23-6654

No.

IN THE SUPREME COURT OF THE UNITED STATES

LANCEY DARNELL RAY—PETITIONER

VS.

TERRY QUISENBERRY et al.—RESPONDENTS

On Petition for a Writ of Certiorari
To the Tenth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Lancey D. Ray
Oklahoma State Reformatory • G2-223
1700 E. First Street
P.O. Box514
Granite, OK 73547

January 11, 2024

QUESTION PRESENTED

1. Whether under Article 1 of the treaty of October 21, 1867 between the United States and the Kiowa and Comanche tribes of Indians an enrolled member of the federally recognized Comanche Tribe is liable for wrongs committed upon the person of any one subject to the authority of the United States.

2. Whether the 10th Circuit Court of Appeals decision regarding a confusion of legal theory where Complaint needed to be amended comport with this Court's decision in Haines v. Kerner, 404 U.S. 519 regarding pro se litigant complaints.

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PETITION FOR WRIT OF CERTIORARI

Comes now Petitioner, Lancey D. Ray, 1LT FA (Res.),[1] *pro se*, pursuant to S. Ct. Rule 10 (a) where the Tenth Circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the federal district court for the Western District of Oklahoma as to call for an exercise of this Court's supervisory power; furthermore, the court of appeals decided an important question of federal law that has not been, but should be, settled by this Court. S. Ct. Rule (c).

Petitioner's Complaint was filed in the United States District Court for the Western District of Oklahoma whereby certain named Defendants were shown to have violated federal law and clearly established rights guaranteed by the Constitution of the United States, and the treaty of October 21, 1867 between the United States and the Kiowa and Comanche tribes of Indians. Additionally certain named Defendants were sued in their official capacity in order to prevent future violations or either to perform a duty according to federal law. Defendants sued in their official capacity are Lloyd J. Austin, III, Eric Pfeifer, Kyle Cabelka, and Gerald Neuwirth.[2] The named persons sued for damages that resulted from their conduct that violated clearly established rights guaranteed by the Constitution and federal law were Defendants Terry Quiensberry, Andrew Sibly, Inas Yacoub, Fred C. Smith, Jr., Eddie Valdez, and Jordan Cabelka.

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[1] The rank "First lieutenant" is abbreviated as "1LT", and the abbreviation for the "Field Artillery" Branch is FA. Petitioner resigned his commission as an officer in the Regular Army after conviction in the state court; hence, the abbreviation "Res."

[2] Defendant Neuwirth retired from the bench in 2022. The Honorable Emmitt Tayloe serves in Neuwirth's place.

For purposes of this Petition for Certiorari Petitioner presents only those issues, *not* necessarily decided, regarding Defendants Austin and Pfeifer, and Defendant Valdez who is an enrolled member of the Comanche tribe of Indians.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not reported, but is available at 2023 WL 3634720. The order of the district court (Pet. App. B) is not reported but is available at 2023 WL 2447598, Slip copy. The court of appeals order denying rehearing is not reported, but is listed in the Appendix (Pet. App. C).

JURISDICTION

The judgment of the Tenth Circuit court of appeals was entered on May 25, 2023. A petition for rehearing *en banc* was denied on July 31, 2023.

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1) regarding any civil case.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

- United States Const. Art. 6, Cl. 2 (Supreme Law of Land) *treaties*;
- Treaty with the Kiowa and Comanche (Art. 1 & 2), Oct. 21, 1867, 15 Stat. 581;
- Title 10 Armed Forces, USCA § 1471;
- Title 25 USCA § 71;
- Title 25 USCA § 229;
- Title 42 USCA § 1983;
- Okla. Stat. tit 80 § 4

DIRECTLY RELATED CASE

Lancey D. Ray v. State of Oklahoma, No. 22-7790, on Petition for Rehearing in Supreme Court of the United States, Washington, D.C. Judgment pending.

INTRODUCTION

The Supremacy Clause provides that the Constitution, federal statutes, and **treaties** constitute "the supreme Law of the Land." Art. VI, Cl. 2. The clause provides a rule of decision for determining whether federal law or state laws apply in a particular situation. *Kansas v. Garcia,* 589 U.S. ---, 140 S. Ct. 791, 801, 206 L. Ed. 2d 146 (2020). If federal law confers rights on a person and a state law imposes restrictions that conflict with the federal law, the federal law takes precedence and the state law is preempted. *Id.*

In the case at bar, what must be necessarily decided is whether the treaty of October 21, 1867 (15 Stat 681) between the United States and the Kiowa and Comanche tribes, that confers rights on respective parties, or whether Oklahoma's statute of limitations, which imposes restrictions that conflict with the treaty provisions, apply regarding Petitioner's cause for redress. The *Heck* rule does not apply in this instance; that is, *Heck* has no bearing on treaty obligations and the rights conferred on the person injured.

This case is about two relevant issues: whether Congress gave the Armed Forces Medical Examiner, under regulations prescribed by the Secretary of Defense, autonomy to conduct or not to conduct a forensic pathology investigation of a death when an authorized Department of Defense investigation is underway involving matters of a factual determination of the cause or manner of the death is necessary;

and whether Congress disannulled treaty obligations provided in the 1867 Treaty with the Kiowa and Comanche Nations, when it disestablished the reservation.

The Supreme Court for the United States explained that a treaty is construed more liberally than private agreements, and in ascertaining their meaning it looks beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. And that the Court construes treaties, so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognized the full obligation of this nation to protect the interests of a dependent people. *Choctaw Nation of Indians v. U.S.*, 318 U.S. 423, 431-432, 63 S. Ct. 672, 87 L. Ed. 877 (1943). The Supreme Court decided in part, in favor of the Indians in *Tulee v. State of Washington*, 315 U.S. 681, 683, 62 S. Ct. 862, 864, 86 L. Ed. 1115 (1942) when it explained treaty rights of Indians, whatever their scope, were preserved by Congress in the Act which created the Washington Territory and the enabling act which admitted Washington as a state. And the Court in *U.S. v. Berry,* D.C. Colo. 4 F. 779, 2 McCrary 58 (1880) held that expressed so plainly in the provisions of a treaty, it is impossible to suppose that it was the intention of congress, by the organization of a state, to annihilate the treaty, and to deprive the Indians of their right to protection under it. Moreover the case is about whether the treaty in question is self-executing. The Supreme Court has explained that a treaty is "equivalent to an act of the legislature" and "self-executing when it operates of itself without the aid of any legislature provision." *Medellin v. Texas*, 552 U.S. 491, 505, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

STATEMENT OF THE CASE

A. Historical background.

1. Treaty with the Kiowa and Comanche, 1867 (15 Stat. 581)

As signatories to the Treaty of 1867 all parties—the Kiowa and Comanche, and the United States—agreed that bad men among the respective tribes who commit wrongs upon persons subject to the authority of the United States would be delivered up to the United States to be tried and punished according to its laws. In the event the respective tribe willfully refused to do so, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under that treaty or other treaties made with the United States. Likewise the parties agreed if other people subject to the authority of the United States commit any wrong upon the person or property of the Indians the offender shall be arrested and punished according to the laws of the United States. And the offender would reimburse the injured person for the loss sustained.[3] Art. 1 (15 Stat. 581).

Further the United States solemnly agreed that no persons except those authorized so to do and except such **officers, agents, employees of the government** as may be authorized to enter upon Indian reservation in discharge of duties enjoined by law, shall ever by permitted to pass over, settle upon, or **reside**

[3] *Cf.* Treaty with Choctaw and Chickasaw, 1866, Art. 42, (14 Stat., 769). Ratified June 28, 1866. (The Choctaw and Chickasaw Nations shall deliver up persons accused of crimes against the United States who may be found within their respective limits upon the requisition of the judge of the district court of the United States for the district within which the crime was committed.)

in the territory described in Article 2 of the treaty, or in such territory as may be added to the reservation, for the use of said Indians. Art. 2, (15 Stat. 581).[4]

2. Allotment Era

The 1867 "Medicine Lodge Treaty" established a reservation for the Kiowa, Apache, and Comanche. Allotment severely diminished the reservation. The Jerome Agreement of 1891 opened the reservation for allotment, and most lands soon passed into non-Indian hands.

3. Allotment and the Kiowa, Comanche, and Apache

Today, 274, 312.53 allotted acres supplement the joint tribal land base. Those acres include counties which are Caddo, Cotton, **Comanche**, Tillman, Stephens and Jefferson.

4. Today's Comanche Nation

The nations today, especially the Comanche, do exceptionally well. The Comanche lands are comprised of 7,592.61 acres of noncontiguous, federal trust land spread across a six-county area of South Western Oklahoma. Those lands are owned jointly with the Kiowa and Apache tribes. The Comanche tribe owns and operates the Comanche Red River Hotel Casino. Comanche Nations estimated revenue per employee is $403, 750. The Hotel Casino grosses $121,500,000 a year. Additionally the Comanche tribe earns revenue through land leases and tribunal

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[4] *Cf.* Treaty with Choctaw and Chickasaw, 1866, Art. 43, (14 Stat., 769). Ratified June 28, 1866. (The United States promise and agree that no person, except **officers, agents, and employees of the government**, and of any internal improvement company, or persons traveling through, or **temporarily sojourning** in the said nations, or either of them, shall be permitted to go into said territory.)

enterprise. The tribe owns and operates a Class III bingo facility in Lawton. It owns a smoke shop selling cigarettes and tobacco.

5. *Arizona*

Whether the federal government has expressly accepted judicially enforceable obligations to an Indian tribe must train on specific rights-creating or duty-imposing language in a treaty. Federal courts must adhere to the text of the treaty. *Arizona v. Navajo Nation,* 599 U.S. 555, 564, 143 S. Ct. 1804, 216 L. Ed. 2d 540 (2023).

6. *Berry*

According to a well-settled rule of construction, when there is no express repeal of any part of a treaty the provisions of such should be allowed to stand.

7. *French*

"[i]f any nation or tribe to which such offending Indian may belong receive an annuity from the United States, such claim shall at the next payment of the annuity be deducted therefrom and paid to the party injured, and if no annuity is payable to such nation, or tribe then the amount of the claim shall be paid from the Treasury of the United States."

8. *McGirt*

This Court explained, "[e]ach tribe's treaties must be considered on their own terms." *McGirt v. Oklahoma,* 591 U.S. --- 140 S. Ct. 2452, 2479, 207 L. Ed. 2d 985 (2020). And among the questions before the Court today is a question that concerns the treaty with Kiowa and Comanche.

9. *Medellin*

This Court explained, "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text" and "a treaty ratified by the United States is an agreement among sovereign powers." *Medellin v. Texas*, 552 U.S. 491, 506-507, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

10. *Pino*

The liability of an Indian tribe for wrongs or depredations may arise out of a treaty as well as by express enactment.

11. *Sokaogon Chippewa Community v. Exxon Corp.*

Treaties and congressional acts involving Native Americans are meant to be construed to effect purposes for which they were executed or enacted.

12. Allotment and Fort Sill

By the act of Congress of June 6, 1900 (31 Stat. at L. 677, chap. 813) President William McKinley declared "that all lands so as aforesaid ceded by [...] the Comanche, Kiowa and Apache tribes of Indians, respectively [...] saving and excepting all lands allotted in severalty to individual Indians [...] and **saving and excepting the land set apart for military** [...] be opened to entry and settlement and to disposition under the general provisions of the homestead and townsite laws of the United States."

Oklahoma ceded to the United States in 1913 whatever authority it ever could have exercised in the Fort Sill Reservation. State law, 80 O.S. § 4, provides:

> Exclusive jurisdiction be, and the same is hereby ceded to the United States over all the territory now owned by the United States and

> comprised within the limits of the Military Reservation of Fort Sill, in Comanche County, as declared from time to time by the President of the United States, and over such lands as may hereafter be acquired for the enlargement of said reservation; provided, however, that the State of Oklahoma reserves the right to serve civil or criminal process within said reservation in suits or prosecutions for or on account of rights acquired, obligations incurred, or **crimes committed in said state** but outside of such cessions and reservation.

The Oklahoma Supreme Court has recognized that the general power to govern the Fort Sill area is vested in the United States, not in Oklahoma, and the U.S. Supreme Court decisions lead to the same conclusion. *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 384, 385, 64 S. Ct. 622, 624, 88L. Ed. 814 (1944).

B. Factual Background

Petitioner is a Georgia native, born and raised. In 2012 he was a commissioned officer in the Army stationed at Fort Sill, subject to the authority of the United States, when *wrongfully* detained for first-degree murder by "willful and malicious injury or use of unreasonable force" in connection with the wrongs allegedly committed by Respondent Valdez on Indian lands within the territory described in Article 2 of the 1867 U.S. Treaty with the Kiowa and Comanche.[5] Respondent

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[5] On December 22, 2010, M.R., Petitioner's oldest son, was taken to the Reynolds Army Community Hospital (RACH) Emergency Room at Fort Sill out of Ray's concern he had aspirated (inhaled foreign object into his lungs). From RACH M.R. was transferred to the Oklahoma University Medical Center (OUMC) in Oklahoma City, Oklahoma. Hours later M.R. died. On the morning of December 23, 2010, a Lawton City police detective *Mirandized* Petitioner. Petitioner (Continued...) requested an attorney. The detective abruptly informed Petitioner of the death of M.R. Petitioner kneeled and whispered a prayer. Having filed his report as a public record, the detective should have known he was violating Petitioner's religious privilege when he reported:

> I then told Lancey Ray that [M.R.] was dead.
> Lancey Ray yelled out 'Oh Sweet Jesus' [*sic*]
> Lancey Ray then lowered his head and prayed 'lord heavenly father [*sic*] forgive me for my sins.' [*sic*]

Detective's Investigative Report p. 3.

Valdez, an enrolled member of the Comanche Nation of Oklahoma, prosecuted the case against Petitioner.

Contrary to the clearly established 80 O.S. § 4, clearly established federal law and the U.S. Constitution, Defendant Quisenberry, under the supervision of Defendant-prosecutors Smith and Valdez, coolly circumvented the laws and acquired federal documents generated at Fort Sill. Quisenberry admitted as much.[6]

(Continued...) On December 27, 2010 Petitioner was arraigned in the District Court for Comanche County by Information that alleged murder in the second degree. On April 18, 2011, at the close of the preliminary hearing, Petitioner was bound over for trial on one count of first degree murder. On April 19, 2011, Respondent, filed an Amended Information wherein he cited 21 O.S. 2010, § 701.7 C. Furthermore contrary to clearly established law *i.e.* 22 O.S. 2010, § 404, Respondent filed a duplicitous-disjunctive Amended Information, and alleged three distinct underlying felony offenses as such: "[I]willful and [II]malicious injury or use of [III]unreasonable force". *See* § 404 "[t]he indictment or information must charge but one offense." Consequently, Petitioner was denied Due Process in violation of the Fourteenth Amendment to the U.S. Constitution. *See also* 22 O.S. 2010, § 409. Contrary to § 409 the alleged acts disjunctively stated evaded the degree of certainty required and otherwise prevented the judge and jury from pronouncing a judgment upon a conviction according to the right of the case. As to which underlying felony Petitioner was accused of is anybody's guess. On January 28, 2012, three days before trial, a Lawton Constitution newspaper article read:

> Murder trial is set to start Monday in Court here...On tape, in response, Ray cried out, 'Oh Jesus!' hung his head and prayed, 'Heavenly Father,' please forgive me for my sins'. . . . [Judge] Neuwirth wrote in his order issued Thursday. . . 'It is clear to this Court that such statements were made in such a manner to invoke a response by the defendant and that his action was the functional equivalent of express questioning.'

Contrary to Rule of Professional Conduct 3.6 Respondent failed to prevent Petitioner's prayer from being made public, i.e. published and circulated by the local newspaper. Petitioner's religious privilege was violated; moreover, his prayer—the detective's version—was weaponized against him. Valdez reasonably should have known that it would have an imminent and materially prejudicial effect on the fact-finding process in the trial of Petitioner. Petitioner was tried on duplicitous-disjunctive Information for first-degree murder under 21 O.S. § 701.7 C. Whether the jury was unanimous on the underlying felony is unknown.

[6] Federal regulation 45 C.F.R. § 164.512 (e) (1) (v) requires "an order of a court" to obtain protected health information. Regarding an use of an Army CID agent, Quisenberry testified:

> We talked to Dr. Ware, got a brief statement from him. Talked to Dr. Tolson, got a brief statement with him. **We utilized Agent Kroll to start gathering medical records for [M.R.'s] visit that night at the hospital.**

Tr. Vol. 3 p. 9

Defendant Sibly, contrary to clearly established state and federal law, having acquiesced, allowed Defendant Yacoub to conduct a forensic pathology investigation on M.R.—however incomplete Yacoub's investigation was to determine the cause or manner of death.

In October 2022, Petitioner—now age 51—filed a § 1983 Complaint and enumerated the wrongs Respondent committed. Petitioner complained of wrongs deliberately employed by Respondent Valdez in order to detain him, as well as wrongs Respondent committed after appeal. The federal court for the Western District of Oklahoma dismissed some allegations without prejudice under the *Heck* Rule, others were dismissed with prejudice as time barred, and the court declined to recognize the Treaty obligation regarding Respondent Valdez. Diminished to a footnote, the federal court, pontificated:

> Plaintiff argues that his claims against Defendant Valdez should be allowed to proceed pursuant to 'the Medicine Lodge Treaty of 1867 between the United States and the Kiowa and Comanche Indians,' but fails to articulate how this treaty undermines the magistrate judge's

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(Continued...) *See Wade v. Vabnick-Wener*, citing 45 C.F.R. § 164.512 (e) (1) (i) (ii): HIPPA regulations allow health care providers to disclose patient health information in connection with judicial proceedings: . . . **in response to a subpoena** or formal discovery request where the requesting party assures the provider that either the patient was made aware of the request but did not object or the requesting party has made reasonable efforts to secure a proper protective order. *See Bissonette v. Haig*, 776 F. 2d 1384, 1386, 54 USLW 2288 (8th Cir. 1985): [T]he decisions of the Supreme Court embody certain limitations of the use of military personnel in enforcing the civil law, and that searches and **seizures** in circumstances which exceed those limits are unreasonable under the Fourth Amendment. *See also* Title 18 USCA § 1385-Use of **Army**, Navy, Marine Corps, Air Force, and Space Force as *posse comitatus*:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses part of the Army, [...] as a posse comitatus, **or otherwise** to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

> determination that Plaintiff's claims are premature under *Heck* or time barred under the applicable statute of limitations.

Pet. App B.[7]

Further Petitioner's § 1983 Complaint described wrongs, whether by omission or commission, that were committed by the Office of the Secretary of Defense and the Office of the Chief Medical Examiner for Oklahoma, regarding respective jurisdictions of the Armed Forces Medical Examiner and state medical examiners, the federal court needs to address in order to prevent future violations that reasonably could result in wrongful detention of persons subject to the authority of the United States.

Additionally Petitioner's complaint described wrongs by the Office of the District Attorney for Comanche County Oklahoma regarding violations of the Constitution of the United States that need to be addressed in order to prevent future violations. The federal district court nonetheless dismissed the above claims. Petitioner appealed, and the circuit court affirmed. The circuit court noted, erroneously however, that "the district court concluded Ray's belated [*sic*] assertion that he sought 'prospective relief to prevent future violations,' which was raised for the first time [*sic*] in Ray's objections to the magistrate judge's report and recommendation, was waived." Pet. App. A. The circuit court declined to address any of the specific jurisdictional issues raised with the latter claims.

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[7] The Report and Recommendation failed to address treaty obligations provided by the 1867 U.S. Treaty with the Kiowa and Comanche. The Report did however make mention of the claim but wholly mis-assigned that claim to the wrong Defendant; moreover, neither the magistrate nor district court attempt to reach the merits of the claim against Defendant Valdez and treaty obligations.

Reasons for Granting the Petition

This Court's decision in *U.S. v. Berry* works to help settle the issue regarding Respondent Valdez and the 1867 Treaty with the Kiowa and Comanche. That is, According to a well-settled rule of construction, when there is no express repeal of any part of a treaty the provisions of such should be allowed to stand. Furthermore the following cases aid in settling the issue regarding Respondent Valdez: *Arizona v. Navajo Nation,* 599 U.S. 555, 564, 143 S. Ct. 1804, 216 L. Ed. 2d 540 (2023); *French v. U.S.,* 49 Ct. Cl. 337, 1914 WL 1388, (*French v. U.S.,* Ct. Cl. 1914, 49 Ct. Cl. 337); *Pino v. U.S.,* 38 Ct. Cl. 64, 66, 1903 WL 1083, (*Pino v. U.S.,* Ct. Cl. 1903, 38 Ct. Cl. 64); *Sokaogon Chippewa Community v. Exxon Corp.,* E.D. Wis. 805 F. Supp. 680 (1992); and *U.S. v. Berry,* D.C. Colo. 4 F. 779, 2 McCrary 58 (1880).

This Court's decision in *Haines*, as well as the Tenth Circuit's own decisions in *Hall v. Bellmon*, 935 F. 2d 1106, 1110 (10th Cir. 1991) and *Carbajal v. Mccann*, 808 Fed. Appx. 620, 631 (10th Cir. 2020) should settle the issue regarding Petitioner's claims for prospective relief. In *Haines* the Supreme Court explained allegations of pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). Following *Haines* the Tenth Circuit extrapolated, "if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's . . . confusion of various legal theories." *Hall v. Bellmon,* 935 F. 2d 1106, 1110 (10th Cir. 1991). Further the court noted "the *Haines* rule applies to all proceedings involving a pro se litigant" and that "pro se litigants are to

be given reasonable opportunity to remedy the defects in their pleadings." *Hall*, 935 F. 2d at 1114 n.3. And in *Carbajal* the court explained in "[d]etermining whether a complaint contains well-pleaded facts sufficient to state a claim is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Petitioner, with all due respect, believes the Tenth Circuit's decision to except the lower court's decision regarding Petitioner's § 1471 claims concerning the Secretary of Defense, because "the complaint failed to allege any wrongdoing of any kind on the part of Secretary Austin" is contrary to common sense regarding the prospective relief sought. *Carbajal* at 631.

In Petitioner's complaint he asked for both declaratory and injunctive relief specific to the offices of the Secretary of Defense and the Chief Medical Examiner for Oklahoma. Given the context of Petitioner's Complaint regarding the respective offices it was clear, though not mentioned by name, that the relief sought is prospective in nature. It is clear neither the district court nor the circuit court liberally construed Petitioner's complaint; neither did any of the courts allege to have done so. And according to *Hall* a "plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his complaint." *Hall v. Bellmon,* 935 F. 2d 1106, 1110, 19 Fed. R. Serv. 3d 1217.

SUMMARY OF ARGUMENT

I. [A-B] Congress Did Not Disannul Treaty Obligations of Article 1, Para 2 of the 1867 Treaty with the Kiowa and Comanche upon cession of communal lands.

to a well-settled rule of construction, when there is no express repeal of any part of a treaty the provisions of such should be allowed to stand. An express law conferring certain special rights and privileges is held never to be repealed by implication. *U.S. v. Berry,* 4 F. 779, 785, 2 McCrary 58, (District Court, D. Colorado; 1880).

Congress has recognized the obligation of all treaties with the Indian tribes lawfully made and ratified prior to March 3, 1871. *Berry* at 786. Moreover when enacting 25 USCA § 71 Congress recognized the obligations of all treaties with the Indian tribes lawfully made and ratified prior to March 3, 1871. Title 25 USCA § 71 provides in part that, "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." So to ignore treaty obligations on the part of the Comanche would be to impair those obligations.

The case of *U.S. v. Berry* dealt with the treaty of March 2, 1868, between the United States and several bands of the Ute tribe of Indians (15 St. 619) regarding certain treaty obligations. Similarly provided, in comparison, to Article 2 of the treaty of October 21, 1867, between the United States and the Kiowa and Comanche tribes of Indians (15 St. 581), the Ute treaty, at Art. 2, provided in part:

> [T]he United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes [*sic*] of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, except as herein otherwise provided.

More so to the point, Article 6 of the Ute treaty—similarly worded to Article 1 of the treaty with the Kiowa and Comanche—provided in part:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one [...] subject to the authority of the United States, and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent and notice to him, deliver up the wrong-doer to the United States to be tried and punished according to its law; and, in case they willfully refuse so to do the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States.[8]

The treaty obligations, as stated above, remain in force in the state of Oklahoma even after its admission into the Union or its achieved statehood. As previously mentioned Congress has recognized the obligation of all treaties with the Indian tribes lawfully made and ratified prior to March 3, 1871. It would then follow that though the Kiowa and Comanche reservation was disestablished their lands allotted in severalty nonetheless remain within the exclusive jurisdiction of the United States by virtue of the 1867 treaty. The tribes however would argue, and the Supreme Court recited in *Lone Wolf*, Congress disestablished the reservation based on "fraudulent misrepresentations." *Lone Wolf v. Hitchcock,* 187 U.S. 553, 556, 558, 23 S. Ct. 216, 47 L. Ed. 299 (1903).

Nonetheless by virtue of the 1867 treaty, Respondent Valdez is to be held accountable, liable for his wrongs; that is, delivered up to the United States to be

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[8] Petitioner was a first lieutenant in the Army at pay grade O-2E, with twelve years of enlisted service prior to his commission when arrested and detained in the Dale Cagle Detention Center in Lawton, Oklahoma. Prior to trial, Petitioner had been detained from December 23, 2010 to May 31, 2012. The wages lost during that time, at basic pay, totaled $ 78, 160. 70. Therefore Petitioner sought as much for compensatory damages against Defendant Valdez sued in his individual capacity because of his conduct that violated clearly established federal law and the Constitution of the United States, and that to Petitioner's detriment.

tried and punished according to its laws for his wrongs that violated clearly established federal law and the Constitution of the United States which resulted in loss to Petitioner who, at the time, was an employee of the Government subject to the authority of the United States.

Regarding the treaty of March 2, 1868 between the United States and bands of the Ute tribes of Indians, the Court in *U.S. v. Berry* explained, "expressed so plainly in the provisions of the treaty above named, it is impossible to suppose that it was the intention of congress, by the organization of the state of Colorado, to annihilate the treaty, and to deprive the Indians of their right to protection under it." *U.S. v. Berry,* 4 F. 779, 788. Likewise expressed so plainly in the obligations of the treaty of October 21, 1867 between the United States and the Kiowa and Comanche tribes of Indians, it is impossible to suppose that it was the intention of Congress, by the organization of the state of Oklahoma, to annihilate the treaty, and to deprive both the Indians and persons subject to the authority of the United States, such as Petitioner, of their right to protection under it.

B. The 1867 Treaty with the Kiowa and Comanche is self-executing.

Whether the provisions of Article 1 of the treaty of October 21, 1867 between the United States and the Kiowa and Comanche tribes are self-executing is answered on this wise: The stipulation in a treaty on a subject is self-executing, and the treaty itself is to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. *U.S. v. Lee Yen Tai,* 185 U.S. 213, 221, 22 S. Ct. 629, 633, 46 L. Ed. 878.

(1902). More recently the Court has held, "[A] treaty is equivalent to an act of the legislature and hence self-executing, when it operates of itself without the aid of any legislative provision." *Medellin v. Texas*, 552 U.S. 491, 505, 128 S. Ct. 1346, 1356, 170 L. Ed. 2d 190 (2008). Moreover, "if the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, will they have the force and effect of a legislative enactment." *Medellin* at * 506.

Treaty obligations, i.e. provisions, on the part of the Comanche should therefore be enforced. And either Respondent Valdez or the Comanche tribe should reimburse Petitioner for: (1) his losses sustained while wrongfully detained prior to trial, and (2) violations that, at present, deprive Petitioner of Due Process after appeal of the Judgment and Sentence.[9]

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[9] Respondent Valdez, an assistant district attorney at the time, functioned as both investigator and supervisor concerning the conduct Petitioner complains of that deprived him of rights guaranteed by federal law and the United States Constitution. Respondent reasonably should have known that Petitioner was an officer in the United States Army at the time of his arrest and 17 month detention prior to trial. Respondent's own witness on the first day of trial nonetheless testified as much when he stated, "he had the rank of first lieutenant" (Tr. Vol. 1 p. 244). Respondent's professional misconduct persisted during trial proceedings; Petitioner was convicted.

Petitioner through court appointed counsel timely appealed (Direct Review) to the Oklahoma Court of Criminal Appeals. The Judgment and Sentence was affirmed on September 23, 2013.

On October 2, 2013, having timely filed a *pro se* motion to suspend the judgment and sentence, Petitioner invoked the trial court's jurisdiction pursuant to 22 O.S. 2012, § 994 (Suspension of Judgment and Sentence after appeal). 22 O.S. § 994 provides:

> After appeal, when any criminal conviction is affirmed, either in whole or in part, the court in which the defendant was originally convicted may **suspend the judgment and sentence** as otherwise provided by law. **Jurisdiction for such suspension shall be vested in said trial court by a request by the defendant within ten (10) days of the final order of the Court of Criminal Appeals.** Any order granting or denying suspension made under the provision of this section is a nonappealable order.

Respondent was assigned to answer the motion. To date, due to Respondent's professional misconduct, Petitioner's § 994 motion has *not* be ruled upon, yet pending in the state district court. Federal district courts in Oklahoma have held that a § 994 motion for a suspended judgment and sentence filed under 22 O.S. § 994 qualify as a motion for collateral review and serves to trigger tolling of the one-year limitations period. *Estes v. Crow*, No. CIV 20-031-RAW-KEW, 2022 WL

II. Congress gave the federal courts jurisdiction over Indians who commit wrongs upon the person or property of any one subject to the authority of the United States.

Simply put, the wrongs committed by Respondent Valdez occurred on Indian lands, and according to *U.S. v. Berry*, "federal jurisdiction over it continues until it is changed by acts of congress, or by treaty, or until the Indian title is extinguished,

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(Continued...) 301598, *3 (E.D. Okla. Feb. 1, 2022) (unpublished); *Smith v. Whitten*, No. CIV-20-1310-D, 2022 WL 811071, at *2 (W.D. Okla. Mar, 16, 2022); *Nordstedt v. Louthan*, No. 220 CIV-0414-GKF-CDL, 2023 WL 3689408, at *6 (N.D. Okla. May 26, 2023).

Petitioner by his § 994 motion duly presented fact issues in support of his claim that the state medical examiner who conducted the autopsy had not based her opinion upon sufficient fact and data, her opinion was not the product of reliable principles and methods, and had not applied forensic pathology investigation principles and methods reliably to the facts of the case. Petitioner's pending § 994 motion gives rise to the question of "Whether the expert [State forensic pathologist] (Continued...) has adequately accounted for obvious alternative explanations." Petitioner's § 1983 claim on this issue manifests a due process violation knowingly committed by Respondent.

On October 3, 2013, circumventing the Petitioner's properly filed § 994 motion, Respondent drafted the district court's order and intentionally cited 22 O.S. § 982a for a Judicial Review as the legal authority before the court. Having purposefully cited § 982a, instead of § 994, the Respondent, contrary to Rule of Professional Conduct 3.3 a, "...knowingly fail[ed] to disclose to the tribunal the legal authority in the controlling jurisdiction known to him to be directly adverse to his position." Moreover Respondent committed fraud in order to obtain the district court's signature. Consequently, Petitioner is being denied "due process". Justice delayed is justice denied. *William E. Gladstone,* 1868.

Adding to the injury, Respondent writing the Order for the court, lied when he wrote, "[t]his matter comes before the Court, pursuant to the provisions of 22 O.S. Sec 982a [*sic*] on the application of the Defendant named above for modification/judicial review [*sic*]", and "...this matter (Continued...) should be decided without oral argument and **without further hearings** pursuant to District Court Rule 4 (h)."Rule 4 (h) provides, "Motions may be decided by the court without a hearing...".Rule 4 (c) Motions however provides:

> Motions raising fact issues shall be verified by a person having knowledge of the facts, if possible; otherwise, **a verified statement by counsel of what the proof will show will suffice until a hearing** or stipulation **can be provided.**

Respondent knew Petitioner's § 994 motion "raising fact issues" required a hearing pursuant to Oklahoma District Court Rule 4 (c). Respondent's conduct, which occurred immediately after Petitioner's direct appeal, had no connection to his "role as advocate for the State". *See Allen v. Lowder*, 875 F. 2d 82, 86 (4th Cir. 1989) ("[Prosecutor] cannot seriously argue that his actions resulted from any advocacy role in rehabilitating [the plaintiff's] conviction" because he "did not himself participate in the presentation of the State's appeal.").

Similar to *Smith* supra, where it had been almost ten years that his § 994 motion had been properly filed and had not been ruled on, in the instant case Petitioner's § 994 motion properly filed on October 2, 2013 has not been ruled on.

and this notwithstanding it may be embraced within the limits of a state." *U.S. v. Berry,* 4 F. 779, 788.

Moreover the enactment of 25 USCA § 229 [Injuries to property by Indians] was derived from Act of June 30, 1834 (4 Stat. 731), as modified by Act of Feb. 28, 1859 (11 Stat. 401), and the joint resolution of June 25, 1860 (12 Stat. 120). Section 229 provides for "satisfaction for the injury" when any Indian, belonging to any tribe in amity with the United States, takes or destroys the property of any person lawfully within such country. It does appear however that § 229's provision is limited to injuries to property whereas under the Act of June 30, 1834, "[t]wo classes of cases are provided for: (1) Those involving wrongs by Indians outside of their reservations; (2) those involving wrongs within the reservations where the injured party was lawfully in Indian country." *French v. U.S.,* 49 Ct. Cl. 337, 341, 1914 WL 1388. The term "lawfully" as used in context regarding the Act "means in pursuance of or according to law, or that which is not contrary to law." *French* at *349. And the term "wrong", employed in the context of both the treaty of October 21, 1867 between the United States and the Kiowa and Comanche Indian tribes and the Act of June 30, 1834 (4 Stat. 729), wherewith 25 USCA § 229 was derived, deals with legal wrongs defined so far as any liability. *French* at *349.

The liability of an Indian tribe for wrongs or depredations may arise out of a treaty as well as by express enactment. *Pino v. U.S.,* 38 Ct. Cl. 64, 66, 1903 WL 1083. Citing the act of June 30, 1834 the court in *French* explained, "[i]f any nation or tribe to which such offending Indian may belong receive an annuity from the

United States, such claim shall at the next payment of the annuity be deducted therefrom and paid to the party injured, and if no annuity is payable to such nation, or tribe then the amount of the claim shall be paid from the Treasury of the United States." *French* at 49 Ct. Cl. 337, 341. The court explained that in order for Petitioner "to be entitled to recover the claimant must bring his case within one of the two categories provided for in the statute." That is, claimant was "within the Indian country" and that he was "lawfully within such country." *French* at 49 Ct. Cl. 337, 342.

In sum, no element of estoppel exists which can aid Respondent Valdez in this action. Petitioner was on Indian lands and legal wrongs were done him for which he is entitled indemnity; moreover, an essential element met in his case is that he "lawfully" resided there. And should it be said that Petitioner was not on Indian lands when legal wrongs were done him, § 229 yet provides for wrongs by Indians outside of their reservations or in this case Indian lands such that Petitioner is entitled indemnity. And where no legislation would exist to aid the latter, the treaty of October 21, 1867 between the United States and the Kiowa and Comanche tribes is self-executing.

Under 18 USCA§ 1151 (c) "all Indian allotments" are Indian country. It is in these lands, otherwise defined by § 1151 as Indian country, that Respondent Valdez who is an enrolled member of the Comanche tribe committed the wrongs against Petitioner.

III. Congress gave the Armed Forces Medical Examiner authority to conduct forensic pathology investigations under regulations prescribed by the Secretary of Defense.

Under the National Defense Authorization Act for Fiscal Year 2000, federal statute Title 10 USCA § 1471 Forensic pathology investigations went into effect October 5, 1999. (PL 106-65, Div. A, Title VII, § 721 (a), Oct. 5, 1999, 113 Sat, 692).

Congress gave the Armed Forces Medical Examiner authority, under regulations provided by the Secretary of Defense, to conduct forensic pathology investigations where an authorized Department of Defense investigation of matters a factual determination of the cause or manner of the death is necessary. 10 USCA § 1471(B).

The Office of the Secretary of Defense, at the time, failed to provide regulations for or enforce regulations for 10 USCA § 1471 provisions where authorized Department of Defense investigation of matters, i.e. elimination hearing and discharge of officer from Army which involved a death, a factual determination of the cause or manner of the death was necessary. Additionally Congress provided for such an investigation to be determined by commanders of installations and commanders of units "without regard to a determination made by the Armed Forces Medical Examiner." 10 USCA § 1471 (c).

Congress further recognized concurrent jurisdiction cases; nonetheless it provided for a forensic pathology investigation to be conducted by the Armed Forces Medical Examiner if the investigation by the other sovereign is concluded without a forensic pathology investigation that the Armed Forces Medical Examiner considers complete. 10 USCA § 1471 (d). Moreover under § 1471 (b) (3) (A) (iv) Congress

provided that a forensic pathology investigation is justified when the decedent is a civilian dependent of a member of the Armed forces and died outside the United States. And under § 1471 (b) (3) (B) a forensic pathology investigation is justified in any other authorized Department of Defense investigation of matters which involves the death, a factual determination of the cause or manner of the death is necessary.

Respondent Austin is being sued in his official capacity for prospective relief to prevent future violations, and for the purpose of safeguarding the rights of persons subject to the authority of the United States. In an official-capacity action in federal court replacement of official will result in automatic substitution of the official's successor in office. *Kentucky v. Graham*, 473 U.S. 159, 166, n.11, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

Oklahoma's Office of the Chief Medical Examiner, at the time, under color of state law played a part in the violation of federal laws, violation of Petitioner's rights under federal law and the U.S. Constitution. In Petitioner's suit however Respondent Pfeifer in his official capacity is sued for prospective relief. Implementation of state policy and custom may be reached in federal court because official capacity actions for prospective relief are not treated as actions against the state. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

Contrary to state law at the time, the Office of the Chief Medical Examiner for Oklahoma allowed for a state medical examiner to conduct a forensic pathology

examination on M.R. The Oklahoma State Legislature, by means of Title 63 O.S. § 940 (B), limited the authority of the Office of the Chief Medical Examiner to make investigations to deaths of patients in certain state hospitals. In 1988, by an Act of the State Legislature, Oklahoma Medical Center Hospital and Clinics thereof were excluded. Meaning, the Office of the Chief Medical Examiner would not have authority to investigate deaths of patients in Oklahoma Medical Center Hospitals and Clinics thereof. Between 1989 and 2014 the Office of the Chief Medical Examiner for Oklahoma was without authority to investigate deaths of patients in Oklahoma Medical Center Hospitals and Clinics thereof.

In 2014, well after Respondent's arrest, by an Act of the State Legislature, Section 940 was amended to give authority of the Chief Medical Examiner to conduct investigations into the cause and manner of death of patients in Oklahoma Medical Center Hospitals and Clinics thereof. The amended § 940 (B) removed the clause "except Oklahoma Medical Center Hospitals and Clinics thereof." It follows that § 941 providing, "[t]he investigating medical examiner shall have access at all times to any and all medical and dental records and history of the deceased, including, but not limited to, radiographs and electrocardiograms in the course of his official investigation to determine the cause and manner of death," was and is limited to patients in state hospitals. 63 O.S. (2010), § 941.

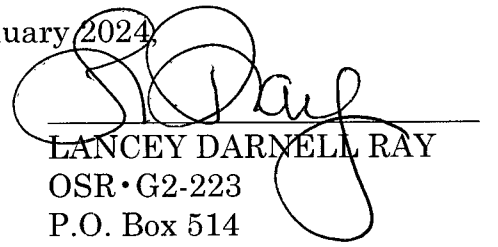
And where the State Legislature by means of 63 O.S. (2010), § 940 (A) provided for state and county law enforcement officers to cooperate with and notify Oklahoma's Chief Medical Examiner of the occurrence of deaths coming to their

attention, and provided for the district attorney to authorize removal of a body recognizing when a state law enforcement agency has begun an investigation of the cause of death, it follows that federal law 10 USCA § 1471 forecloses state law.

CONCLUSION

For the reasons stated the petition should be granted.

Respectfully submitted this 11 day of January 2024.

By, 

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