Guthrie to Oklahoma City when its Enabling Act unambiguously required the capital be maintained at Guthrie. The *Coyle* Court engaged in a detailed analysis of the meaning and impact of sovereignty and the powers and prerogatives of States upon entry into the Union. The Court stated that all States are admitted on an equal footing to the original thirteen. It wrote:

> 'This Union' was and is a Union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a Union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus, it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them in the Union; and second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. *Id* at 567.
>
> The argument that Congress derives from the duty of 'guaranteeing to each State in this Union a republican form of Government' power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has no merit. *Id.*

Petitioner argues that the State could have elected to place the State capital in Tulsa, Oklahoma, or any other City within its boundaries but that does not mean that the State would retain jurisdiction over such lands and now considering Oklahoma's actions of exercising jurisdiction that never properly belonged to them trying Indians. See *McGirt v. Oklahoma,* 591 U.S. ____, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020).

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 Enabling Act and the Oklahoma Constitution.

In *Gibson v. Choutèau*, 80 U.S. 92, 20 L.Ed. 534, 16 S.Ct. 904 (1872), the Court was called upon to review the question of ownership of land that transferred by legal fiction in 1818, but which transfer was not completely consummated until 1862. The original patent to the land was made by the United States when the land was in territorial condition in the Missouri territory. Missouri was not admitted to the Union until 1821. The dispute turned on the statute of limitations which the Missouri Court held began to run in 1818 under Missouri law and had, therefore, expired by the time suit was initiated. In reversing the Missouri decision, the Supreme Court wrote:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise, and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the further clause that the legislature shall also not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers."
>
> The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. *Id.* at 99-100.

This broad language appears to indicate that the United States Government has the right and power to manage and dispose of public lands within the borders of an admitted State, "without

limitation", even after statehood. However, when the language is put in context, it simply means that land sold or granted by the United States while the region is in territorial condition carries with it the right and power of the United States Government, and title to land conveyed under these circumstances cannot be affected or the conveyance undone by subsequent State law. This means that nothing a State does after statehood can interfere with a Federal transfer of land undertaken during territorial condition, even if the transfer does not become complete, consummated and effective until after statehood.

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). ...

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." For Oklahoma to retain jurisdiction it would take an act of Congress and require a cession.

In 1976, the Supreme Court decided *Kleppe v. New Mexico,* 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976), in which it was asked to decide whether the Federal Government has the power to promulgate rules that protect wild horses and burros on unappropriated public lands assumed to belong to the Federal Government. Justice Thurgood Marshall, writing for the Court, wrote:

> [T]he Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. *U.S. v. San Francisco*, 310 U.S., at 29-30; *Light v. U.S.*, 220 U.S., at 537; *U.S. v. Gratiot*, 14 Pet., at 537-538. And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[the] power over the public land thus entrusted to Congress is without limitations."

The opinion assumes, without deciding, that the Federal Government does, in fact, own the land it claims within the borders of New Mexico. The question of State claims to succession

to the ownership of unappropriated lands within their borders was neither argued, considered nor decided by the *Kleppe* Court. *Kleppe* stands for one proposition: that the Federal Government has plenary power to manage its own land as it wishes, without interference. The Court further explained its position: *Id.*, at 540-541

> And even over public land within the States, "[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." *Camfield v. U.S.*, *supra*, at 525. We have noted, for example, that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them...." *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 405, 37 S.Ct. 387; 61 L.Ed. 791 (1917). And we have approved legislation respecting the public lands "[i]f it be found to be necessary for the protection of the public, or of intending settlers [on the public lands]." *Camfield v. U.S., supra*, at 525. In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain. *Alabama v. Texas,* 347 U.S. 272, 273, 74 S.Ct. 481, 98 L.Ed. 689 (1954); *Sinclair v. U.S.,* 279 U.S. 263, 297, 49 S.Ct. 268, 73 L.Ed. 692 (1929); *U.S. v. Midwest Oil Co.*, 236 U.S. 459, 474; 35 S.Ct. 309, 59 L.Ed. 673 (1915). Although the Property Clause does not authorize "an exercise of a general control over public policy in a State," it does permit "an exercise of the complete power which Congress has over particular public property entrusted to it." *U.S. v. San Francisco,* 310 U.S. 16, 30, 60 S.Ct. 749, 84 L.Ed. 1050 (1940) (footnote omitted). In our view, the "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.

The question *Kleppe* does *not* answer is whether the public lands belong to the United States or should properly have transferred to State ownership on admission to the Union. *Kleppe* furnishes no guidance on that question because the question was not joined. It holds only that the Federal Government has the power to manage land it properly owns, an accurate statement of the law.

In *Idaho v. U.S.,* 533 U.S. 262, 121 S.Ct. 2135, 150 L.Ed.2d 326 (2001), the United States Supreme Court was called upon to decide the ownership of certain submerged lands. In writing the opinion, Justice Souter affirmed that the States presumptively succeeded to ownership of the

submerged lands on admission to the Union and observed, without argument or decision, this is "in contrast to the law governing surface land held by the United States ....". The question of Federal ownership of such lands was not at issue in the case and was neither joined nor decided by it. But all prior case law and Congress's intent is that the land remain in possession of the United States.

Looking at *McGirt* and the State's argument which they pointed to attempting to support disestablishment was the so-called "allotment era." The allotment era and the land run of 1889 where much the same thing for the Indians and the United States. *McGirt* held:

> In the allotment agreement with the Tribe in 1901. Creek Allotment Agreement, ch. 676, 31 Stat. 861.With exceptions for certain pre-existing town sites and other special matters, the agreement established procedures for allotting 160-acre parcels to individual Tribe members who could not sell, transfer, or otherwise encumber their allotments for a number of years. §§ 3, 7, *Id.*, at 862-864 (5 years for any portion, 21 years for the designated "homestead" portion). Tribe members were given deeds for their parcels that "convey[ed] to [them] all right, title, and interest of the Creek Nation." § 23, *Id.*, at 867-868. In 1908, Congress relaxed these alienation restrictions in some ways, and even allowed the Secretary of the Interior to waive them. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. One way or the other, individual Tribe members were eventually free to sell their land to Indians and non-Indians alike.

McGirt, supra, at 2464.

The Court in *McGirt,* actually addressed land patents to the homesteaders but the question was not before the Court, but the opinion supports Petitioner's claims, the Court wrote: "[I]t isn't so hard to see why. The Federal Government issued its own land patents to many homesteaders throughout the west. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States' claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one Nation to another. 3 E. Washburn, American Law of Real property *521-*524. And there is no reason why Congress cannot reserve land for tribes in much

the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally. Indeed, such an arrangement seems to be contemplated by 18 U.S.C. § 1151(a)'s plain terms." *McGirt, supra*, at 2464.

The land patents were the absolute legal title to land and derived from the U.S. Constitution, makes the United1 States of America a party of interest in any attack on that title in courts of law. Article Four of the United States Constitution provides that Congress has the power to enact laws respecting the territory or other Property belonging to the United States. Federal jurisdiction exists over any territory thus subject to laws enacted by the Congress. "There are three methods by which the United States obtains exclusive or concurrent jurisdiction over Federal lands in a state: (1) a state statute consenting to the purchase of land by the United States for the purposes enumerated in article 1, Section 8, Clause 17, of the Constitution of the United States; (2) a state cession statute; and **(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 State lacked subject-matter jurisdiction over the offense because exclusive jurisdiction lied with the Federal Court just like the issue in *McGirt* which the Oklahoma State courts rejected any suggestion that these lands remained a reservation, but the Tenth Circuit reached the opposite conclusion. See *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*, *supra*, (Per Curiam) (The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed for the reasons stated in *McGirt v. Oklahoma*, *ante*, p.)

Indian lands are "Reservation[s]," "Indian allotments," and "dependent Indian communities" thus Oklahoma County is a dependent Indian community thus depriving the State Court of subject-matter jurisdiction.

The public-school system created by the Choctaws shortly after their arrival became the model for Oklahoma schools that exists today. Last year, Oklahoma tribes contributed over $130 million to Oklahoma public schools. Oklahoma tribes also enrich Oklahoma's economy, employing over 96,000 people–most of them non-Native–and attracting tourists with their cultural events. In 2017, Oklahoma tribes produced almost $13 billion in goods and services and paid out $4.6 billion in wages and benefits. The Muscogee (Creek) Nation invests heavily in the state, creating businesses, building roads and providing jobs, health care and social services in 11 Oklahoma counties.

Determining whether an Independent Indian community exists within the meaning of the Indian Country statute, 18 U.S.C. § 1151 (b), is made case-by-case, considering all the circumstances relevant to the principles applied by the courts in interpreting that phrase. 18 U.S.C. § 1151 (b) provides:

> 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.

In 1995, the Tenth Circuit Court of Appeals has explicitly adopted the Eighth Circuit's four-prong test established in *U.S. v. South Dakota*, 665 F.2d 837, 841-42 (8th Cir.1981), *cert. denied*, 459 U.S. 823, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982), to determine the issue of the proper community of reference for dependent Indian community analysis under § 1151 (b). See *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1542-1543 (10th Cir. 1995). The Court's analysis consists of:

> [W]hether a particular geographical area is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory,"; (2) "the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the Federal Government, and the established practice of Government agencies toward the area,"; (3) whether there is "an element of cohesiveness... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,"; and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples." *U.S. v. South Dakota*, 665 F.2d 837, 839 (1981).

The other circuits that have addressed this issue have followed the Tenth Circuit and the Eighth Circuit's lead. See *U.S. v. Levesque*, 681 F.2d 75 (1st Cir.), *cert. denied,* 459 U.S. 1089, 103 S.Ct. 574, 74 L.Ed.2d 936 (1982); *U.S. v. Cook*, 922 F.2d 1026 (2nd Cir.), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991); *Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988).

SCOTUS has decided issues of subject-matter jurisdiction in *U.S. v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), held that subject-matter jurisdiction "involves a Court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in District Court. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). In *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), the Court wrote "[w]henever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject-matter, the Court shall dismiss the action." citing *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). When a requirement goes to subject-matter jurisdiction, courts must consider, even **sua sponte** issues that the parties have disclaimed or have not presented. See *Cotton, supra.* Subject-matter jurisdiction can never be waived or forfeited. *Gonzalez v. Thaler*, 565 U.S. 134, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012). *See also Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (whether subject-matter jurisdiction exists and

may raise the issue at any stage in the litigation).

The OCCA has also ruled consistently with the United States Supreme Court determining that questions regarding whether the trial Court had subject-matter jurisdiction are always ripe for resolution, and the issue can, therefore be raised at any time, even if not preserved below. Buis v. State, 1990 OK CR 28, 792 P.2d 427, 428-29 (vacating conviction for lack of subject-matter jurisdiction of trial Court although issue not raised until petition for rehearing); Jonson v. State, 1980 OK CR 45, 30 611 P.2d 1137, 1145 ("There are, of course, some constitutional rights which are never finally waived. Lack of jurisdiction, for instance, can be raised at any time"). Subject-matter jurisdiction is never waived and can therefore be raised on a collateral appeal. Wallace v. State, 1997 OK CR 18 935 P.2d 366, 372. The Tenth Circuit also rules consistently with the United States Supreme Court. See Triplet v. Franklin, 365 Fed. Appx. 86, 95 (10th Cir. 2010) (unpublished) (recognizing that, in Oklahoma, issues of subject-matter jurisdiction are not waivable and can be raised for the first time in collateral proceedings); Wackerly v. State, 2010 OK CR 16, 237 P.3d 795, 797 (considering jurisdictional claim that crime occurred on Federal land raised in prisoner's second application for post-conviction relief). Further, the OCCA also determined in Magnan v. State, 2009 OK CR 16, 207 P.3d 397, 402 (Indian country jurisdictional challenge; explaining subject-matter jurisdiction may be challenged at any time). See also Cox v. State, 2006 OK CR 51, 6, 152 P.3d 244, 247.

This essentially violated petitioner's Fourteenth Amendments Rights to Due Process. For Oklahoma to have jurisdiction, the State must prove the Land had been ceded from the United States which it cannot do.

CONCLUSION

WHEREFORE, premises considered the Petitioner respectfully asks the Court to VACATE AND SET ASIDE the Judgment and Sentence in the interest of justice as it is void for a lack of subject-matter jurisdiction.

IT IS SO PRAYED.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February / 8 /2022.

Respectfully Submitted,

Major Hudson III

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