25-5582

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL CURTIS PEMBERTON,

Petitioner,

v.

MICHAEL MILLER, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Paul Pemberton, #492659,
AGCC DS-245,
6888 East 133rd Rd.,
Holdenville, OK 74848

FEDERAL QUESTIONS

1. a. Whether Oklahoma Criminal Statutes May Be Enforced Against An Enrolled Member of the Muscogee (Creek) Nation Tribe within the Indian Country. If so, by what authority?

   b. Whether the 1-year limitations period in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C.§ 2244(d)(l), would start from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Or, if the Petition alleges newly presented/ or discovered evidence, would the filing deadline be one-year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," under § 2244(d)(l)(D) to 'further the principles of comity, finality, and federalism.," to a Court that lacks competent jurisdiction to exercise the power and authority over the case. Does the AEDPA time-bar protect a State's false imprisonment of a defendant whom the Court has no power to act or exercise authority over?

2. Whether this Courts' prior precedent through "Stare Decisis" would obligate an investigation of any officer who knows or acts in reckless disregard of Treaty and Federal Law in violation of a defined Constitutional or other Federal Right? Screws v. United States, 325 U.S. 91, 69, 104, 111 (1945). Is false imprisonment a Crime under 18 U.S.C. § 241-242, and 18 U.S.C. § 1201(a)(1)-(2), for unlawful arrest and malicious Prosecution?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Paul Curtis Pemberton, Pro se, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on November 26, 2024 by Nancy L. Moritz.

OPINION BELOW

The unpublished "ORDER DENYING CERTIFICATE OF APPEALABILITY," in Pemberton v. Miller, Case No. 24-7027; 2024 WL 4891560 (10th Cir. November 26, 2024), is found at Appendix A-2.

JURISDICTION

The United States District Court for the Eastern District of Oklahoma, Ronald A. White had federal Jurisdiction under 28 U.S.C. § 2254 over Petitioner's Petition For Writ of Habeas Corpus in Pemberton v. Miller, Case No. 23-CV-025-RAW-JAR; 2024 WL 1216713 (E.D. Okla. March 21 , 2024)(Unpublished). The Tenth Circuit had jurisdiction pursuant to that order under 28 U.S.C. § 1291 and 28 U.S.C. § 2244, and entered judgment on November 26, 2024, and denied Pemberton's Petition for Panel Rehearing or Rehearing En Banc on December 27, 2024. (Appendix A-1, A-1(a)). On July 2, 2025, this Court extended the time in which to file a Petition for Writ of Certiorari to September 2, 2025. (Id. at A-2). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATE STATUTES INVOLVED

21 0.S. Supp. 1996 § 701. 7(A): Murder in the First Degree; (A person commits murder in the first degree when he unlawfully and with Malice Aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof).

21 0.S. Supp. 1996 § 1283(C): Convicted felons and delinquents; (Any person who has previously been convicted of a non violent felony in and Court in the State of Oklahoma, and who has received a full and complete pardon from the proper authority shall be permitted to possess a weapon specified in this section to the extent necessary for the pursuit of gunsmithing or firearm repair, provided stich person has graduated from a gunsmithing School conducted by an institution whose accreditation as recognized by the Oklahoma State regents for Higher

Education and who is engaged in the occupation of gunsmithing or firearm repair on September 1, 1992).

These are the State charges against Petitioner by the State. (Appendix A___). Pemberton points out that the State erred by listing the charge as from paragraph (C) when the accusations fall under paragraph (A)(It shall be unlawful for any person convicted of any felony in any Court of this State or of another State or of the United States to have in his or her possession or under his or her immediate control, or in any vehicle which the person is operating, or in which the person is riding as a passenger, or at the residence where the convicted person resides, any pistol, imitation or homemade pistol, machine gun, sawed-off shotgun or rifle, or any other dangerous or deadly firearm which could be easily concealed the person, in personal effects or in an 21 O.S. Supp. 1996 § 1283(A)).

FEDERAL STATUTES INVOLVED

28 U.S.C. § 2244: Finality of determination; (d)(l)(A 1-year period of limitation shall apply to an application for a Writ of Habeas Corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of-(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review); ...(d)(1)(D)(the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence).

INTRODUCTION

The Petitioner, Paul Curtis Pemberton, filed his Federal Habeas Petition on January 17, 2023. ("Pemberton"), submitted new evidence that the Bureau of Indian Affairs lists the property where the Homicide of Deanna Gayle Pemberton, occurred, "Pemberton's" Stepmother, as an Indian Allotment located about (4) four-miles within the Cherokee Nation Reservation. As early as 1926 this Court has told Oklahoma that the Major Crimes Act applies through Statehood and the State of Oklahoma lacks Criminal jurisdiction over enrolled members of Federally recognized Indian Tribes. United States v. Ramsey, 271 U.S. 467, 468-470 (1926). Oklahoma law was finally settled as early as 1978 in State v. Littlechief, 1978 OK CR 2, 573 P. 2d 263. Pemberton submitted six Treaties consisting of three from the Cherokee Nation and three from the Muscogee Nation that clearly, 'Pre-empt,' Oklahoma's territorial limits or jurisdiction by the Fifth Article of the December 29, 1835 Treaty at "New Echota," of the Cherokee Nation Treaty.

See Talton v. Mayes, 163 U.S. 376, 380-385 (1896); and the August 7, 1856 Treaty with the

Creeks in Article 4, "It guaranteed, "that 'no State or territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians,' and the United States pledged that 'no portion of either of the tracts of County defined in the treaty shall ever be embraced or included within, or annexed to, any Territory or State.'" (quoting Treaty with the Creek and Seminole Tribes, art. 4, Aug. 7, 1856, 11 Stat. 699, 700, available at 1856 WL 11367)(Murphy v. Royal, 875 F. 3d 896, 933 (10th Cir. 2017), Aff'd Sharp v. Murphy, 591 U.S. 977 (2020)).

The Tenth Circuit has held since as early as 2010 that "..., the Oklahoma Enabling Act does not contain express termination language." Osage Nation v. Irby, 597 F. 3d 1 1 17, 1 124 (10th Cir. 2010); Herrera v. Wyoming, 587 U.S. 329, 341-342, 344-345 (2019). Yet, in the Tenth Circuit, Oklahoma tried to justify their enforcement of Oklahoma Law (21 O.S. § 701.7(A)), against Patrick Dwayne Murphy from a Jury trial verdict of conviction also from McIntosh County District Court, Oklahoma. Murphy v. Royal, 875 F. 3d 896, 907-905 (10th Cir, 2017), Affirmed Sharp v. Murphy, 591 U.S. 977 (2020). What Oklahoma claimed in that case is that eight Statutes and/or Acts Diminished or Disestablished the Muscogee Reservation by implication. Murphy, 875 F. 3d at 939-948; see also McGirt v. Oklahoma, Case No. 18-9526; 2020 WL 1478582 * 14-28; March 13, 2020 (U.S.)(Appellate Brief) "Brief for Respondent," but failed to direct the Tenth Circuit or this Court to any *Statutory language* similar to 18 U.S.C. § 3243 ("KANSAS"). Hagan v. Utah, 510 U.S. 399, 412, 415-416 (1994). Mr. Murphy and Mr. McGirt's attorney's failed to explain that in the Indian Reorganization Act, 25 U.S.C.§ 5103, June 18, 1934, Ch. 576, § 3, 48 Stat. 984, Congress sought to rehabilitate the Indians economic way of life and to give him a chance to develop the initiative destroyed *by a Century of Oppression.* This Court made that very holding in 1973. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973). Congress enacted this legislation to restore Tribal Sovereignty. Chase v. McMasters, 573 F. 2d 1011, 1016 (8th Cir. 1978). Congress enacted the same different outlook in 1936 by enacting the *Oklahoma Indian Welfare Act*, 25 U.S.C. § 5201-5210. Where Oklahoma Tribes may apply for Tribal Sovereign restoration under 25 U.S.C. § 5203. See Wheeler v. United States Dep't of Interior, Bureau of Indian Affairs, 811 F. 2d 549, 550-555 (10th

Cir. 1987). The Cherokee Nation followed, '§ 5203,' by their Tribal vote thus, Congress enacted a repealer statute that any Acts that are inconsistent with this chapter are repealed.

25 U.S.C. § 5209: (All Acts or parts of Acts inconsistent with this chapter are repealed)(June 26, 1936, Ch. 831, 9, 49 Stat. 1968).

The Muscogee (Creek) Nation followed the requirements of 25 U.S.C. § 5203 and it was accepted by the Secretary' of the Interior rendering all other acts repealed. See Muscogee (Creek) Nation v. Hodel, 851 F. 2d 1439, 1440-1447 (D.C. Cir. 1988). Both Tribes have complied with Congressional expectations therefore the, 'Curtis Act,' 'Indian Allotment Act,' and/or 'Oklahoma Enabling Act,' are repealed as to any inconsistency with Tribal Sovereignty such as *what the treaties specify and state, that no State has territorial limits or jurisdiction* over Pemberton being associated with the Cherokee Nation Tribe through his enrollment with the Muscogee Nation thus, the boundaries of both tribes Pre-empt Oklahoma's jurisdiction over him through the above articles of the treaties themselves. Furthermore, as it also relays that unless Oklahoma obtains permission from either tribe to enforce their State Law against Pemberton, Oklahoma is Pre-empted by **Treaty**; 18 U.S.C. § 1153; and 25 U.S.C. § 1321. United States v. Hoodie, 588 F. 2d 292, 294 (9th Cir. 1978); United States v. Sands, 968 F. 2d 1058, 1062 (10th Cir. 1992). The Secretary of the Interior and Bureau of Indian Affairs have listed these tribes as Reservations since as early as January 28, 1992, Law and Order on Indian Reservations 57 FR 3270-01; **1992 WL 10949**; 25 C.F.R. § 11.1(23). Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma, 618 F. 2d 665, 667-668 (10th Cir. 1980). An Article III, federal Court lacks Constitutional authority under the Indian Commerce Clause, Art. I, § 8, Cl. 3; and the Treaty Clause, Art. II, § 2, Cl. 2 to change Congressional intent to repeal any Act inconsistent with Tribal Sovereignty, Cherokee or Muscogee citizens or persons whom have associated themselves with either tribe. Haaland v. Brackeen, 599 U.S. 255, 273-275 (2023); Texas Industries INC. v. Radcliff Materials, INC., 451 U.S. 630, 641 (1981). This law was in effect on April 4, 2004 when State Officers

arrested Pemberton and took him to the McIntosh County Jail where false imprisonment stems from the arrest and the filing of an Information by McIntosh County District Attorney's Assistants, Karen Volz and Gregory Stidham falsely stating that Pemberton violated 21 0.S. § 701.7(A) & 21 0.S. § 1283(C). These Treaties pre-empt Oklahoma's territorial limits or jurisdiction and federal law takes precedent over this crime. 18 U.S.C. § 1152-1153. Timpanogos Tribe v. Conway, 286 F. 3d 1 195, 1203 (10th Cir. 2002). The Tenth Amendment also prohibits Oklahoma's authority. See U.S. Constitution, Amendment 10. Pollard v. Hagan, 44 U.S. 212, 228-229 (1845). The State of Oklahoma has no Sovereign Rights over *Paul Curtis Pemberton* as an enrolled member of the Muscogee (Creek) Nation within Indian Country. Solem v. Bartlett, 465 U.S. 463, 470-472, **481** (1984); and United States v. Celestine, 215 U.S. 278, 285, 290-291 (1909). This Court not only defined what a 'Reservation,' is, it held that State citizenship does not authorize State criminal prosecution. Id. at 290-291. Both sets of Treaties establish that these reservations were restored in exchange for the Northern Lands Ceded by the Cherokee and Muskogee Tribes for a forever home. See Code of Federal Regulations, 25 C.F.R. §151.2, beginning in 45 FR 62036, September 18, 1980, as amended at 60 FR 32879, June 23, 1995 establishing federal law defining both Cherokee and Muscogee Nations as Reservations by Statute since as early as 1980; ***1992 WL 10949***. Based on this law in effect on April 4, 2004, the McIntosh County District Attorney's Office, Karen Volz and Gregory Stidham obtained the conviction of Petitioner through *false testimony* and in Napue v. Illinois, 360 U.S. 264, 269-270 (1959) this Court recognized as "implicit in any concept of ordered liberty" that the State "may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." United States v. Bagley, 473 U.S. 667, 679 n.9 (1985); and Giglio v. United States, 405 U.S. 150, 154 (1972). The State accuses Pemberton of confessing his guilt to former Sheriff, Jeff Coleman and OSBI Agent, John David Jones when he recorded what Pemberton said. Jones testified that he

tried to replicate what Pemberton said that he fired the six shot revolver by squeezing the trigger until the gun was empty and Jones admitted that he tried this *and was unsuccessful*. This Court held in Horton v. California, 496 U.S. 128, 136-137 (1990) that an officer must have a right to be in the area where the evidence seized is located, thus, excluding Jones' questioning altogether. Next, Pemberton said that after the victim fell that he walked over and shot at her. This was not corroborated by the 911 caller as an eyewitness that testified that as soon as she fell that he jumped up instantly and went to her side to check for a pulse. This would not allow Pemberton to walk over and shoot based on that witness testifying that Pemberton was just standing there looking at him and his wife. Preliminary Hearing on June 17, 2004, Pages 8-14; 23-24. That is the "Corpus Delicti." This Court held in Smith v. United States, 348 U.S. 147, 153 (1954) that a confession like this is not admissible because it is not corroborated. The rest of the evidence as discussed below is inconsistent and uncorroborated, but, the Court fails to acknowledge that the State Courts have no authority to make a finding of fact in this case. Because Mr. Pemberton has attached "New Evidence," that he is Indian, that the crime occurred on a Cherokee Indian Allotment and even if the Allotment was lawfully transformed it remained an Indian Reservation under Treaty and the Major Crimes Act, 18 U.S.C. § 1153 is exclusive of State prosecution, he is innocent of violating 21 O.S. § 701.7(A) or 21 O.S § 1283(C). Pemberton also submits evidence that in 2004 the State did not prove their allegations against Pemberton and Pemberton's 2021 federal trial generated new evidence not considered by the (2004) State jurors establishing "Actual Innocence."

Eastern District of Oklahoma United States District Court

The U.S. District Court, Ronald A. White applied the 1-year time-bar of the ("AEDPA") Antiterrorism Effective Death Penalty Act, 28 U.S.C. § 2244(d)(1)(A) that began to run when Petitioner observed the allegedly false statements at trial on October 26, 2004. **[Tr. 509-511]**. Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977). The State Court failed to apply Solem v. Bartlett,

465 U.S. 463, 470-472, **481** (1984) and overruled the demurrer. Eastern District of Oklahoma, Judge, Ronald White also held that all the "New Evidence," attached to the Habeas Petition from Pemberton's Federal Trial in United States v. Pemberton, Case No. 21 CR 012 JFH (E.D. Okla. Feb. 23, 2021) did not constitute a later triggering date under 28 U.S.C. § 2244(d)(1)(D) inconsistent with this Courts' holding in McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) because Pemberton is "Actually Innocent," of violating 21 O.S. § 701.7(A) or 21 O.S. § 1283(c) by Treaty and Federal law above. Pemberton also satisfies the requirement to open the gateway for a merits review in Schlup v. Delo, 513 U.S. 298, 327, 329 (1995); and House v. Bell, 547 U.S. 518, 538, 554-555 (2006). Judge White failed to grant Pemberton an evidentiary hearing for expansion of the record with this new evidence. United States v. Rushin, 642 F. 3d 1299, 1302 (10th Cir. 2011); United States v. Weeks, 653 F. 3d 1188, 1200 (10th Cir. 2011); and Brumfield v. Cain, 576 U.S. 305, 314 (2015). Judge White relied on the State Court findings in 2004 and the OCCA in 2006. See Johnson v. Zerbst, 304 U.S. 458, 468 (1938)(The Judgment of conviction pronounced by a Court without jurisdiction *is void*, and one imprisoned thereunder may obtain release by habeas corpus); Frank v. Mangum, 237 U.S. 309, 326-327 (1915). The ("AEDPA"), 28 U.S.C.§ 2244(d)(1)(A) or 2244(d)(1)(D) was not enacted to stop a federal judge from overturning a conviction under State law *where the State has no Sovereign Rights to enforce*, especially against an Indian within Indian Country. See Shinn v. Ramirez, 596 U.S. 366, 376-378 (2022). There are no State Sovereign Rights to impede or impose upon, only a reversal of a false imprisonment.

The United States Court of Appeals for the Tenth Circuit

The United States Court of Appeals for the Tenth Circuit has denied Pemberton a Certificate of Appealability by creating an intra-circuit split on the "Actual or Factual Innocence" gateway as applied to non-Indians and as to Indians. Paul Curtis Pemberton v. Michael Miller, Warden, Case No. 24-7027; 2024 WL 4891560 (10th Cir. November 26, 2024). An Opinion was issued by Circuit

Judge, Nancy L. Moritz whom failed to even read the record submitted by Pemberton and made a factual error in holding that he filed a jurisdictional claim under McGirt in postconviction proceedings that the record does not support. Pemberton initiated his jurisdictional claim through trial counsel by demurrer in 2004 to begin with. [**Tr. 509, 511**], Wainwright, 433 U.S. at 90-91. Pemberton again attempted to raise a jurisdictional claim in 2018 and was denied by the State Courts. Pemberton attached the State Courts' Orders to his Habeas Petition filed January 17, 2023. Pemberton filed an Application For Post-Conviction Relief in McIntosh County District Court with a claim of Actual Innocence of this crime altogether on July 8, 2020 one-day before this Court issued McGirt v. Oklahoma, 591 U.S. 894 (2020)(July 9, 2020). Pemberton proved that he did not commit this crime and the conviction was obtained only through false testimony. Napue v. Illinois, 360 U.S. 264, 269-270 (1959). The McIntosh County District Court did not consider the evidence of innocence or grant an evidentiary hearing to develop the record on Actual Innocence. Instead, that Court held that Pemberton waived that claim and the Court *added a McGirt claim* as the Fifth Proposition of that Post-Conviction where everything had been filed before McGirt issued. *That finding is unsupported by the record.* Without considering all of the evidence old and new, Judge Moritz applied a Tenth Circuit rule made for Indians applying for relief under McGirt in:

Pacheco v. Habti, 62 F. 4th 1233, 1242 (10th Cir.), denied, 143 S. Ct. 2672 (2023); see also id. at 1245("Ms. Pacheco's actual-innocence claim is not based on evidence regarding what she did, but where she did it."). Moritz held, "We concluded, 'the rationale behind the gateway does not support its' application to conviction by the wrong jurisdiction." Id. at 1242. See Pemberton, at * 2, 2024 WL 4891560.

This created an intra-Circuit split on the application of this Courts "Factual Innocence," and/or "Actual Innocence," framework that stems from Schlup v. Delo, 513 U.S. 298, 329 (1995); and House v. Bell, 547 U.S. 51 8, 538, 554-555 (2006) as applied by the Tenth Circuit before Pemberton filed his Habeas. See Lopez v. Trani, 628 F. 3d 1228, 1230-1232 (10th Cir. 2010) and newly reaffirmed in Fontenot v. Crow, 4 F, 4th 982, 1029-1035 (10th Cir. 2021). Pemberton relies

on Fontenot in his habeas petition applying Schlup and House on appeal when this courts rule of Miller-El v. Cockrell, 537 U.S. 322, 338, 340-342, 348 (2003) allows this type of claim

(We do not require Petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration that petitioner will not prevail.... We conclude, on our review of the record at this stage, that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the State Court's evaluation of the demeanor of the prosecutors in Petitioner's trial. The Court of Appeals evaluated Miller-El's application for a COA in the same way... AEDPA does not require Petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence).

This Court has granted Certiorari to resolve a Circuit split in United States v. Wong, 575 U.S.402, 407 (2015)

(We granted certiorari in both cases, 573 U.S. --- 134 S. Ct. 2873, 189 L. Ed. 2d 831, 832 (2014), to resolve a circuit split about whether Courts may equitably toll 2401(b)'s two time limits).

The State of Oklahoma possesses no Sovereign Right over Paul Curtis Pemberton as an enrolled member of the Muscogee (Creek) Nation Tribe within "Indian County" to enforce State law against him under 21 O.S. § 701.7 (A) or 21 O.S. § 1283(C). Thus, everything that happened after McIntosh County Sheriff's Deputy, Dewayne Hall arrested Pemberton in "Indian Country" with a loaded firearm *is false imprisonment*. See Wallace v. Kato, 549 U.S. 384, 388 (2007); Torres v. Madrid, 592 U.S. 306, 322-323, 325 (2021); Taffflin v. Lenitt, 493 U.S. 455, 459 (1990); and Walter's v. J.C. Penny co.. Inc., 2003 0K 100, ¶ 9, 82 P. 3d 578, 583 (Okla. 2003). The McIntosh County District Court, Gene F. Mowery Sentenced Pemberton to a term of Life Without Parole as to Count 1-Murder in the First Degree- 21 O.S. § 701.7(A) and to a term of Life as to Count 2-Unlawful Possession of a Firearm After Former Conviction of a Felony-21 O.S. 1283(C) under the custody and control of the Oklahoma Department of Corrections where he remains at this time. See Johnson, 304 U.S. at 468, Supra.. The Prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). It is therefore "as much his duty to refrain from improper methods calculated to produce a wrongful

conviction as it is to use every legitimate means to bring about a just one." Id. Prosecutors may "strike hard blows," but they are "not at liberty to strike foul ones." Id. Pemberton is "Actually Innocent" of these Life Sentences ordered by the State under Sawyer v. Whitley, 505 U.S. 333, 339, 343-344, 346, 348 (1992) because these jurors in McIntosh County had no constitutional authority to find him guilty of either crime nor did they have authority to recommend Life Without Parole or Life in Prison. Indian Major Crimes Act, 18 U.S.C. § 1153. Pemberton has met the standard for the Tenth Circuit to issue a Certificate of Appealability as required in Slack v. McDaniel, 529 U.S. 473, 484 (2000)

(When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling).

Pemberton offered the Tenth Circuit their own authority where they held that when a statute is unenforceable against a defendant he is Actually innocent of violating the statute and the AEDPA 1-year time-bar will be set aside. United States v. Bowen, 936 F. 3d 1091, 1095, 1108-1109 (10th Cir. 2017); United States v. Hisey, 12 F. 4th 1231, 1235-1236, 1238-1239 (10th Cir. 2021); and United States v. Lujan, Case No. 22-2014; 2022 WL 17588500 * 4-5 (10th Cir. December 13, 2022). The Tenth Circuit set aside the AEDPA time-bar and moved further in these non-Indian cases. Pemberton was not provided that opportunity solely because of his race as Native American. The Tenth Circuit applied Pacheco v. Habti, 62 F. 4th 1233, 1242, 1245 (10th Cir. 2023), and denied a COA telling Pemberton he raised a claim under McGirt when that is false because Pemberton's jurisdictional issues were final in 2018 and he attached those State orders as exhibits. This Court touched on this type of subject in Palmore v. Sidoti, 446 U.S. 429, 433 (1984) where State officials are not allowed to rely on hidden biases toward race as they have done here, telling these Federal Courts that the (AEDPA) applies to bar the Judge from vacating the

conviction. Wilkins v. United States, 598 U.S. 152, 157-158 (2023); Brown v. Davenport, 596 U.S. 118, 129 (2022). The State of Oklahoma has no right to re-try Pemberton if the conviction is vacated. Thus, abuse of State Sovereign authority does not translate into rights, as in this case, it's an Indian Commerce Clause violation. "Habeas Corpus is, at its core, an equitable remedy," Schlup v. Delo, 513 U.S. 298, 319 (1995), and the "Great Writ" thus demands that "a strong equitable claim be heard. Holland v. Florida, 560 U.S. 631, 648-649 (2010). A conviction obtained by such misconduct by State Officials cannot stand. The Tenth Circuit erred in refusing to grant Pemberton a Certificate of Appealability and Pemberton is entitled to an evidentiary hearing on "Factual and Actual Innocence" of this crime altogether.

STATEMENT OF THE CASE

On April 4, 2004, Pemberton spoke to his father Donald Gene Pemberton on the phone and obtained permission to come get a Satellite Dish from his well-house. Pemberton travelled from Muskogee, Oklahoma to Checotah, Oklahoma about 20 miles to enter his father's residence to find his Stepmother, Deanna Gayle Pemberton face down in a bedroom entrance connected to the den, where his dad sat in his recliner. After discussion with his father, Pemberton went outside and waited for law enforcement by sitting on the opened tailgate of his pickup, parked in the driveway. The evidence gathered and elicited from State Officers directed the shooting toward Pemberton by his father Donald Pemberton.

A. The State Trial

Pemberton was brought before McIntosh County District Court Judge, Gene F. Mowery by State Information accusing him of violating 21 O.S. Supp. 1996 § 701. (A) and 21 O.S. Supp. 1996 § 1283 (C). **[Tr. 169-170;614-619]**. The State began with the arresting Officer DeWayne Hall by questioning him on his bulletin received and what he found when he arrived on scene. **[Tr. 174-191]**. Hall was ask what Pemberton was doing when he drove up and Hall testified that Pemberton

was sitting on the tailgate of his pickup and that he did not have a gun on him. [**Tr. 182**]. The testimony from Hall is that this is a rural farm area about ten miles outside Checotah, OK 74426. Hall never seen any furtive movements or evidence of a crime. He pulled a loaded .45 Caliber pistol on Pemberton and ordered him to throw his hands up and to get on the ground. Hall testified that the residence is located in McIntosh County. [**Tr. 176**]. The State elicited testimony from former Sheriff, Jeff Coleman. [**Tr. 192-219**]. Coleman testified that when he walked up to Pemberton face down on the ground he said "she drove me crazy." (Hall did not support that. [**Tr. 179**]). Although Coleman testified that he did smell beer on Pemberton he began questioning him anyway and he said Pemberton confessed the crime to him. He also testified that there was an audio-video system in the Tahoe at this time but as Sheriff of McIntosh County he did not know how to use it. He also said that he had unhooked it because this vehicle was in storage at his house for a while his Deputy was over seas. Coleman testified that Pemberton confessed that he shot Deanna. [**Tr. 196-201**]. The State elicited testimony from former Sheriffs Deputy, Jason Jackson that transported Pemberton from the crime scene to the McIntosh County Jail. Jackson claims that during this trip that Pemberton ask what would happen to him. Jackson then says that while he was at the jail he could hear Pemberton confess to other prisoners that he shot his stepmother and that he shot her six times. [**Tr. 224-234**]. Jackson also testified that he could smell alcohol on Pemberton. During Jackson's testimony Pemberton stood up in open court and tried to address the Judge. [**Tr. 229-230**]. After Jackson's testimony Judge Mowery dismissed the Jury for the day and when they left he addressed Pemberton's termination of both counsel and request to represent himself. Judge Mowery took issue from defense counsel who made him aware that Pemberton terminated them and wants to represent himself. Mowery stipulated to Pemberton that he did not want to hear any of his defenses. *Pemberton could not object to the Court's jurisdiction at that point because of that stipulation.* After Pemberton tried to tell the Judge that counsel is failing to

offer the defenses agreed upon that he has no choice but to represent himself. Mowery told Pemberton to discuss this over night with these attorney's and the next day the issue come up resulting in denying self representation. [**Tr. 235-252**]. The State elicited evidence from former OSBI Agent, Iris Dalley. [**Tr. 253-315**]. Dalley told the jurors how she gathered the evidence as they were watching on an over head projector and they were told of how she searched Pemberton's Pickup. She commented in response to the D.A.'s question that she searched this pickup pursuant to a Warrant, but, the record reflects that the OSBI Report, Pgs. 27-28 clearly state's that she was told by Jones that he has a Warrant while he was in route to the scene so she began the search without the Warrant. Dalley's testimony explains, that she found a hole in the headboard of a bed, and in the wall behind the headboard, in the bedroom where the victim was found with her body lying half in and half out of the entry of that bedroom. Dalley said that she performed laser trajectory to find a possible emanation point of the shot that created that hole. What she determined is that her laser ended up from that hole in the wall to the center of the top of the doorframe of the entry to the den from the garage area and wash room. Pictures were shown to the jury on a screen of this scene. Dalley gave an opinion that had the person been standing behind the recliner shown in the picture, it would logically be too high for a person to get a shot off to hit that area in that bedroom. There would be no way to aim that at this angle. [**Tr. 276-283**]. The State elicited testimony from OSBI Agent, John David Jones. [**Tr. 316-365**]. Jones testifies that Coleman called him and alerted him to the crime and he met Pemberton at the Sheriff's Office in Eufaula, Oklahoma 74432. Jones claims that he obtained a waiver of rights from Pemberton and began an interview of the defendant. Pemberton stated that he shot his stepmother. Jones recorded the interview. [**Tr. 328**]. Jones told the jury that he tried to replicate what Pemberton told him of how he shot Deanna, by squeezing the trigger until the gun was empty, and he was not successful. Another words, that was not corroborated. [**Tr. 334-335**]. The recorded interview was played for these jurors with a transcript

passed out to them of what it said. [**Tr. 338-339**]. The State elicits testimony from Curtis Martin. [**Tr. 365-380**]. Martin testifies that he is a neighbor who lives about three-hundred feet from the Pemberton home on the Pemberton property itself, in his own Mobile Home Trailer. Martin testifies that when Pemberton was moving out of Donald's home that he came and got some dishes from him, Martin claims that Pemberton was mowing the yard and stopped to ask of the pots and pans on his porch and Martin claims at this time he gave Pemberton a Harley Davidson Shirt. Martin claims that Pemberton commented that he was going to kill Deanna and Martin said that this was the only time that he spoke to Pemberton at the time he was kicked out the Pemberton home. Martin claims this occurred about two-weeks after Christmas 2003 because that shirt that he gave him was a Christmas present that he had received for Christmas. The State then elicits testimony from the Medical Examiner, Andrew Sibley. [**Tr. 380-407**]. Sibley explained how an autopsy revealed these gun shot wounds to the jury. Sibley commented that while seeing the drawings from his report on the overhead projector on the wall that one of them was altered to the effect that it did not show the upper right back shoulder graze wound. [**Tr. 396**]. Sibley was ask if the graze wound and angle would be consistent with a shot that was fired at someone who was lying on the floor. [**Tr. 397**]. Sibley was ask if the defendant (Pemberton) gave a statement to the effect that after Ms. Pemberton fell that he shot her again, would that be consistent with the graze wound and it penetrating the head as he indicated. Sibley said absolutely, yes. The State elicited testimony from OSBI Agent, Terrance Higgs. [**Tr. 409-428**]. Higgs testifies as to his examination of a revolver, six spent casings, a box that had numerous cartridges or live rounds in it. He also examined four projectiles labeled as from the victim. Higgs testified that this gun is a single action meaning that every time a person squeezes the trigger and fires a shot, they must manually pull the hammer back to cock the weapon before it will fire again. [**Tr. 413**]. Higgs tells the jury that he linked two projectiles as having been fired from that Colt Frontier Scout revolver taken from the

victim. He could not connect the other two. The State elicited testimony from the victim's Husband, Donald Gene Pemberton. [**Tr. 430-492**]. Donald Pemberton was allowed to sit in the Courtroom Gallery the entire presentation of the State's case before they called him up to testify. [**Tr. 475-476**]. Donald testifies that he received a phone call from Pemberton and during this call his wife picked up the phone and was listening. She became enraged at him for what she heard and Donald told Pemberton that he had to go. Donald testified that Deanna was yelling at him for a few minutes over the call itself until he finally got up and went outside to cut a load of wood to get away from her. [**Tr. 467**]. Donald told them at about three O' Clock PM on that Sunday while he was watching T.V. that Pemberton walks in his den and he was trying to get him to leave when Deanna shows up in the hallway yelling at Pemberton to get out and Donald says that is when Pemberton just started shooting. He said he was still sitting in his recliner shown in the State's Exhibit No. 4: CR 04 1017; 10025. He says Pemberton was standing behind the recliner on the left in this picture when he was shooting, as he watched from the recliner on the right. He said that he seen his wife turn nearly a complete circle and fall as she was found in that picture. He said it looked like she was trying to get out of the way. Donald says that as soon as she fell that he jumped up and went to her side to feel for a pulse. Donald claims that he did not even know that Pemberton had fired the gun again after the shots from behind the chair. [**Tr. 457**]. Once this occurred he said that Pemberton just walked outside and he called 911 to report the shooting. After the close of the States evidence, Defense Counsel, Brian K. Morton demurred to this evidence based on the State's failure to show that it is within the confines of the State of Oklahoma. [**Tr. 509, 511**]. Without any discussion that demurrer was overruled by Judge Mowery. Looking at these testimonials it is easy to see that defense Counsel did not test these accusations with the numerous inconsistencies nor did they direct the jurors to the area's that conflict and could not be considered as true. [**Tr. 540-579**]. The jury found Pemberton guilty on both counts and recommended a Life Without Parole Sentence

as to Count One and Life as to Count Two. Pemberton was sentenced according to their recommendation.

B. The Direct Appeal
(Oklahoma Court of Criminal Appeals)

On Appeal, Pemberton was appointed three separate attorney's. Finally, one from McAlester, OK 74501 actually filed the Brief on Direct Appeal. Kimberly D. Adams, 900 S. Main, McAlester, OK 74501; Ph: (918) 423-8400, never actually spoke to Pemberton about any issues to raise or otherwise. Adams actually filed the Brief in Chief and sent Pemberton a copy without so much as a phone conversation or anything else. On Direct Appeal, Pemberton, through this counsel argued seven propositions of error. The Brief is filed in the Oklahoma Court of Criminal Appeals; Paul Curtis Pemberton v. State of Oklahoma, Case No. F-2004-1256, filed December 16, 2004 and closed on March 29, 2006. This Court is ask to take judicial notice of the OCCA website at www.OSCN.net pursuant to Fed. R. Evid. R. 201. The Oklahoma Court of Criminal Appeals Affirmed the convictions on March 29, 2006.

C. The State Habeas Corpus Proceedings
(McIntosh County District Court)

On August 13, 2018, Pemberton, acting Pro se, filed a (State) Petition For Writ of Habeas Corpus in McIntosh County District Court, in and for McIntosh County, Oklahoma, 110 N. 1st St., Eufaula, OK 74432. This Court is ask to take judicial notice of the docket at www.OSCN.net pursuant to Fed. R. Evid. R. 201. Oklahoma State law authorizes a defendant to contest the Courts jurisdiction under 12 O.S. 1331. In direct support of the demurrer at trial **[Tr. 509, 511]**, Pemberton raised two grounds for relief. One is that the State of Oklahoma lacked jurisdiction over the Homicide of Deanna Pemberton because the tract of land where the crimes alleged to have occurred is in "Indian Country." Pemberton explained that he is an enrolled member of the Muscogee (Creek) Nation Tribe and attaching his enrollment card with a picture of him on it. A statement from the citizenship

Board and a Statement from Nathan Wilson of the Muscogee Citizenship Board that read that Pemberton is an enrolled member of that Tribe with 1/64th Creek Blood. Pemberton argued that this is a Major Crime as listed in 18 U.S.C. § 1153 and Oklahoma lacks jurisdiction. In ground two Pemberton argued that the State lacked jurisdiction over him personally within the Indian Country concerning criminal matters. Without notice to Pemberton, Judge, James R. Pratt ordered McIntosh County Assistant District Attorney, Gregory R. Stidham to respond to the Petition, which he did. On November 6, 2018, Stidham filed a response by attaching mapping from the McIntosh County Assessor that this crime occurred within the Cherokee Nation Reservation. DA Stidham claims that Pemberton relies on Murphy v. Royal, 866 F. 3d 1164 (10th Cir, 2017) for relief and that is not supported by the record. Pemberton relied on Solem v. Bartlett, 465 U.S. 463, 470 (1984) and Oklahoma authorities that determine that Oklahoma lacks jurisdiction. Judge Pratt refused to hold a hearing and without allowing Pemberton a reply he denied the Petition on November 15, 2018. Judge Pratt did so inconsistent with Oklahoma law. See State v. Powell, 2010 OK 40, ¶ 3, 237 P. 3d 779, 780. Judge Pratt had no authority. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998). Pemberton's enrolment with the Muscogee Nation divested the Court of jurisdiction per 18 U.S.C. § 1153.

D. The State Habeas Corpus Proceedings
(Oklahoma Court of Criminal Appeals)

On December 14, 2018, Pemberton, still acting Pro se, filed a Petition For Writ of Habeas Corpus in the Oklahoma Court of Criminal Appeals, Paul Curtis Pemberton v. the State of Oklahoma, ex rel., Joe M. Allbough, Director of the Oklahoma Department of Corrections, and James A. Yates, Warden of the Davis Correctional Facility, Case No. HC-2018-1247. Pemberton asks this Court to take judicial notice of that Courts' docket via the internet at www.OSCN.net by Fed. R. Evid R. 201. The OCCA local rules allow Pemberton this per Rule 10.6(c). The claims are verbatim as those in McIntosh County District Court. Pemberton argued under Solem v. Bartlett,

465 U.S. 463, 470-472, **481** (1984), that Oklahoma has no authority over the case under 18 U.S.C. § 1153. Pemberton attached his enrollment with a picture with the Muscogee (Creek) Nation and the mapping of the reservation and pointed out that the claim is that the crime occurred in Indian Country, thus, divesting Oklahoma of criminal authority under 18 U.S.C. § 1153. Without concern for the State's abuse of authority, the OCCA claims that under Ekstrand v. State, 1990 OK CR 21, 791 P. 2d 92 that Pemberton has not met his burden to prove the State lacks authority. This is an Indian Commerce Clause violation. Neither Court (McIntosh County District Court; or Oklahoma Court of Criminal Appeals), cited nor applied Solem when it addressed Pemberton's jurisdictional claim and the substance of Ekstrand lacks even cursory engagement with any of the three Solem factors. The OCCA did not evaluate any Statute to see if Congress had disestablished the Cherokee or Muscogee Nation Tribes' Reservations. In other words, the OCCA improperly required Mr. Pemberton to show that the Cherokee and Muscogee Nations' Reservation's had not been disestablished instead of requiring the State to show that it had been. This violated clearly established law under Williams v. Taylor, 529 U.S. 362, 405 (2000) as to Solem, 465 U.S. at **481** instead of heeding Solem's "presumption" that an Indian Reservation continues to exist until Congress acts to disestablish or diminish it, *the OCCA flipped the presumption by requiring evidence that the Cherokee and Muscogee Nation 's Reservation's had not been disestablished- that it "still exists on April 4, 2004."* The Treaties establish that Oklahoma lacks jurisdiction within the Cherokee Reservation as to the crime, the arrest, seizure of evidence, and questioning by Former Sheriff Coleman, and the Muscogee Nation Reservation as to obtaining a State Warrant, confinement of Pemberton and taking him to a State trial without authority to do so. The Oklahoma Enabling Act was repealed as to those areas of the Treaties concerning Indians by Congress. 25 U.S.C. § 5209.

E. State Post-Conviction Relief Proceedings (McIntosh County District Court)

On July 8, 2020, Pemberton, filed an Application For Post-Conviction Relief, Pro se, in the McIntosh County District Court, 110 N. 1st St., Eufaula, OK 74432. Pemberton raised five propositions of Trial Error. Pemberton asks this Court to take Judicial Notice of that Court's docket of State of Oklahoma vs. Paul Curtis Pemberton, Case No. CF-2004-57 concerning this Application filed on July 8, 2020. Pemberton began arguing that he was not provided a full and fair suppression hearing before trial based on a conflict of interest of counsel. This resulted in unlawfully obtained evidence being entered in the State trial on top of the fact that the Court lacked criminal authority. Pemberton argued that the statements that he made after his unlawful arrest both unrecorded and recorded are inadmissible against him as a direct product of that arrest. Pemberton argued that the Prosecutor knowingly used perjured testimony to obtain this conviction with the OSBI Report, the transcripts of the June 17, 2004 Preliminary Hearing and the Trial Transcripts of October 25-27, 2004. Pemberton directs the Court to the exact pages where Donald Pemberton testified falsely under oath. Pemberton proved that what Donald is saying cannot happen within this crime scene and it conflicts with the asserted confession of the crime by Pemberton to Agent Jones. Pemberton proved first through Agent Jones that his statements of the Corpus Delicti that he squeezed the trigger on this revolver until it was empty is not possible. Pemberton also proved that with the June 17, 2004 Preliminary Hearing Transcripts that he did not walk over and shoot at his stepmother after she fell because Donald said that as soon as she fell, instantly, that he went to his wife's side and tried to feel for a pulse. Donald did not say Pemberton tried to shoot at her after she fell at that time. Donald said that Pemberton was just standing there looking at Donald and his wife at that point. Had the jury been directed to these points it would be likely that Pemberton would have been acquitted because nothing is corroborated that the State alleges. The State of Oklahoma was ordered to respond to this

Application For Post-Conviction Relief within 90 days and the McIntosh County District Court docket reflects that the State did not file a response to exhaust their arguments in relation to actual innocence, 'July 9, 2020,' and 'July 27, 2020.' Judge Brendon Bridges set the matter for a McGirt Hearing after Pemberton filed a Motion for the Court to take Judicial Notice of new authority of McGirt v. Oklahoma, 591 U.S. 894 (2020) that issued one day **after** Pemberton filed this Post-Conviction pleading. Judge, Bridges appointed Counsel and allowed the case to stall for over fifteen months and denied Post-Conviction Relief, on November 3, 2021. Pemberton raised ineffective Trial Counsel as well as ineffective Appellate Counsel and used the record to direct the Court to exactly where Counsel should have directed the jurors to, but, Judge Bridges held that Pemberton waived each issue raised in the Post-Conviction itself. In Proposition Five of the Post-Conviction, Pemberton raised a claim of ineffective Appellate Counsel. Judge Bridges ignored that claim and instead transformed that proposition into a McGirt claim *where there is no such claim raised.*

F. State Post-Conviction Appeal Proceedings (Oklahoma Court of Criminal Appeals)

On December 3, 2021 , Pemberton, Pro se, filed an appeal of Judge Bridges' November 3, 2021 order to the Oklahoma Court of Criminal Appeals, 2100 N. Lincoln, Blvd., Suite 4, Oklahoma City, OK 73105-4907, styled as Paul Curtis Pemberton Vs. State of Oklahoma, Case No. PC-2021-1396; 12-3-21. Pemberton asks this Court to take Judicial Notice of the OCCA docket concerning this case via the internet at www.OSCN.net pursuant to Fed. R. Evid. R. 201. Pemberton raised error by the District Court for failing to grant each Proposition of the Application For Post-Conviction relief. Pemberton established that Judge Bridges did not apply the standard set forth by this Court in Schlup v. Delo. 513 U.S. 298, 316, 324, 327 (1995); and House v. Bell, 547 U.S. 518, 538-540, 554 (2006). Without acknowledging any argument the Court concluded that Pemberton waived these issues. In Proposition Five Pemberton explained that he raised a claim for ineffective

Appellate Counsel under Smith v. Robbins, 528 U.S. 259, 287-288 (2000) and the Court ignored the pleading and added a claim under McGirt v. Oklahoma, 591 U.S. 894 (2020) that is not supported anywhere in the record. The OCCA issued an Order Affirming Denial of Post-Conviction relief on June 3, 2022 by applying State ex rel. Matloff v. Wallace 2021 OK CR 21, ¶¶'s 27-28, 497 P. 3d 686, 691-692, 694 holding that claims under McGirt do not apply to cases that were final before McGirt issued on July 9, 2020.The OCCA held that Pemberton waived all other claims including Actual Innocence.

G. Federal Habeas Corpus Proceedings under 28 U.S.C. § 2254 (United States District Court For the Eastern District of Oklahoma)

On January 17, 2023, Pemberton, Pro se, filed a Petition For Writ of Habeas Corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Oklahoma, 101 North 5th Street, Muskogee, OK 74401 styled as Paul Curtis Pemberton v. Michael Miller, Warden, Case No. CIV-23-25-RAW-JAR. Pemberton asks that this Court take Judicial Notice of the Eastern District of Oklahoma docket of this case per Fed. R. Evid. R. 201. Judicial Notice may be taken via the internet at www.oked.uscourts.gov. Pemberton raised eight grounds for relief. Pemberton argued that he was denied his Faretta right to represent himself at trial. Pemberton argued that the State lacked jurisdiction over the homicide of Deanna Pemberton because it was alleged to have occurred within Indian Country. Pemberton attached the Cherokee and Muscogee Nations Treaties that divest the State of Oklahoma of jurisdiction and the crime is one listed under the Major Crimes Act, 18 U.S.C. § 1153. Pemberton submitted evidence as well that the property where the crime charged occurred is an Indian Allotment and Oklahoma had never tried to show their authority. Pemberton argued that the State lacked Jurisdiction over him in Indian Country as an enrolled member of the Muscogee Nation Tribe. Pemberton argued that he did not get a full and fair Suppression Hearing resulting in illegally obtained evidence and statements being used against him at trial. Pemberton argued that the statements he made after his unlawful arrest are not

admissible in Court under Brown v. Illinois, 422 U.S. 590, 602-603 (1975). Pemberton argued that the prosecutor knowingly used perjured testimony to obtain the conviction establishing actual innocence of this crime. He offered new evidence that stemmed from his Federal Trial in United States v. Pemberton, Case No. 21 CR-012-JFH, (E.D. Okla. Jan. 23, 2021). Pemberton dismantles his confession with the State record and explained clearly with Trial Transcripts that Donald Pemberton falsely accused Pemberton of shooting his wife in a manner that could not have physically happened. Pemberton proved that the Medical Examiner changed his 2004 opinion during his 2021 testimony because he was allowed to view the crime scene itself concerning the two entrance wounds to the backside of Ms. Pemberton's head and an upper right back graze wound that he associated with entrance wound three (3). In 2004 Sibley was ask that if the Defendant in this case said that he fired at Ms. Pemberton while she lay on the ground pointing to the angle of the shot, whether that would be consistent with entrance wound #3, and Sibley said absolutely yes. In 2021, once he seen the crime scene, Sibley *changed that opinion* saying from the point that Donald claims that he seen Pemberton shoot his wife he could not even see the victims head. That alone is *new evidence* that calls the eyewitness into question, not considered by the 2004 jurors. Also with the transcripts Pemberton argued that Agent Higgs testified that you cannot squeeze the trigger on that revolver until the gun is empty. Higgs also only linked two fragments to that firearm not two projectiles. What Higgs identified *could have been one projectile*. Pemberton argued that he had ineffective counsel in failing to direct the jurors to this available evidence that would have resulted in acquittal. Pemberton argued the fact that he raised an ineffective appellate counsel claim in Ground Eight and that he never raised a claim under McGirt as Judge White found somewhere and the State of Oklahoma was ordered to respond to the Habeas Corpus on May 25, 2023, Doc. Nos. 11-12, they did. The State of Oklahoma relies on (an inarguable defense), 28 U.S.C. 2244(d). *The State of Oklahoma never tries to prove that they have authority*

over this crime, Mr. Pemberton, or that they possess Sovereign Rights to prosecute the Homicide of Deanna Gayle Pemberton in Indian Country. The State of Oklahoma falsely told Judge White that Pemberton raised a claim under McGirt v. Oklahoma, 140 S. Ct. 2455 (2020). The State tells Judge White that the OCCA affirmed the denial of post-conviction relief on June 3, 2021 in OCCA Case No. PC-2021-1396, citing to State ex rel.. Matloff v. Wallace, 497 P. 3d 686 (Okla. Crim. App. 2021). The State of Oklahoma acknowledged that this is an Indian Major Crime, 18 U.S.C. § 1153 and that the crime occurred in Indian Country. [Doc. 12](Pg. 3). That should have been the end of the State's defense under Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998). The State continues that applying the AEDPA, '2244(d)(1)(A)', saying the petition is untimely. [Doc. 12](Pg. 6). They're acknowledging the false testimony from their eyewitness Donald Pemberton. Judge, Ronald A. White Denied Pemberton an evidentiary Hearing where Pemberton ask for an opportunity to direct the Court to the complete change in the opinion of the Medical Examiner when he was able to see the actual crime scene in 2021. Also, the area's where Donald Pemberton completely changed his testimony by trying to align his eyewitness account to Pemberton's recorded confession. Judge White held that the AEDPA barred Habeas Corpus relief and dismissed the Habeas Corpus without prejudice. Judge White denied Pemberton a COA on Appeal. [Doc. 24](3/21/24).

H. Application For Certificate of Appealability
(United States Court of Appeals for the Tenth Circuit)

On May 24, 2024, Pemberton, Pro se, filed his Motion for Certificate of Appealability in the United States Court of Appeals for the Tenth Circuit. Pemberton raised issue that he is Actually innocent of violating Oklahoma State law as an enrolled member of the Muscogee (Creek) Nation tribe and the crime occurred in Indian Country constituting an Indian MajorCrime, 18 U.S.C. § 1153. Pemberton used Tenth Circuit authority of United States v. Bowen, 936 F. 3d 1091, 1095, 1108-1109 (10th Cir. 2017); United States v. Hisey, 12 F. 4th 1231, 1235-1236, 1238-1239 (10th

Cir. 2021); and United States v. Lujan, Case No. 22-2014; 2022 WL 17588500 *4-5 (10th Cir. December 13, 2022) to explain to the panel that the Court has set aside the AEDPA *time-bar when a non-Indian defendant* did not violate the Statute that he was charged with and addressed the merits of the Habeas Corpus. All three cases resulted in dismissal of the charges against the defendants. With the evidence submitted to prove that the State obtained the conviction through false testimony by Donald Pemberton and using an uncorroborated confession that conflicts with the State's eye witness account, Pemberton argued with the Medical Examiner's new testimony that he is innocent of committing the crime altogether and denied an evidentiary hearing for an opportunity to direct the Court to these area's more clearly. Judge, Nancy L. Moritz did not acknowledge that authority, nor did she read the record submitted for support of Pemberton's arguments. Instead, she applied an opinion by that Court for "Indians" who bring claims under McGirt v. Oklahoma, 591 U.S. 894 (2020) that were final before July 9, 2020. Pacheco v. Habti, 62 F. 4th 1233, 1242, 1245 (10th Cir.), cert denied, 143 S. Ct. 2672 (2023). Without applying the analysis under Schlup v. Delo, 513 U.S. 298, 316, 324, 327 (1995); and House v. Bell, 547 U.S. 518, 538-540, 554 (2006) Judge Moritz claims, "'In a recent case, where another Oklahoma prisoner advanced a similar jurisdictional argument, we considered whether' "the factual-innocence gateway is available when one has been convicted by the wrong jurisdiction." "We concluded 'the rationale behind the gateway does not support its application to conviction by the wrong jurisdiction.'" That's not the analysis under Schlup or the other authorities relied on by Pemberton and creates a Split from Lopez v. Trani, 628 F. 3d 1228, 1230-1232 (10th Cir. 2010); and Fontenot v. Crow, 4 F. 4th 982, 1029-1035 (10th Cir. 2021) based solely on Pemberton's Native American Race not the facts of the case where he did not receive an Actual Innocence analysis from Schlup.

SUMMARY OF THE ARGUMENT

As shown above, the State of Oklahoma arrested Pemberton in Indian Country for a crime listed in the Indian Major Crimes Act, 18 U.S.C. § 1153. At the time Pemberton was arrested he is an enrolled member of the Muscogee (Creek) Nation Tribe and he possessed his enrollment card with his picture on it in his wallet at the time Oklahoma State Trooper, Darin Koch searched his pockets and removed its contents. Trooper Koch did see the enrollment card as soon as he opened Pemberton's wallet. Without any concern for Pemberton's rights he was taken to a State Court and tried for Murder and Unlawful Possession of a Firearm after Former conviction of a felony for violating Oklahoma Statutes, 21 O.S. § 701.7(A) & 21 O.S. § 1283(C). Oklahoma has never proven that they have jurisdiction in this case. Oklahoma tells the Eastern District Judge that Pemberton is time-barred by 28 U.S.C. § 2244(d)(1). Pemberton submitted enough evidence for an evidentiary hearing to determine first, whether Oklahoma has criminal jurisdiction over an enrolled member of the Muscogee Nation Tribe within Indian Country. Second, whether State criminal statutes may be enforced against Pemberton within Indian Country and new evidence shows that Pemberton could not have committed this crime in the manner the eyewitness claims that he seen it happen. This case involves one traditional exception-the "Miscarriage of Justice" exception. Miscarriage of Justice: A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime. Black's Law Dictionary (12th ed. 2024). See also definition of (fundamental-Miscarriage-of-Justice exception). This exception permits Courts to consider procedurally barred claims if a Petitioner could show that no reasonable juror would have convicted him in light of new evidence. If a petitioner can meet that standard, it permits review of the Petitioner's claims whether or not the Petitioner had been diligent. This Court has already decided that a Statute of limitations under 28 U.S.C. § 2244(d)(l) does not bar a Court

from review when a Habeas Petitioner meets this standard. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013)

(We hold that actual innocence, if proved, serves as a gateway through which a Petitioner may pass whether the impediment is a procedural bar, as it was in Schlup and House, or, as in this case, expiration of the statute of limitations).

The State of Oklahoma is wrong by arguing that the exception includes a diligence component which both the District Court and the Tenth Circuit found as well. Pemberton was deprived an evidentiary hearing to clarify these arguments with the evidence submitted, testimony and summary arguments by denial of a Certificate of Appealability.

ARGUMENT

I. THE MISCARRIAGE OF JUSTICE EXCEPTION HAS LONG ACTED AS A "GATEWAY" ELIMINATING PROCEDURAL OBSTICLES TO A FEDERAL COURT'S REVIEW OF A HABEAS PETITION ON ITS MERITS

Todays case involves one traditional exception to procedural limits on the Writ of Habeas Corpus-the "fundamental miscarriage of justice exception." Herrera v. Collins, 506 U.S. 390, 404 (1993). That exception has long been "well defined in the case law,' and 'familiar to Federal Courts.'" Calderon v. Thompson, 523 U.S. 538, 559 (1998). It "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Herrera, 506 U.S. at 404. Under the exception, a court would consider a procedurally barred constitutional claim if a Petitioner with new evidence could "show that it was more likely than not that no reasonable juror would have convicted him in light of the new evidence." Schlup v. Delo, 513 U.S. 298, 327 (1995). This showing sufficed, "standing alone," to permit review of constitutional claims even if the Petitioner had not been diligent. Withrow v. Williams, 507 U.S. 680, 700 (1993). This exception furthered the Habeas' central purpose by "serving as 'an additional safeguard against compelling an innocent man to suffer an

unconstitutional loss of liberty.'" McCleskey v. Zant, 499 U.S. 467, 495 (1991). This Court decided McQuiggin v. Perkins, 569 U.S. 383, 386 (2013)

(We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup and House, or, as in this case, expiration of the statute of limitations).

This Court's focus in that case is the application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 stat. 1214.

A. The Antiterrorism and Effective Death Penalty Act of April 24, 1996, 110 Stat. 1217, 1220 is enacted to protect State Sovereign Rights to enforce State Law

This Court has held since as early as 1998 in Calderon v. Thompson, 523 U.S. 538, 555560 (1998)(Federal Habeas review of State Convictions frustrates "'both the States' Sovereign Power to punish offenders and their good-faith attempts to honor Constitutional rights.'"); to reflect a purpose of restrictions on a Federal Judge from overturning a State Conviction and the AEDPA time-bar protects the States' Sovereign Power and/or Rights to enforce State Law. Duncan v. Walker, 533 U.S. 167, 179 (2001)(The 1-year limitation period of 2244(d)(l) quite plainly serves the well-recognized interest in the finality of State Court judgments); and Shinn v. Ramirez, 596 U.S. 366, 376-380 (2022).

B. The State of Oklahoma has no Sovereign Power or Rights over an enrolled member of a federally recognized Indian Tribe within Indian Country concerning Criminal Matters

(i). The County Sheriff's Deputy arrested Pemberton four (4) miles within the Cherokee Nation Reservation on an Indian Allotment on April 4, 2004 where State Territorial Limits or Jurisdiction is pre-empted. Treaty with the Cherokee, December 29, 1835 at "New Echota" in Article 5:

(The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, *in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory*);

and the Treaty with the Cherokee Nation, July 19, 1866, "Treaty of Washington" in Article 5; Article 7; and Article 13 clearly relay that criminal matters will be resolved by the United States

Courts. Talton v. Mays, 163 U.S. 376, 380-382 (1896); and United States v. Elliott, 131 F. 2d 720, 724 (10th Cir. 1942). Pemberton possessed these rights guaranteed in these Treaties through the Major Crimes Act, 18 U.S.C. § 1153; 25 U.S.C. § 1321 and his enrollment with the Muscogee Nation Tribe. See Herrera v. Wyoming, 587 U.S. 329, 341-342, 344-345 (2019); Osage Nation v. Irby, 597 F. 3d 1117, 1124 (10th Cir. 2010). This Court has told Oklahoma since as early as 1926 that it does not have jurisdiction on Indian Allotments. See United States v. Ramsey, 271 U.S. 467, 468-470 (1926); and even Oklahoma Law divested State authority since as early as 1978 in State v. Littlechief, 1978 OK CR 2, 573 P. 2d 263.

(ii). The County Sheriff's Deputy transported Pemberton from the crime scene located within the Cherokee Nation to the McIntosh County Jail located within the Muscogee (Creek) Nation Reservation. Here, at the Sheriffs Office, Agent Jones, while impersonating an officer, elicited uncorroborated statements from Pemberton that he used to obtain a warrant from McIntosh County and McIntosh County prosecutors brought charges against Pemberton in that Court. Relevant to that filing is the Muscogee (Creek) Nation treaty that prohibits any State or Territory from passing these laws to govern Creek Indians.

> Treaty with the Muscogee (Creek) Nation, August 7 1856; Article 4: (The United States do solemnly agree and bind themselves, that *no State or Territory shall ever pass for the government of the Creek or Seminole Tribes of Indians, and that no portion of either of the tracts of Country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the Tribe owning the same*).

That Treaty sets criminal jurisdiction within the United States Courts in Articles 14; Article 16; Article 18; and Article 25. The June 14, 1866 Treaty with the Muscogee (Creek) Nation, Article 10-Third, clearly excludes any State authority over both Tribes, its members, or persons connected with the Tribes. United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 196 (1876). *The United States Supreme Court may not disestablish these Treaties.* Divesting a Reservation of its

land status is such a drastic measure that it can only be accomplished *by Congress*, not by individual land sales or any Court. Solem v. Bartlett, 465 U.S. 463, 470, **481** (1984). Absent a clear Congressional statement to change the status of the land, it is clear that the Cherokee and Muscogee Nation Treaties control the jurisdictional issue. United States v. Pueblo of San Ildefonso et. Al., 513 F. 2d 1383, 1387 (U.S. Ct. Cl. 1975); United States v. John, 437 U.S. 634, 649 (1978) and Hagen v. Utah, 510 U.S. 399, 412 (1994). Both sets of Treaties use language from the 1835-1839 era that exclude State authority over Indians within these areas so 18 U.S.C. §§'s 1152-1153 are exclusive of State jurisdiction by Treaty. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).

(iii). The Oklahoma Enabling Act, Ch. 3335, 34 Stat. 267 (June 16, 1906)(35 Stat. 2160-61; Nov.16, 1907). § 1 , § 3, 34 Stat. at 269 speaks on restrictions concerning Indians. The Enabling Act transferred all non-federal cases pending in territorial Courts to Oklahoma's new State Courts. See Act of June 16, 1906, § 20, 34 Stat. at 277 and Act of March 4, 1907, § 3, 34 Stat. 1287(Clarifying treatment of cases to which United States was a party). It also transferred pending cases that arose "under the Constitution, laws, or treaties of the United States" to Federal District Courts, § 16, 34 Stat. at 277. Pending criminal cases were then transferred to a Federal Court if the prosecution would have belonged there had the territory been a State at the time of the crime. § 1, 34 Stat. 1287 (Amending the Enabling Act). The Oklahoma Enabling Act sent State Law cases to State-Court and Federal Cases to Federal Court by Congressionally enacted statutes. Oklahoma has been in violation of these statutes from June 16, 1906 per 34 Stat. at L. 267, Chapter 3335, becoming admitted on Nov. 20, 1907. Settled Law has set this in motion as early as 1908 in:

Higgins v. Brown, 20 Okla. 355, 1 Okla. crim. 33, 94 P. 703, 725 (1908) (Further, however, prosecutions under any federal statute, which were not contingent on the fact that the Country was formerly a territory, but established a general law relating to crime against the United States of which a federal Court would have had jurisdiction even had the crime been committed within a State, and not within a territory, *are to be transferred to the federal Courts*)(While it is not entirely clear that under this statute it was intended to extend these laws to all parts of the territory as

distinct from those places of exclusive federal jurisdiction, such as military' or Indian Reservations, to which they would have extended even within a State,...)(94 P. at 726-727).

(iv). Congress repealed the General Allotment Act of February 8, 1887, Ch. 119, 24 Stat. 388; 25 U.S.C. 331 et seq., and the "Curtis Act," of June 28, 1898, Ch. 517, 30 stat. 495 specifically for the *Cherokee* and *Muscogee Nations* when Congress enacted the Oklahoma Indian Welfare Act, 25 U.S.C. § 5201-5210, in *25 U.S.C. § 5209*. That repeal also applies to the Oklahoma Enabling Act of all acts or parts of acts inconsistent with this chapter are repealed. 25 U.S.C. § 5209. Settled law speaks directly to the compliance of the Cherokee Nation with 25 U.S.C. § 5203 in Wheeler v. United States Dep't of Interior, Bureau of Indian Affairs, 811 F. 2d 549, 550-555 (10th Cir. 1987). Settled law speaks directly to the compliance of the Muscogee Nation with 25 U.S.C. § 5203 in Muscogee (Creek) Nation v. Hodel, 851 F. 2d 1439, 1440-1447 (D.C. Cir. 1988). Even if the State of Oklahoma was not pre-empted by these treaties from authority over Indian Crimes or from protecting Indians from crimes by non-Indians, it is repealed in 1936 (OIWA), '§ 5209'. This Court must begin with the six treaties' language *because State authority is excluded* as quoted above. Congress re-enforced that with Federal Statutes. 25 U.S.C. § 1321.

(v). The Bureau of Indian Affairs records for the Eastern District of Oklahoma lists the property where this crime occurred as an Indian Allotment and a Reservation by Statute. Oklahoma's exercise of Criminal Jurisdiction over Indians or persons committing crimes against Indians would infringe upon the Dec. 29, 1835 Treaty of the Cherokee; Article 5; and the Aug. 7, 1856 Treaty of the Muscogee in Article 4 because both Tribes' have a right to contract with the United States under their self-government. Oklahoma has not directed any Court to any statute that they relied on to exercise criminal authority over this case. See Illinois v. Krull, 480 U.S. 340, 344, 352, 355 (1987) where this Court addressed a similar type of statutory authority but the Major Crimes Act would notify these officers that enforcing State Law is a violation of the Indian Commerce Clause and *18 U.S.C. § 241-242*. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980).

Oklahoma's authority is pre-empted by Treaty and Federal Law. Both Cherokee and Muscogee Nation's possess the right to make a contract with the United States to exclude State authority and the Oklahoma Enabling Act is silent as to authority over Indians or crimes against Indians by non-Indians. Oklahoma has not submitted sufficient grounds by statute for concurrent jurisdiction. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341(1983). McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 170 (1973):

(As a leading text on Indian problems summarizes the relevant law: 'State Laws generally are not applicable to Tribal Indians on an Indian Reservation except "*'where Congress` has expressly provided that State laws shall apply*');

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 313 (1981). Mr. Pemberton is Actually and Factually Innocent of violating an Oklahoma State Statute such as 21 O.S. 1996. § 701.7(A) and 21 O.S. 1996, § 1283(C), because Oklahoma is pre-empted by these Treaties and Federal Law, thus, Tenth Circuit authority supports setting aside the AEDPA time-bar in United States v. Bowen, 936 F. 3d 1091, 1095, 1108-1109 (10th Cir. 2017); United States v. Hisey, 12 F. 4th 1231, 1235-1236, 1238-1239 (10th Cir. 2021); and United States v. Lujan, Case No, 22-2014; 2022 WL 17588500 * 4-5 (10th Cir. December 13, 2022) especially because the crime is exclusively federal under 18 U.S.C. § 1153, per McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) and the statute of limitations under § 2244(d)(1) maybe set-aside.

II. Protecting the Actual Innocent from Unjust Incarceration is the Paramount Goal of the Criminal Justice System relying on equitable principles in Habeas Proceedings to prevent unjust incarceration

The questions presented in this case should be evaluated in light of the crucial and fundamental importance of protecting actually innocent people from an unjust incarceration. Schlup v. Delo, 513 U.S. 298, 324-325 (1995) ("..., concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.'). This Court upheld the miscarriage of justice gateway in:

House v. Bell, 547 U.S. 518, 538, 554 (2006)(A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt, or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.... Accordingly, and although the issue is close, we conclude that this is the rare case where, had the jury heard all the conflicting testimony, it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt).

Pemberton never received the Schlup analysis required by Judge White in the District Court or Judge Moritz in the Tenth Circuit, thus, the gateway factors were never considered

(i). Judge White conceded that he only considered a portion of the record designated by Pemberton in Pemberton v. Miller, 2024 WL 1216713 *1 (E.D. Okla. March 21, 2024)[Dkts.1, 11, 12, 14 and 17]. In Doc. 1, the Habeas-Petition, Pemberton relies on his State Application For Post-Conviction Relief styled as Paul Curtis Pemberton Vs. The State of Oklahoma, Case No. CF-2004-57; McIntosh County District Court, filed **July 8, 2020** entered as (Document # CC20070900000025). Pemberton asks that this Court take judicial notice of the McIntosh County docket of that entry via the World Wide Web at www.oscn.net per Fed. R. Evid. R. 201. The evidence attached to that application stems from the Motions Hearings Transcripts and Preliminary and Trial Transcripts along with the OSBI Report and crime scene photos that the state accuses Pemberton with. In that application Pemberton proved that what the State accuses him of cannot happen. Jordan v. A.G. of New Mexico, 116 F. 3d 489 (10th Cir. 1997); or United States v. Virgen-Chavarim, 350 F. 3d 1122, 1134 (10th Cir. 2003). In the Third Proposition, Pages 25-74, Pemberton raised a claim of Actual Innocence based on his conviction rests on false testimony in violation of Napue v. Illinois, 360 U.S. 264, 269 (1959); Giglio v. United States, 405 U.S. 150, 153 (1972); and United States v. Agurs, 427 U.S. 97, 103 (1976). Judge Bridges Ordered Oklahoma to respond to that application on July 9, 2020, "ORDER DIRECTING RESPONSE FROM STATE," (Doc. No. CC20070900001315). This Court issued McGirt v. Oklahoma, 591 U.S. 894 (2020) on 7/9/20 and Pemberton noticed Judge Bridges by Motion outside the Post-Conviction proceedings on July 27, 2020, (Doc. No. CC2007270000394) to wit;

he issued an ORDER for the State to respond. (Doc. No. CC20072700000554). If the Court will notice that Oklahoma did not respond to either Order, they waived their arguments concerning Actual Innocence that they raised in Habeas during Pemberton v. Miller, Case No. CIV-23-25-RAW-JAR, 1/18/23 in Doc. Nos. 11-12 filed 5/25/23. As the OCCA docket Case No. PC-2021-1396 filed Dec. 3, 2021, on Post-conviction appeal proves, Oklahoma waived their arguments concerning innocence. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Pemberton invoked the State's waiver in his Reply to Doc. Nos. 11-12 on June 8, 2023 Doc. No. 14, Pgs. 6-7, in Pemberton v. Miller, CIV-23-25-RAW-JAR; and Judge White relied on the State's Responses in his March 21, 2024 Opinion and Order, 2024 WL 1216713.

Walker v. Martin, 562 U.S. 307, 321 (2011)("Federal Courts must carefully examine State procedural requirements to ensure that they do not operate to discriminate against claims of federal rights).

In the Habeas Corpus proceedings before Judge White Pemberton established a Napue violation when the State told the jurors that Pemberton confessed to this crime yet did not and could not corroborate the Corpus Delicti. Pemberton v. Miller, Case No. CIV-23-25-RAW-JAR, Doc. 1, Pgs. 30-32. Pemberton likewise proved that looking at the crime scene photo of States' Exhibit # 5; Picture of the crime scene CR 04-1017; 10025, that the States' eyewitness placed himself over top of his wife at the time the confession claims that he walked over and shot at Deanna after she fell. Preliminary Hearing Tr. Pgs. 8-9, 23-24. June 17, 2004. This Court has held that a confession like this is inadmissible. Smith v. United States, 348 U.S. 147, 153 (1954); and Opper v. United States, 348 U.S. 84, 93 (1954). The confession and eyewitness account were conflicting to one another and could not exist together. Fontenot v. Allbaugh, 402 F. Supp, 3d 1110, 1123, 1136 (E.D. Okla. 2019). This type has been excluded in the past in that Court. Judge White may not rely on these State Court opinions *because they are not competent Courts*. See Carlsbad Technology, INC. v. HIF, Bia. INC., 556 U.S. 635, 639-640 (2009). Instead, Pemberton should be

granted an evidentiary hearing to expand the record to clarify the points of innocence as this Court held in In re Davis, 557 U.S. 952, 953 (2009) speaking on a sentence of death , but, would equally apply to Pemberton's two consecutive Life Sentences. Judge Moritz in the Tenth Circuit did not read the exhibits attached to the Habeas Petition in Pemberton v. Miller, Case No. CIV-23-25-RAW-JAR; 2024 WL 1216713 (E.D. Okla. 2023)[Doc. 1](Exh. 13, Pgs. 208-240) of Andrew Sibley's Federal Trial testimony on September 9, 2021 when Sibley was allowed to view the actual crime scene through a picture. Andrew Sibley changed his State Trial testimony at [**Tr. 381-407**]. Specifically at Pgs. [**Tr. 395-397**]. Sibley agrees that at Pg. 396, the upper right back shoulder graze is **not** present in the pages used for his testimony that the 2004 jury seen and then he agrees that if Pemberton gave a statement that after Deanna fell, that he shot at her again, would that be consistent with this graze and entrance wound #3. Sibley said absolutely, yes. Looking at that federal trial testimony he was shown the picture listed as (**CR 04-1017**; **10025**; **State's #5**) and changed his opinion to the fact that from that point in the picture he could not see the victim's head. Sibley said the shot would have to come from an area closer to the light in the picture next to Donald Pemberton's recliner *where he said he was* during the shooting of his wife. Donald placed Pemberton at that very spot behind the recliner in this picture No. 10025 during his June 17, 2004 Preliminary Hearing testimony and his Trial testimony as pointed out in Post-Conviction and Habeas Corpus. The *Federal jury never heard any evidence from the State Trial* and the testimony from the Federal Trial was not available until June 16, 2022 as far as new evidence. Pemberton testified *in this competent court* under oath that he did not shoot his stepmother. What the Court did not consider is the Application For Post-Conviction Relief, Case No. CF-2004-57, filed July 8, 2020 in McIntosh County Dist. Ct., Pgs. 46-47 with the June 17, 2004 Preliminary Hearing proceedings before Judge, Michael Claver in its Pgs. 8-10; 23-24. Donald's testimony here is about sixty-days after the shooting and he claims that all shots came

from behind that recliner in (CR 04-1017-10025) State's #5 and that after Deanna fell he jumped up instantly after the last shot as he explained, at least five-shots, he was then over top of his wife checking for a pulse. *Donald said that at that point Pemberton had come around the other recliner and backed up just standing there looking at him and his wife*. Neither Court considered this original testimony that does not corroborate Pemberton's confession that he walked over and shot at Deanna after she fell based on Donald placing himself over top of his wife at that point and he did not support that. [**Tr. 457**; **475-476**]. Donald learned that only after Agent Jone's testimony.[**Tr. 336**]. Looking at Dr. Sibley's 2021 testimony attached as an exhibit to the Habeas Petition [Doc. 1](Exh. 13, Pgs. 208-240 (**228-234**; **236-239**)), here, he does not support Donald Pemberton's eyewitness account from the wounds that he found on Deanna. Sibley placed the shooter in the area exactly where Donald Pemberton *places himself* at both Preliminary Hearing and at Trial. This evidence should have been authorized under 28 U.S.C. § 2244(d)(l)(A) because it did not surface until June 16, 2022, This is exactly the type of circumstance that this Court held a basis to go farther through evidentiary hearing in House v. Bell, 547 U.S. 518, 554-555 (2006)(Yet the central forensic proof connecting House to the crime-blood and the semen-has been called into question, and House has put forward substantial evidence pointing to a different suspect). In Schlup v. Delo, 513 U.S. 298, 331-333 (1995), Loyd Schlup proved that he could not have been in the area where Arther Dade was killed based on his inability to have the time to travel from the crime scene back to the prisoner's dining room where Schlups' witnesses placed him at the time of the radio call. This Court held that this type of evidence would allow a case to go forward. The Eastern District Court Judge, Ronald A. White held in error, "Petitioner was tried by jury and convicted in McIntosh County District Court Case No. CF-2004-57 (Dkt. 12-2 at 14), and his judgment and sentence was entered on December 20, 2004. (Dkt. 12-8). He directly appealed the convictions to the OCCA, which Affirmed his convictions on March 29, 2006.

Pemberton v. State, No. F-2004-1256 (Okla. Crim. App. March 29, 2006)(Unpublished)(Dkt. 12-1). His convictions, therefore, became final 90 days later on June 27, 2006." Pemberton v. Miller, 2024 WL 1216713 * 2 (E.D. Okla. March 21, 2024). Under the doctrine of **'Coram Non Judice'** Judge White may not acknowledge those Courts as *having power or authority* when evidence appears from Judge, John F. Heil, III, in United States v. Pemberton, Case No. 21 CR 012-JFH (E.D. Okla. February 23, 2021) that this very crime is an Indian Major Crime, 18 U.S.C. § 1153. The Tenth Circuit relied on Judge White's finding in *Coram Non Judice* based on neither Court in Oklahoma has power or authority to make findings of fact or conclusions of law in an Indian Major Crime, thus, Judge Moritz erred. Pemberton v. Miller, 2024 WL 4891560 *2, *4 (10th Cir. November 26, 2024)(Unpublished). Pemberton offers this Courts' authority in **Coram Non Judice** in:

> Burnham v. Superior Court of California, 495 U.S. 604, 608-609 (1990)(The proposition that the judgment of a Court lacking jurisdiction is void traces back to the English Year Books, See Bowser v. Collers, Y.B. Mich. 22 Edw. IV. f. 30, pl. 11 , 145 Emg. Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in case of the Marshalsea, 10 Coke Rep. 686, 77a, 77 Eng. Rep. 1027, 1041 (KB. 1612). Traditionally that proposition was embodied in the phrase *Coram Non Judice, before a person not a judge "-meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present*, **and could therefore not yield a judgment**); Pennoyer v. Neff, 95 U.S. 714, 732-733 (1877); and J. McIntyre Machinery, ltd. V. Nicastro, 564 U.S. 873, 879-880 (2011).

Without an evidentiary hearing it is obvious that the Court below is unable to discern the facts relied on by the evidence attached to the Habeas Corpus and thus, a Certificate of Appealability should have been granted.

CONCLUSION

The Tenth Circuit Order denying a Certificate of Appealability should be Vacated and the case remanded to grant a Certificate of Appealability.