No._____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

TRAVIS WAYNE BENTLEY – PETITIONER

vs.

KEVIN HARVONEK (WARDEN) – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Travis Wayne Bentley
L.C.C. Unit 5-H2-J
P.O. Box 260
Lexington, OK 73051

QUESTIONS PRESENTED

1) Did the Oklahoma Court of Criminal Appeals violate Mr. Bentley's Fourteenth Amendment right to Due Process by affirming the district court's Denial of Petitioners application for Post-Conviction relief by:
   a) Agreeing with the District Court to continue the evidentiary hearing without allowing Petitioner time to adequetly prepare a defense?
   b) Affirming the District Courts decision to not allow Petitioner time to obtain expert witnesses?
   c) Affirming the District Courts decision to not allow Petitioner ample time to obtain indigent legal counsel that is knowledgable in Indian and Federal law at a critical stage of proceedings?
2) Did the Oklahoma Court of Criminal Appeals violate U.S. Const. Art. VI cl. 2 in concuring with the state regarding the diminishment of the Citizen Pottawatomie Nation (CPN) by:
   a) Allowing the District Court to utilize the Act of 1891 to show when the CPN's boundaries were diminshed without presenting the Act of Jan. 2, 1975 in which congress authorized the tribes to reconvey the tracts to the United States, to be held in trust for the tribes?
3) Did the Oklahoma Court of Criminal Appeals violate the Organic Act of May 2, 1890 and the Enabling Act of June 16, 1906 by:
   a) Affirming the District Courts decision to not allow Petitioner ample time to obtain indigent legal counsel essentially impairing the rights of person or property pertaining to Indians?

4) Whether Oklahoma courts may exercise criminal jurisdiction over a Choctaw Indian in violation of treaty provisions between the Choctaw Indians and the United States, and the Citizen Band Potawatomi Indians and the United States?

5) Does U.S. Constitution Art. 1, Section 8 deny criminal jurisdiction to any State absent a grant by Congress?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

RELATED CASES

Bentley v. State, No. CF-2015-1240, Cleveland County District Court, State of Oklahoma, Judgment enetered July 2, 2018. (PCR denial)

Bentley v. State, No. PC-2018-743, Oklahoma Court of Criminal Appeals, Judgment entered June 25, 2019. (OCCA PCR denial)

Bentley v. State, No. 19-5417, Supreme Court of the United State, Judgment entered July 9, 2020. (Supreme Court Granting Writ of Certiorari and Forma Pauperis)

Bentley v. State, No. PC-2018-743, Oklahoma Court of Criminal Appeals, Judgment entered November 25, 2020. (On Remand from Supreme Court of the United States)

Bentley v. State, No. CF-2015-1240 & PC-2018-743, Cleveland County District Court, Judgment entered February 24, 2021. (On Remand from the Oklahoma Court of Criminal Appeals)

Bentley v. State, No. PC-2018-743, Oklahoma Court of Criminal Appeals, Judgment enetered October 1, 2021. (PCR denial)

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING WRIT 6

REASONS FOR GRANTING PETITION 7

CONCLUSION 33

INDEX TO APPENDICES

APPENDIX A	Opinion of the Oklahoma Court of Criminal Appeals
APPENDIX B	Opinion of the Cleveland County District Court
APPENDIX C	Opinion of the Oklahoma Court of Criminal Appeals
APPENDIX D	Opinion of the Supreme Court of the United States
APPENDIX E	Opinion of the Oklahoma Court of Criminal Appeals
APPENDIX F	Opinion of the Cleveland County District Court
APPENDIX G	Transcripts to Evidentiary Hearing on January 22, 2021
APPENDIX H	Transcripts to Evidentiary Hearing on January 15, 2021

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

28 U.S.C.§ 1257(a). - 1 -

Antoine v. Washington, 420 U.S. 194, 203, 95 S.Ct. 944, 43 L.Ed. 2d 129 (1975) - 17 -

Citizen Band of Pottawatomie Indians of Okl. v. U.S. Docket 96 ICC, September 18, 1958 - 11 -, - 21 -

DeCoteau v. District County Court, 420 U.S. 425, 427-428 (1975) - 26 -

Draper v. United States, 164 U.S. 240 (1896) - 30 -

Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534-535 (1991) - 8 -

Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893) - 18 -

Hagen v. Utah, 510 U.S. 399, 411, 114 S.Ct. 958, 127 L.Ed. 2d 252 - 26 -, - 27 -

Lonewolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216 (1903) - 14 -

Madison v. Marbury, 5 U.S. 137 (1803) - 9 -

Marlin v. Lewallen, 276 U.S. 58, 60-62 (1928) - 9 -

Mattz v. Arnett, 412 U.S. 481 (1973) - 25 -

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed. 2d 129 (1973)- 29 -

McGirt v. Oklahoma, 591 U.S. ____, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020) - 4 -, - 7 -, - 31 -, - 33 -

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) - 9 -

Nebraska v. Parker, 136 S.Ct. 1072 (2016) - 10 -, - 27 -

Okl. Tax Comm. v. Citizen Band Pott. Indian Tribe, 498 U.S. 505 (1991) - 19 -, - 21 -, - 23 -

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 674 (1974) - 14 -

Richardson v. Malone, 762 F.Supp. 1463 (1991) - 13 -

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) - 20 -

Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424 (1962) - 10 -, - 23 -

Sisseton Wahpeton Bands of Sioux Indians v. United States, 277 U.S. 424, 48 S.Ct. 536 (1928) - 13 -

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 359, 118 S.Ct. 789, 139 L.Ed. 2d 773 - 27 -

Southern Surety Company v. State of Oklahoma, 241 U.S. 582, 585-586 (1916) ..... - 31 -

Stringer v. Black, 503 U.S. 222, 227, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) ..... - 32 -

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) ..... - 32 -, - 33 -

The Cherokee Tobacco, 78 U.S. 616 (1870) ..... - 14 -

Tulee v. State of Washington, 315 U.S. 681-685, 62 S.Ct. 862, 86 L.Ed. 1115 ..... - 17 -

U.S. v. Keyes, 558 F.Supp.2d 1169 (2007) ..... - 32 -

U.S. v. Lara, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed 2d 420(2004) ..... - 17 -

U.S.C. Art. VI, cl. 2 ..... - 2 -

United States v. Celestine, 215 U.S. 278, 285 (1909) ..... - 24 -

United States v. Dion, 476 U.S. 734, 738 (1986) ..... - 18 -

United States v. John, 437 U.S. 634 (1978) ..... - 19 -, - 20 -, - 21 -

United States v. Kagama, 118 U.S. 375, 384 ..... - 7 -

United States v. McGowan, 302 U.S. at 538-539 (1938) ..... - 20 -, - 21 -

United States v. Saldona, 246 U.S. 530, 38 S.Ct. 357, 62 L.Ed. 870 (1918) ..... - 25 -

United States v. Shoshone Tribe, 304 U.S. 111, 116, 58 S.Ct. 794, 797, 82 L.Ed. 1213 (1938) ..... - 17 -

United States v. Wright, 229 U.S. 226 (1913) ..... - 30 -

Upper Skagit Indian Tribe v. Lundgren, 2018 WL 2292445 ..... - 23 -

Washington State Department of Licensing v. Cougar Den, 139 S.Ct. 1000 (2019) ..... - 8 -

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 488-489 fn 32, 95 S.Ct. 755-756 ..... - 28 -

Welch v. U.S., 136 S.Ct. 1257, 194 L.Ed.2d 387, 84 USLW 4195 (2016) ..... - 32 -

York v. Turpen, 681 P.2d 763 (1984) ..... - 12 -

U.S. Court of Appeals Tenth Circuit Cases

Indian Country U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 973-976 (10th Cir. 1987) ..... - 20 -

Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Commission, 829 F.2d 976, 975 n.3 (10th Cir. 1987) ..... - 26 -, - 28 -

Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) ..... - 26 -

STATE EX REL. Mark Matloff v. Wallace, --- P.3d ---, 2021 WL 3578089, 2021 OK CR 21 (2021) ... - 31 -

U.S. Court of Appeals (Outside Tenth Circuit)

Brief of Amicus Curiae, the Inter-Tribal Council of the Five Civilized Tribes, 1990 WL 10012687 (U.S.) Appellate brief ..... - 26 -

Confederated Bands of the Yakima Indian Nation v. Washington, 550 F.2d 443 (9th Cir. 1977) ..... - 29 -

Green v. United States, 262 F.3d 715 ..... - 33 -

Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999) ..... - 14 -

In re Humbolt Fir Inc., 426 F.Supp 292, 296 ND Cal. 1977 ..... - 14 -

Oklahoma Tax Commission v. The Citizen Band Pottawatomie Indian Tribe of Oklahoma, 1990 WL 10012682 (U.S.) (Appellate Brief) (No. 89-1322) ..... - 19 -

United States Exp. Co. v. Friedman, 191 Fed. 673, 678-679 (8th Cir. 1911) ..... - 31 -

United States v. White Horse, 316 F.3d 769 (8th Cir. 2015) ..... - 14 -

Oklahoma State Cases

Ahboah v. Housing Authority of Kiowa Tribe, 660 P.2d 625 (1983) ..... - 14 -, - 28 -

Ex parte Buchanen, 94 P. 943, 944-945 (Okla. Crim. App. 1908) ..... - 30 -

Ex parte Curlee, 95 P. 414 (Okla. Crim. App. 1908) ..... - 30 -

Higgins v. Brown, 94 P.2d 703, 730 (1908) ..... - 30 -

Matloff v. Wallace, 2021 OK CR 21 ..... - 31 -

Matloff v. Wallace, 2021 OK CR 21, ___ P.3d ___. ..... - 5 -, - 7 -

Neal v. Travelers Ins. Co., 188 Okla. 131, 106 P.2d 811, 1940 OK 314 ..... - 13 -

Oklahoma Tax Commission v. Citizen Band Pottawatomie Nation, 89-1322 WL 10012687 ..... - 20 -, - 25 -

State ex rel. May v. Seneca Cayuga Tribe of Oklahoma, 711 P.2d 77, 82 (1985) ..... - 26 -

Wright v. United States, 18 Okla. 510 (1907) ..... - 15 -, - 32 -

Oklahoma State Statutes

74 O.S. 2001 § 18 ..... - 3 -, - 15 -

U.S. Constitutional Provisions

18 U.S.C. § 1151 (Indian country defined) ..... - 3 -

18 U.S.C. § 1152 ..... - 3 -

18 U.S.C. § 1153 ..... - 3 -

18 U.S.C. § 1162 ..... - 3 -

18 U.S.C. § 3242 ..... - 3 -

25 C.F.R. 151.2 ..... - 24 -

25 U.S.C. §§ 1321-1326 ..... - 3 -

Amendment VI ..... - 2 -

Amendment XIV ..... - 2 -

U.S. Const. Art. VI ..... - 7 -, - 15 -

Oklahoma Constitutional Provisions

Constitution of the State of Oklahoma Art. I § 1 ..... - 2 -

OK Const. Art. I § 3 ..... - 7 -, - 15 -

Proclamation of Statehood, November 16, 1907, No. 6869 ..... - 17 -, - 30 -

Federal Statutes

15 U.S.C.A. § 6312 ..... - 3 -, - 11 -

18 U.S.C. § 3231 ..... - 14 -

25 U.S.C. § 1324 ..... - 29 -

25 U.S.C. § 349 ..... - 23 -

25 U.S.C. § 501 ..... - 3 -, - 25 -

25 U.S.C. § 71 ..... - 17 -

25 U.S.C. 1452 ..... - 20 -

25 U.S.C. 1903 ..... - 20 -

25 U.S.C. 2719 ..... - 20 -

25 U.S.C.A. § 1322 ..... - 28 -, - 29 -

25 U.S.C.A. § 2022 ..... - 19 -

28 U.S.C. § 1360 ..... - 27 -

28 U.S.C. § 2072 ..... - 3 -, - 14 -

29 U.S.C.A. § 750 ..... - 19 -

33 U.S.C. § 1377 ..... - 21 -

42 U.S.C. § 2992 ..... - 21 -

42 U.S.C. § 5318 ..... - 19 -

42 U.S.C. § 682 ..... - 19 -

7 U.S.C. § 1985 ..... - 19 -

Public Law 83-280, 67 Stat. 588 (1953) ..... - 12 -, - 27 -, - 28 -, - 29 -

Other Citations

11 Okl. Op. Attny Gen. 345, 1979 WL 37653 ..... - 11 -, - 15 -

58 Interior Dec. 85, 100-101 (1942) ..... - 20 -

59 Interior Dec. 1, 2 & 5 (1943) ..... - 20 -

AG Op. 79-216, 1979 WL 37653 ..... - 12 -

AG Op. No. 06-6, 2006 WL 768662 ..... - 12 -

AG Opinion 06-39, 2006 WL 3751277 ..... - 11 -

AG Opinion 90-32, WL 567868 ..... - 12 -

K. Kickingbird, Indian Jurisdiction p.63 (1983) ..... - 13 -

Restatement (second) of Contracts § 241 (1981) ..... - 18 -

Restatement (second) of Foreign Relations Law of the United States § 158(1)©(1965) ..... - 18 -

Tymkovich p.2 Order 11/9/17 ..... - 10 -

Publications

Accord H.R. Rep. No. 1661, 86th Cong., 2d Sess. 2 (1960) ..... - 22 -

Cohen's Handbook of Federal Law 775-76 (1982 ed.) ..... - 10 -, - 21 -, - 27 -, - 28 -

Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate Indians, 1880-1920 2-3 (1984) ..... - 9 -

H.R. Rep. No. 1490, 88th Cong., 2d Sess. 2 (1964) ..... - 22 -

H.R. Rep. No. 848 Cong., 1st Sess., reprinted in (1953) U.S. Code Cong. & Admin. News P. 2409 ..... - 29 -

S. Rep. No. 1255, 88th Cong., 2d Sess 1 (1964) ..... - 22 -

S. Rep. No. 1605, 86th Cong., 2d Sess. 2 (1960) ..... - 22 -

Title IV ..... - 29 -

Acts of Congress

1628 ..... - 30 -

Act of 1906 ..... - 23 -

Act of Jan. 2, 1975, P.L. 93-590, 88 Stat. 1922 (Absentee Shawnee Tribe) ..... - 22 -

Act of March 3, 1891, 26 Stat. 1016 ..... - 22 -

Act of September 13, 1960, 74 Stat. 903 ..... - 22 -

Civil Rights Act of 1968 §§ 401-406I ..... - 29 -

Enabling Act of June 16, 1906 § 1 ..... - 2 -, - 17 -

Organic Act of May 2, 1890 § 1 ..... - 2 -, - 16 -

Title IV ..... - 29 -

Federal/Indian Treaties

Constitution of the Citizen Band Pottawatomie Indian Tribe of Oklahoma, Art. 4 June 26, 1936 Amended 1985, 2007 ..... - 2 -

Treaty with the Choctaw and Chickasaw, April 28, 1866 ..... - 2 -

Treaty with the Choctaw, September 27, 1830 ..... - 2 -, - 8 -

Treaty with the Potawatomi, February 27, 1867 ..... - 2 -, - 8 -, - 9 -, - 18 -

Bureau of Indian Affairs cases

Citizen Band Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 28 I.B.I.A 169 (9/12/1995) ..... - 10 -

Interior Board of Indian Appeals, 28 IBIA 169 (9/12/1995) ..... - 21 -

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the Cleveland County District Court appears at Appendix B to the petition and is unpublished.

The opinion of the Oklahoma Court of Criminal Appeals appears at Appendix C to the petition and is unpublished.

The opinion of the Supreme Court of the United States appears at Appendix D to the petition and is unpublished.

The opinion of the Oklahoma Court of Criminal Appeals appears at Appendix E to the petition and is unpublished.

The opinion of the Cleveland County District Court appears at Appendix F to the petition and is unpublished.

JURISDICTION

The date on which the Oklahoma Court of Criminal Appeals decided my case was October 1, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S.C. Art. VI, cl. 2 (Supreme Law of the Land)

Constitution of the State of Oklahoma Art. I § 1 (Supreme Law of the Land)

Organic Act of May 2, 1890 § 1 (Boundaries of Oklahoma Territory)

Enabling Act of June 16, 1906 § 1 (Rights of persons or property pertaining to Indians)

Amendment VI (Effective Assistance of Appellate Counsel)

Amendment XIV (Due Process)

Treaty with the Potawatomi, February 27, 1867

Constitution of the Citizen Band Pottawatomie Indian Tribe of Oklahoma, Art. 4 June 26, 1936 Amended 1985, 2007 (Tribal Jurisdiction)

Treaty with the Choctaw, September 27, 1830

Treaty with the Choctaw and Chickasaw, April 28, 1866

STATUTORY PROVISIONS

18 U.S.C. § 1151 (Indian country defined)

18 U.S.C. § 1152 (Laws governing)

18 U.S.C. § 1153 (Offenses committed within Indian country)

18 U.S.C. § 1162 (State jurisdiction over offenses committed by or against Indians in the Indian country)

18 U.S.C. § 3242 (Indians committing certain offenses; acts on reservations)

15 U.S.C. § 6312

28 U.S.C. § 2072

25 U.S.C. §§ 1321-1326

25 U.S.C. § 501

74 O.S. 2001 § 18

STATEMENT OF THE CASE

The petitioner, Travis Bentley, entered a blind plea of guilty and was convicted of Count 1: Manslaughter in the First Degree; Count 2: Driving Under the Influence of Drugs Resulting Great Bodily Injury; and Count 3: Unlawful Possession of Paraphernalia in Case No. CF-2015-1240 in the District Court of Cleveland County. Petitioner was sentenced to 25 years imprisonment for Count 1, 10 years imprisonment for Count 2-, and 1-year imprisonment for Count 3, with all sentences ordered to run concurrently (CC). Petitioner filed a motion to withdraw his plea that was denied by the District Court and affirmed on appeal to the Oklahoma Court of Criminal Appeals (OCCA). *Bentley v. State*, No. C-2016-699 (Okl.Cr. February 7, 2017).

On July 20, 2018, Petitioner filed the instant application for post-conviction relief in the District Court. Petitioner's propositions included a claim that the District Court lacked jurisdiction to try him. Petitioner argued that he is a member of the Choctaw Nation, and that his crime in this case occurred in Indian Country. On July 2, 2018, the District Court entered an order denying Petitioner's application without conducting an evidentiary hearing pursuant to 22 O.S.2011 § 1084. Petitioner appealed the denial of his application for post-conviction relief and was affirmed by the OCCA. *Bentley v. State*, PC-2018-743 (Okl.Cr. June 25, 2019) (not for publication) Petitioner sought review of the OCCA's decision by this Court which ruled in favor of Mr. Bentley and Granted writ of certiorari. Judgment vacated and remanded for further consideration in light of *McGirt v. Oklahoma*, 591 U.S. ____, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). *See Bentley v. Oklahoma*, No. 19-5417 (U.S. July 9, 2020)

On November 25, 2020, the OCCA issued Order Recalling Mandate, Reversing District Court Order Denying Post-Conviction Relief, And Remanding To The District Court For An

Evidentiary Hearing And Further Proceedings. On January 15, 2021, Petitioner attended an evidentiary hearing that was delayed for appointment of counsel for petitioner. On January 22, 2021, Petitioner was brought before the Court to continue the previous evidentiary hearing **without** the appointment of counsel. Petitioner was promised the opportunity to have counsel present for the hearing but was forced to defend himself due to the District Court having a lack of funds in the Court funds to "hire" indigent counsel. (Emphasis added)

On February 24, 2021, the District Court of Cleveland County issued it's Finding of Facts and Conclusions of Law in which the District Court agreed to Mr. Bentley's Indian status but argues that the crime did not occur within Indian country. On October 1, 2021, the OCCA issued Order Affirming Denial Of Post-Conviction Relief citing *Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___.

REASONS FOR GRANTING THE WRIT

Overview of the State Court's Determination of Facts

In the evidentiary hearing held on January 15, 2021, Mr. Bentley was brought before the court at which time Mr. Bentley was questioned by the Court regarding representation. Mr. Bentley advised the Court that he filled out paperwork requesting to be represented by counsel that was knowledgeable in Indian and Federal Law.[1] After a brief discussion, the Court advised Mr. Bentley he had a right to an attorney. A representative from the Attorney General's office, Ms. Crabb, stated "there is no constitutional right to counsel at this point, not a statutory right. There is for postconviction and capital cases, but not noncapital cases..."[2]

The Court goes on to further question the Assistant District Attorney (ADA), Mr. White, about the issues involving indigent counsel for Mr. Bentley and the burden it will place on the time limit to conduct the hearing set forth by the OCCA. Mr. Bentley was advised he would be appointed counsel as soon as possible.[3] The Court reset the hearing for January 22, 2021.[4] At the continuation of the evidentiary hearing held on January 22, 2021, Mr. Bentley was forced to represent himself due to "no funds in the court funds." Ms. Crabb from the Attorney General's office went on to state, " Counsel necessary in representation shall be made available to the applicant after filing the application on a finding by the court that such assistance is necessary to provide a fair determination of meritorious claims." Mr. White argues that Mr. Bentley has "a

---

[1] Evidentiary Hearing Transcripts Pg.2 January 15, 2021.

[2] Evidentiary Hearing Transcripts Pg. 3 January 15, 2021.

[3] Evidentiary Hearing Transcripts Pgs.4-10 January 15, 2021.

[4] Evidentiary Hearing Transcripts Pg.10 January 15, 2021.

significant acumen" and seems to understand the procedural process that's involved in litigating Mr. Bentley's issues.[5] Mr. White goes on to explain to the Court the benefits of continuing with the hearing in favor of the state. Mr. White also agrees that the matter before the Court is a complex legal issue as previously addressed by Ms. Crabb.[6] After proceeding with the evidentiary hearing, the state Court determined the area of where Mr. Bentley's accident occurred was within the boundaries of the of the Citizen Pottawatomie Nation but did NOT consider the area to be "Indian Country." The state Court denied Mr. Bentley's post-conviction application based on this conclusion.

In the Denial order from the OCCA, the Court utilizes *Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, to deny Mr. Bentley on the basis that retroactivity does not apply because the decision set forth in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) is a new procedural rule and does not void final state convictions.

REASONS FOR GRANTING THE PETITION

For nearly all of its history, the State of Oklahoma has ignored or flagrantly violated the United States Constitution (USCA Const. Art. VI § 2), treaties with Indian tribes[7], federal statutes (18 U.S.C. 1151-1153), decisions of this High Court[8], and most ashamedly, its own

---

[5] Evidentiary Hearing Transcripts Pg.6-8 January 22, 2021.

[6] Evidentiary Hearing Transcripts Pg. 8 January 22, 2021.

[7] Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333; Treaty with Chickasaws and Choctaws, April 28, 1866, 14 Stat. 769; Treaty with the Potawatomi, Feb. 27, 1867, 15 Stat. 531.

[8] I.E. *United States v. Kagama*, 118 U.S. 375, 384; *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020)

constitution (OK Const. Art. I § 3) when it comes to the prosecution of Indians. Sadly, federal authorities responsible for holding Oklahoma to the rule of law have been complicit in Oklahoma's rebellion.

As recently as October 2018, this Court held that treaties matter. *Washington State Department of Licensing v. Cougar Den*, 139 S.Ct. 1000 (2019). In the Instant case, Mr. Bentley as a Choctaw Citizen, is subject to the following treaty provisions:

> "... the United States shall forever secure said Choctaw nation from and against all laws, except such as from time to time, may be enacted in their own national councils, not inconsistent with the constitution, treaties and laws of the United States; and except such as may and which have been enacted by Congress to the extent that Congress under the constitution are required to exercise a legislation over Indian affairs."

Treaty of Dancing Rabbit Creek, Article IV (1830)

> "Should a Choctaw, or any party of Choctaws, commit acts of violence upon the person or property of a citizen of the United States... such person so offending shall be delivered up to an officer of the United States..."

Treaty of Dancing Rabbit Creek, Article VI (1830)

> "After such reservation shall have been selected and set apart for the Pottawatomie's, it shall never be included within the jurisdiction of any state or territory, unless an Indian Territory shall be organized, as provided for in certain treaties made in Eighteen Hundred and Sixty-Six with the Choctaws and other Tribes occupying Indian Country in which case, or in case of the organization of a Legislative council or other, the Pottawatomie's resident thereon shall have the right to representation, according to their numbers, on equal terms with other Tribes."

Treaty of February 27, 1867, United States – Pottawatomie Tribe of Indians, Art. III, 15 Stat. 531

As Justice Neil Gorsuch explained in a concurring opinion, "'We are charged with adopting the interpretation most consistent with the treaty's original meaning.' *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-535 (1991)." He further explained, "When we're dealing with a tribal treaty, too, we must 'give effect to the terms as the Indians themselves would have

understood them.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). The Choctaws understood and Mr. Bentley understands the treaty to guarantee that no State may prosecute him for a crime absent a grant from Congress. Congress has not made any such grant to the State of Oklahoma. Consequently, Oklahoma is and has been acting without authority in prosecuting Choctaw Indians.

This Court's responsibility is to state "what the law is," *Madison v. Marbury*, 5 U.S. 137 (1803) and that no State is above the law. The law states that only federal government or the Choctaw Nation (or perhaps another Indian tribe) may prosecute a Choctaw Indian for crimes in the State of Oklahoma. In no case, does the State of Oklahoma possess the right to prosecute a Choctaw Indian.

Congress's treatment of the Pottawatomie nation was consistent with the assimilation and allotment eras and the end of those eras. Pottawatomie Reservation and the Assimilation and allotment policy in Indian Territory, Pottawatomie removal and the establishment of the reservation in Indian Territory in the 1860s, was consistent with contemporaneous federal policy that Indians should be separated from non-Indians and placed on reservations. *Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate Indians*, 1880-1920 2-3 (1984).

After removal, the Five Tribes occupied their land under federal superintendence in an area that was "widely separated from with communities." *Marlin v. Lewallen*, 276 U.S. 58, 60-62 (1928). The Pottawatomie Nation initially secured fee title to its lands under an 1867 Treaty[9]. Such title to continue so long as it should exist as a nation and continue to occupy the country assigned to it.

[9] Treaty with the Potawatomi, Feb. 27, 1867, 15 Stat. 531.

The court should take notice that according to the Interior Board of Indian Appeals in *Citizen Band Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs*, 28 I.B.I.A 169 (9/12/1995) "...This effort is hampered to some extent by the fact that Indian reservations in Oklahoma have generally been presumed, whether rightly or wrongly, to have been terminated by the statutes which opened them to non-Indian settlement. *See e.g. Cohen's Handbook of Federal Law* 775-76 (1982 ed.). Presumably, it is because many of the usual reservation-based issues have simply **not** arisen with respect to the Pottawatomie Reservation that there has been little need to address the question of rights in the reservation. With respect to most of the original reservations in Oklahoma, there have been **no** definitive adjudications concerning their present day status. The Board is **not** aware of such adjudication concerning the Pottawatomie Reservation. Congress has, however, legislated on three occasions concerning certain lands within the Pottawatomie Reservation.." satisfying the subsequent acts and continuing recognition and subsequent treatment factor under *Solem infra*, which "gives the edge to the tribes." See *Tymkovich p.2 Order* 11/9/17. (Emphasis added)

As Judge Tymkovich so eloquently put it in his final order November 9, 2017, the state will "echo the thud of square pegs being pounded into round holes" and attempt to dispute this and pursue "its frequently raised but never accepted argument" by claiming that the Pottawatomie Reservation was disestablished upon statehood, the Land Run of 1889, subsequent Acts of Congress, Allotment, demographics, assimilation of the Indian culture or cession to show a clear intent of disestablishment. However, this is simply not true and has been consistently rejected by the Supreme Court as recently as 2016 in the case of *Nebraska v. Parker*, 136 S.Ct. 1072 (2016); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424 (1962); *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed. 2d 443 (1984).

Mr. Bentley and the tribe, according to a signed letter from the Pottawatomie Nation[10], assert that the Tribes original reservation boundaries exist as they were per the 1867 Treaty and have not been disestablished and are described in the tribes letter. Mr. Bentley's accident is within those boundaries and in Indian Country. The boundaries are described as follows:

> "The Citizen Pottawatomi Nation ... exercises governmental jurisdiction in an area bounded by the North Canadian River, the South Canadian River, the Pottawatomie-Seminole County Boundary (on the east), and the Indian Meridian (on the west)..."

In fact the reservation has actually been extended westward to compensate for lands allotted to the Absentee Shawnee. See *Citizen Band of Pottawatomie Indians of Okl. v. U.S. Docket 96 ICC*, September 18, 1958.

According to the State's **Chief** law officer, "the term reservation means the geographically defined area over which tribal organization exercises governmental jurisdiction" citing 15 U.S.C.A. § 6312(a)(2). See also, *AG Opinion 06-39*, 2006 WL 3751277; *11 Okl. Op. Attny Gen. 345*, 1979 WL 37653. (Emphasis added)

The State of Oklahoma as well as the Department of Transportation's and Department of Interior and various other maps, continued to recognize those jurisdictional boundaries as well. The State also places "jurisdictional guidepost" on the side of the highway to mark the exterior boundaries of the Pottawatomie and Kickapoo Nation.

"...Prior to the Indian Civil Rights Act of 1968, the State could have assumed jurisdiction over all Indian Country merely by legislative act.[11] In 1953, it was suggested by the Department

---

[10] Appendix G, Evidentiary Hearing transcripts January 22, 2021- Pg. 48 & 54- Exhibit 1 – Letter from Tribal Court Clerk affirming Citizen Pottawatomi Nation Boundaries

[11] P.L. 83-280, 67 Stat. 588 (1953)

of Interior that Oklahoma consider assuming such jurisdiction over Indian Lands under Public Law 83-280, 67 Stat. 588 (1953)(hereinafter, Public Law 280). Oklahoma declined to do so, and since the passage of the Indian Civil Rights Act, permission of the tribes is now a necessary prerequisite to the State assuming jurisdiction. *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) cert. denied. **No Oklahoma tribes have granted such permission to the State.**"(Emphasis added)

According to the Major Crimes Act[12], certain crimes committed by Indians in Indian Country are within the exclusive jurisdiction of the federal government. "A state or local police officer who arrested an individual for the commission of a federal crime **would** have to turn that individual over to the appropriate federal authorities. The crime must still be prosecuted in the appropriate sovereigns' tribunal, and according to that sovereign's laws." See *AG Opinion 90-32*, WL 567868 (emphasis added). "...Generally speaking, primary jurisdiction over land that is Indian Country rests with the Federal Government and the Indian tribe inhabiting it and now with the states." See *AG Op. No. 06-6*, 2006 WL 768662. "...It being understood that any prosecution would have to occur in the Federal Court." See *AG Op. 79-216*, 1979 WL 37653. (Emphasis added)

"...The Attorney General is the Chief Law officer of Oklahoma." See 74 O.S. § 18 (1981). Attorney General opinions are binding on state officials unless inconsistent with a final determination of a Court of competent jurisdiction." *York v. Turpen*, 681 P.2d 763 (1984). The situs-locus-nexus or location in question is in the Citizen Band of Pottawatomie Nation (Reservation) determined to be Indian Country under 18 U.S.C. § 1151 (a), (b) and (c). Under the test set forth in *Solem*, which this court must conduct a requisite test and investigation with

[12] 18 U.S.C. 1153

experts well versed in Federal Indian Law, not state actors, so as to properly evaluate under *Solem* in order to make a fair determination of facts underlying this claim or will be subject to collateral attack.

The state court has no authority to pronounce a valid judgment. Therefore to rule against Mr. Bentley's Federal claims would be equally void, as it had no jurisdiction in the first instance, as this case involves questions of federal law and statutes. The Oklahoma Supreme Court noted that, "...the lack of judicial power inheres in every stage of the proceedings by which color of authority is sought to be imparted to the void judgment, and a subsequent order by the same court denying a motion to vacate such void judgment, is likewise void for the same reasons.." *Neal v. Travelers Ins. Co.*, 188 Okla. 131, 106 P.2d 811, 1940 OK 314 (although this case dealt with an Indian allotment, the same jurisdictional theory applies to this case.) "...The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." "...Jurisdiction over Tribal lands is peculiarly within legislative power of Congress." *Sisseton Wahpeton Bands of Sioux Indians v. United States*, 277 U.S. 424, 48 S.Ct. 536 (1928).

As the court stated in *Richardson*, supra, it has been written that, "[p]erhaps in no other state has there been more confusion over who has jurisdiction in Indian Country than in the State of Oklahoma." *K. Kickingbird, Indian Jurisdiction p.63* (1983) Kickingbird's declaration is an understatement. Kickingbird additionally states that the same rules apply in Oklahoma as apply to the other states. E.g. The federal government has primacy in Indian Affairs over the state. This means that unless the Federal Government has passed special legislation granting the state jurisdiction, only the Federal Government and the tribes have jurisdiction. *Richardson v. Malone*, 762 F.Supp. 1463 (1991).

As Judge Easterbrook succinctly observed, "...subject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231 'that's the beginning and the end of the jurisdictional inquiry...'" *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999) quoting *United States v. White Horse*, 316 F.3d 769 (8th Cir. 2015).

18 U.S.C. § 3231 states: "The District Courts of the United States shall have original Jurisdiction, exclusive of the Courts of the State, of all offenses against the Laws of the United States." "...There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974).

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. *Lonewolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216 (1903). The judicial determinations were not enacted by Congress, 28 U.S.C. § 2072 (b) (1990), such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such roles have taken effect. Where a dispute involves trust or restricted property, the state may not adjudicate the dispute nor apply its laws." *In re Humbolt Fir Inc.*, 426 F.Supp 292, 296 ND Cal. 1977, quoting *Ahboah v. Housing Authority of Kiowa Tribe*, 660 P.2d 625 (1983).

Certainly state and county authorities have never enjoyed the power to litigate issues of ownership and possession of federal lands. *Ahboah, supra.* The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. *The Cherokee Tobacco*, 78 U.S. 616 (1870). Whether a

particular tract of land is in fact Indian Country is a question of fact which must be determined on a case by case basis and cannot be answered in an Attorney General Opinion. 74 O.S. 2001 § 18(b)(A)(5), 11 Okl. Op. Attorney Gen. 345, 1979 WL 37653.

U.S. Const. Art. VI cl. 2 Supreme Law of the land states,

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby in any Thing in the Constitution or Laws of any States to the Contrary notwithstanding."

On April 6, 1906, a non-Indian by the name of R.A. Wright, was indicted for the murder of William Slattery within Kiowa county, Oklahoma. The Supreme Court of the Territory of Oklahoma deemed the area where the crime allegedly occurred to be Indian reservation effectively relinquishing jurisdiction from the Territory of Oklahoma to the Federal Government. *Wright v. United States*, 18 Okla. 510 (1907). "The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying with limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States..." Okla. Const. Art. 1.§ 3.

The Constitution of the Citizen Band Pottawatomie Indian Tribe of Oklahoma, Art. 4 §§ 1-2 specifically state, "The jurisdiction and the government powers of the Citizen Band Pottawatomie Indian Tribe of Oklahoma shall, consistent with applicable Federal law, extend to all persons and to all real and personal property, including lands and natural resources, and to all waters and air space within the Indian Country as defined in 18 U.S.C. § 1151 or its successor, over which the Citizen Band Pottawatomie Indian Tribe of Oklahoma has authority.

"The jurisdiction and governmental powers of the Citizen Pottawatomie Nation shall, consistent with applicable Federal law, extend outside the exterior boundaries of the Citizen Pottawatomie Nation to all tribal members. These powers shall also extend to any persons or property which are, or as may hereafter be, included with the jurisdiction of the Citizen Pottawatomie Nation under any laws of the Citizen Pottawatomie Nation, any State, or the United States."

Congress may at anytime thereafter change the boundaries of said territory or attach any portion of the same to any other state or territory of the United States without the consent of the inhabitants of the territory hereby created; Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said territory under the laws, agreements and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to the effect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which would have been competent to make or enact if this act had not been passed. *Organic Act. May 2, 1890*, 26 Stat. 81, § 1.

"That the inhabitants of all that part of the area of the United States now constituting the territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided; provided that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory, (so long as such rights shall remain un-extinguished) or to limit or affect the authority of their government of the United States to make any laws or regulations respecting such Indians, their lands, property or other rights by treaties, agreement,

law or otherwise, which would have been competent to make if this act had never been passed. *Enabling Act, June 16, 1906*, 34 Stat. 267, § 1.

> "And whereas, it appears that the said constitution and government of the State of Oklahoma are republican in form and that the said constitution make no distinction on civil or political rights on account of race or color, and is not repugnant to the Constitution of the United States or to the principles of the Declaration of Independence, and that it contains all of the six provisions expressly required by Section 3 of the said act to be therein contained."

Proclamation of Statehood, November 16, 1907, No. 6869.

The Indian Treaties are still in force and preserved today as the Supreme Court noted in *U.S. v. Lara,* 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed 2d 420(2004), "We recognize that in 1871 Congress ended the practice of entering into treaties with the Indian Tribes." 25 U.S.C. § 71, stating that tribes are not entities "with whom the United States may contract by treaty." But the statute saved existing treaties from being "invalidated or impaired," *ibid.*, and the Supreme Court has explicitly stated that the statute "in no way affected Congress' plenary powers to legislate on problems of Indians," *Antoine v. Washington*, 420 U.S. 194, 203, 95 S.Ct. 944, 43 L.Ed. 2d 129 (1975). When the United States enters into treaties with an Indian tribe, said treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyances, but are to be construed in the sense in which naturally the Indians would understand them," *United States v. Shoshone Tribe*, 304 U.S. 111, 116, 58 S.Ct. 794, 797, 82 L.Ed. 1213 (1938). They are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people." *Tulee v. State of Washington*, 315 U.S. 681-685, 62 S.Ct. 862, 86 L.Ed. 1115

The act of abrogation of a treaty or disestablishing a reservation is of the utmost seriousness, requiring "an Act of Congress, passed in the exercise of its constitutional authority ... clear and explicit... Indian Treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 738 (1986), quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893).

Regardless, history shows that when Congress adjusted Pottawatomie treaty rights, it was not coy. While Congress legislated many changes to tribal land and government, it did not legislate disestablishment. And by violating a treaty, even repeatedly, a party does not dissolve the treaty or the other party's remaining rights. *Restatement (second) of Foreign Relations Law of the United States* § 158(1)©(1965); *Restatement (second) of Contracts* § 241 (1981). Here, moreover, the Allotment Agreement and Enabling Act protected Indian treaty rights. Any individual treaty violations thus left the Pottawatomie remaining treaty rights, including their treaty-protected reservation, undisturbed. In 1895, Senator Dawes assured the Five Tribes that the federal government did not undertake to deprive your people of their just rights, but to secure their just rights under treaties.

By a treaty entered into on February 27, 1867, the Citizen Band agreed to move from Kansas to the "Indian country south of Kansas." Preamble, Treaty of Feb. 27, 1867, 15 Stat. 531, 535. Under the treaty which authorized the creation of their reservation, the Pottawatomie were **promised** that their lands shall **never be included within the jurisdiction of any state**. *Art. 3, February 27, 1867 Treaty.* 15 Stat. 531 (1868)(Emphasis added)

These promises have never been revoked and were protected in the federal laws which authorized statehood for Oklahoma. However, no sooner had the Pottawatomie reservation been established that the federal government began an allotment policy. The ultimate purpose of this

allotment policy was to create surplus land within the reservation for white settlement. Over the next 25 years, most of the Pottawatomie land was taken by the federal government. The government allotted some for distribution to individual Indians, held some for the benefit of the Pottawatomie, and opened the surplus lands (appx. 265,000 acres) for settlement by non-Indians on September 22, 1891. Although this allotment policy dispersed and weakened the tribe, the Pottawatomie survived and many of them still live on lands chosen by their ancestors in 1869. In 1938, the Pottawatomie organized a tribal government under the Oklahoma Indian Welfare Act. The purpose of this Act was to help the Indians help themselves. Quoting, *Oklahoma Tax Commission v. The Citizen Band Pottawatomie Indian Tribe of Oklahoma*, 1990 WL 10012682 (U.S.) (Appellate Brief) (No. 89-1322)

Any state argument to the contrary cannot withstand the voluminous evidence that the federal government today treats Oklahoma Tribes and their territory the same as it treats tribes and their lands elsewhere. In virtually every area in which it administers its trust responsibilities. Congress affords Oklahoma Tribes the same protection and services as it does other tribes. E.g. 7 U.S.C. § 1985 (e)(1)(D)(ii)(agricultural credit and loans); 25 U.S.C.A. § 2022b(b)(3)(educational grants and programs); 29 U.S.C.A. § 750(c)(handicapped vocational rehabilitation services); 42 U.S.C. § 682(i)(6)(job opportunities and basic skills training programs); 42 U.S.C. § 5318(n)(2)(urban development grants) see also citations to other similar statutes in p.25 & 26 of the Brief for the United States as Amicus Curiae in, *Okl. Tax Comm. v. Citizen Band Pott. Indian Tribe*, 498 U.S. 505 (1991).

The Lands in question remain Indian Country as in *United States v. John*, 437 U.S. 634 (1978), there is no apparent reason why the land at issue here did not become a reservation, at least for present purposes, when it was taken into trust by the United States for the benefit of the

tribe pursuant to an act of Congress. A formal proclamation or designation of reservation status was not necessary, *United States v. McGowan*, 302 U.S. at 538-539 (1938), since the land was validly set apart for the use of the Indians as such. Indians who like the Mississippi Choctaws in *John*, *infra*, have adopted a constitution and by-laws under federal law and therefore are under the superintendence of the government, *John*, 437 U.S. at 648-649. The decisions below on this point are consistent with the long standing view of the Department of the Interior that tribal trust lands in Oklahoma may have reservation status. 58 Interior Dec. 85, 100-101 (1942); 59 Interior Dec. 1, 2 & 5 (1943). They are consistent with prior Tenth Circuit holdings regarding tribal lands within the boundaries of the original reservations of other Oklahoma Tribes, *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973-976 (10th Cir. 1987) cert denied, 487 U.S. 1218 (1988)

The General Allotment Act does not reveal a widely held contemporaneous understanding to disestablish the Pottawatomie Reservation Subsequent treatment. The mere fact that a reservation has been opened for settlement does not necessarily mean that the opened area has lost its reservation status, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The Tribe addressed the issue on *Amici* for the *Oklahoma Tax Commission v. Citizen Potawatomi Nation*, 1990 89-1322 ... there is an exception for lands located within or contagious to a tribes reservation and for lands in Oklahoma that are within the boundaries of the Indian tribes former reservation or are contiguous to other land held in trust for the Indian Tribe in Oklahoma, 25 U.S.C. 2719(a)(2)(A); 25 U.S.C. 1452(d)(reservation for purposes Indian Financing Act includes former reservations in Oklahoma); 25 U.S.C. 1903(10)(reservation for purposes of Indian Child Welfare Act includes Indian Country as defined in 18 U.S.C. § 1151 and any other lands, not covered by that section, title to which is held by the United States in trust for the benefit of the

Indian Tribe); 33 U.S.C. § 1377(c)(sewage treatment grants for Indian tribes available in former Indian reservations in Oklahoma); 42 U.S.C. § 2992c(2)(reservation for purposes of financial assistance under Native American Programs Act of 1974, includes any former reservation in Oklahoma).

As previously stated, the Reservation was actually extended westward for compensation for the land taken for the Absentee Shawnee Reservation, *Citizen Band Pottawatomie Indians of Oklahoma v. United States*, Docket 96 ICC September 18, 1958. In *United States v. John*, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian Country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government. *Id* at 437 U.S. 648-649; see also *United States v. McGowan*, 302 U.S. 535, 539 (1938), quoting *Oklahoma Tax Commission v. Citizen Band Pottawatomie Tribe*, 498 U.S. 505 (1991),

Quoting the *Interior Board of Indian Appeals*, 28 IBIA 169 (9/12/1995), "...here, subsequent events might be examined for the purpose of shedding further light upon Congress' intent in 1891 and also for the purpose of determining whether Congress has taken any action to alter the result it evidently intended in 1891. This effort is hampered to some extent by the fact the Indian reservations in Oklahoma have generally been presumed, whether rightly or wrongly, to have been terminated by the statutes which opened them to non-Indian settlement." See e.g. *Cohen's Handbook of Federal Law*, 775-76 (1982 ed.). With respect to most of the original reservations in Oklahoma, there have been no definitive adjudications concerning their present day status. The Board is not aware of any such adjudication concerning the Pottawatomie Reservation. Presumably, it is because many of the usual reservation based issues have simply

not arisen with respect to the Pottawatomie Reservation that there has been little need to address the question of rights in the reservation Congress has, however, legislated on three occasions concerning certain lands within the Pottawatomie Reservation.

In 1960, it authorized the conveyance of a 57.99 acre tract of the Citizen Band subject to the right of the Absentee Shawnee of Oklahoma, Sac and Fox of Oklahoma, Kickapoo of Oklahoma, and Iowa Tribe of Oklahoma to use the Pottawatomie community house that may be constructed and maintained thereon. *Act of September 13, 1960*, 74 Stat. 903. Prior to the conveyance, the land had been used by the government as an Indian school farm. In 1964, Congress authorized the conveyance of six tracts, totaling approximately 222 acres, to the Citizen Band, and on tract containing 33.23 acres, to the Absentee Shawnee Indian School and Agency Reserve. The Senate and House reports on the 1960 and 1964 statutes all stated that the land conveyed was part of a large area ceded to the United States by the Citizen Band and the Absentee Shawnee Indians in an agreement ratified by the *Act of March 3, 1891*, 26 Stat. 1016.; *S. Rep. No. 1605*, 86th Cong., 2d Sess. 2 (1960); *Accord H.R. Rep. No. 1661*, 86th Cong., 2d Sess. 2 (1960); *S. Rep. No. 1255*, 88th Cong., 2d Sess 1 (1964); *H.R. Rep. No. 1490*, 88th Cong., 2d Sess. 2 (1964).

Both the 1960 and 1964 Acts authorized conveyance of the subject tracts to the tribes in fee status. In 1975, Congress authorized the tribes to re-convey the tracts to the United States, to be held in trust for the tribes. *Act of Jan. 2, 1975, P.L. 93-590*, 88 Stat. 1922 (Absentee Shawnee Tribe); *Act of Jan. 2, 1975, P.L. 93-591*, 88 Stat. 1922 (Citizen Band). In conveying lands within the former reservation to both tribes, and in referencing the 1890 cessions by both tribes, Congress acted consistently with the 1891 Act. Recognizing both tribes having rights in the reservation. The Board is not aware of any other 20th Century legislation specifically dealing

with lands or rights in the Pottawatomie Reservation with respect to the Bureau of Indian Affairs (BIA) practice in this century, the Citizen Band and the Area Director agree that the BIA has consistently treated the area as the shared former reservation of the two tribes.

Presumably, however, the Citizen Band exercises jurisdiction over the present day Citizen Band "Indian Country." *Oklahoma Tax Commission v. Citizen Band Pottawatomie Indian Tribe*, 498 U.S. 505 (1991). As the Court stated in *Seymour v. Superintendent of Washington*, 368 U.S. 351, 82 S.Ct. 424 (1962), "... Purpose of Act: providing sale of mineral lands and for settlement and entry under homestead laws of other surplus lands remaining on diminished Colville Indian Reservation was neither to destroy existence of the diminished reservation nor to lessen federal responsibility for and jurisdiction over Indians having tribal rights on that reservation, and such did no more than open way for non-Indian settlers to own land on the reservation in a manner which federal government regarded as beneficial to development of its wards..."

Act of 1906: Purpose of Act: providing sale of mineral lands and for settlement and entry under homestead laws of other surplus lands remaining on diminished Colville Indian Reservation did not dissolve such reservation, but the reservation remains in existence and therefore State of Washington did not have jurisdiction over offense. Notwithstanding issuance of any patent within definition of Indian country as including all land within limits of any reservation under jurisdiction of the federal government, notwithstanding issuance of any patent, means that patented lands should not be excluded from an Indian reservation regardless of whether the patents are issued to Indians or non-Indians. *Seymour supra.* The court in *Upper Skagit Indian Tribe v. Lundgren*, 2018 WL 2292445, addressed a question of statutory interpretation of the *Indian General Allotment Act § 6*, 25 U.S.C. § 349.

It is common knowledge the courts look to legislative history to ascertain congressional intent to disestablish a reservation, but it must be remembered that the Dawes reports are no congressional committee reports. They are simply reports of a commission established to further the assimilationist policies of the times by persuading the tribes to allot their lands in severalty and thereafter implement the allotment process. More importantly, it should not go unnoticed that the State of Oklahoma is unable to cite a single congressional act in which the Congress explicitly disestablished the Pottawatomie reservation boundaries.

The Supreme Court in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) reiterated the rule that once a block of land is set aside for an Indian reservation and no matter what happens to the title of the individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise. Citing *United States v. Celestine*, 215 U.S. 278, 285 (1909) simply allotting lands out of individual plots within the area does not change its reservation character. "Unless another definition is required by the act of Congress authorizing a particular trust acquisition, 'Indian reservation' means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. 151.2 (f)

A study of the legislation resulting in allotment of the Pottawatomie lands finds no expression on the part of Congress to disestablish the tribes reservation. The tribe continues today, to own and occupy surplus lands that were not sold. There is no doubt that the sales of surplus land was not for the purpose of facilitating non-Indian settlement on the reservation but that does not manifest congressional intent to disestablish it. The dealings with the Pottawatomie

was akin to the situation in *Mattz v. Arnett*, 412 U.S. 481 (1973) where the Court held that an **Act opening lands for Indian settlement, allotting lands** to tribal members and sale of the surplus for an undisclosed sum to be deposited for the tribes benefit, **did not evidence an intent to terminate the reservation status** of the entire area. It cannot be denied that members of Congress at the time of this allotment process probably thought this would eventually terminate tribal existence. But, as the Supreme Court said in *Solem*, supra, at 468, "the Congresses that passed the Surplus Land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process. We have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations..." A few years later, the country began to take a dim view of these former termination and assimilationist policies. The advent of a new policy came with the *Oklahoma Indian Welfare Act of 1936*, 25 U.S.C. § 501 et. Seq. The OWIA stopped the allotment of Oklahoma's Indian lands and allowed the tribes to reorganize their shambled governments. Whatever the Congress might have done earlier, the notion of Oklahoma being an assimilated state was laid to rest in 1936. Quoting *Amici, Oklahoma Tax Commission v. Citizen Band Pottawatomie Nation*, 89-1322 WL 10012687.(Emphasis added)

"... Also the Supreme Court has held that an interest in Indian Lands in less than fee simple, held by a non-Indian, does not deprive the lands of their Indian character." *United States v. Saldona*, 246 U.S. 530, 38 S.Ct. 357, 62 L.Ed. 870 (1918)(right of way easement across a reservation) In *Solem v. Bartlett*, 465 U.S. 463 (1984), the court determined whether the boundaries of a reservation had been disestablished, but the reason that issue was pertinent was because the underlying issue was whether the state had jurisdiction over a portion of a reservation which had been opened to settlement by non-Indians by an act of Congress. Framing

the narrow issue before it up front, the court noted the distinction between the effect of reservation boundary disestablishment on non-Indian fee land and its effect on trust land. *Solem* at 467 n.8; accord *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 (1975)

Solem and *DeCoteau* plainly establish that issues of the existence of reservation boundaries are relevant only to issues of jurisdiction over activities on non-Indian fee lands, and are irrelevant to issues of jurisdiction over trust lands, allotted and tribal. This rule has been repeatedly and unequivocally followed by the Tenth Circuit Court of Appeals and the Supreme Court of Oklahoma with respect to trust lands in Oklahoma. See *Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 976, 975 n.3 (10th Cir. 1987) cert. denied.; *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988)(disestablishment question is relevant only to issues of jurisdiction over non-Indian lands, not tribal lands, trust lands and allotments); *State ex rel. May v. Seneca Cayuga Tribe of Oklahoma*, 711 P.2d 77, 82 (1985)(trust allotments of tribe remain Indian Country irrespective of reservation boundaries); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990) petition for cert, filed, 59 U.S.L.W. 3327 (U.S. 10/18/1990)(No. 90-635)(allotted lands retain Indian country status for territorial jurisdiction purposes even if reservation boundaries have been disestablished). Quoting *Brief of Amicus Curiae, the Inter-Tribal Council of the Five Civilized Tribes*, 1990 WL 10012687 (U.S.) Appellate brief, "... only congress may diminish the boundaries of an Indian reservation and its intent to do so must be clear. *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed. 443 (1984)"

The Supreme Courts framework for determining whether an Indian reservation has been diminished is well settled and starts with the statutory text. *Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 127 L.Ed. 2d 252. Here the 1891 Act **bears none of the common textual**

indications that express such a clear intent, e.g. "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests" or "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," *Solem* at 470, 104 S.Ct. 1161. "... In diminishment cases, the Supreme Court has also examined 'all the circumstances surrounding the opening of the reservation,'" *Hagen* at 412, 114 S.Ct. 958, including the contemporaneous understanding of the act's effect on the reservation. Here such historical evidence cannot overcome the text of the act, which lacks any indication that Congress intended to diminish the reservation. Finally and to a lesser extent, the Supreme Court may look to subsequent treatment of the land by government officials. *Solem* at 471-472. The Supreme Court has never relied solely on this third consideration to find diminishment, and the mixed record of subsequent treatment of the disputed land in this case cannot overcome the statutory text, but this subsequent demographic history is the least compelling evidence in the diminishment analysis. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 359, 118 S.Ct. 789, 139 L.Ed. 2d 773. Likewise, evidence of the subsequent treatment of the disputed land by government officials has similarly limited value. And, while compelling the justifiable expectations of the non-Indians living on the land, cannot alone diminish reservation boundaries. *Nebraska v. Parker*, 136 S.Ct. 1072, 194 L.Ed. 2d 152 (2016).(Emphasis added)

One important law enacted in 1953, Public Law 280, addressed state jurisdiction. It allowed some states to assert limited civil and broad criminal jurisdiction in Indian country. *Indian Country, U.S.A.*, 829 F.2d at 980 (Ch. 505, 67 Stat. 588 (1953)(codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360)). Public Law 280 delegated to five, later six states, jurisdiction over most crimes throughout most of the Indian country within their borders. *Cohen* at 537. It offered any other state the option of accepting the same jurisdiction

until a 1968 amendment made subsequent assumptions of jurisdiction subject to Indian consent. *Id.* at 537-538; see 25 U.S.C. §§ 1321(a), 1322(a) & 1326.

The State never had jurisdiction since it never acted pursuant to Public Law 280. The Supreme Court has also stated that while Public Law 280 is clearly an assimilationist measure, it is not intended to immediately terminate tribal government. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 488-489 fn 32, 95 S.Ct. 755-756 fn 32 Section 4(b) of the Act setting forth the areas over which the states may not assume jurisdiction, has been broadly interpreted as a "re-affirmance of the existing reservation." See *Ahboah v. House Authority of the Kiowa Tribe*, 660 P.2d 625 (1983).

Oklahoma chose not to use Public Law 280 to assert jurisdiction. State officials regarded the law as unnecessary because, in their view, Oklahoma already had full jurisdiction over Indians and their lands. *Indian Country, U.S.A.*, 829 F.2d at 980 n.6, but the state's 1953 position that Public Law 280 was unnecessary for Oklahoma has been rejected by both federal and state courts. Oklahoma has not obtained tribal consent following the 1968 amendment and has thus never acquired jurisdiction over Indian country through Public Law 280. See *Cravatt*, 825 P.2d at 279 ("The State of Oklahoma has never acted pursuant to Public Law 83-280." (quoting *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989))); see also *Cohen* at 537-538 & n.47. The termination era began to fade in the late 1950s as federal Indian policy shifter again toward tribal self-government and self-determination. *Cohen* at 93. The six states are: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.

As the Western District Court noted in *LittleChief*, "...Under the Act of August 15, 1953, Public Law 280, congress gave the States permission to assume criminal and civil jurisdiction over any "Indian Country" within their borders without the consent of the tribe affected. *Title IV*

of the Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326, changed the procedure set out in Public Law 280 and required the consent of the Indians involved before a State was permitted to assume criminal and civil jurisdiction over Indian country. 25 U.S.C. §§ 1321(a) & 1322(a). Like section 6, Public Law 280, 25 U.S.C. § 1324 gave States with legal impediments to the assumption of jurisdiction by such a state, should not be effective until the required amendments had been made. Article 1, Section 3 of the Oklahoma Constitution constitutes a legal impediment. See *H.R. Rep. No. 848 Cong., 1st Sess., reprinted in (1953) U.S. Code Cong. & Admin. News P. 2409.* Under the provisions of Public Law 280, it appears therefore that the State of Oklahoma could have unilaterally assumed jurisdiction over any Indian country within its borders at anytime between 1953 and 1968 had the Oklahoma Constitution been amended as required.

After the enactment of *Title IV* in 1968, Oklahoma had to amend its Constitution and the affected **tribes had to consent to the states assumption of jurisdiction** over them before the state could acquire jurisdiction over Indian country. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed. 2d 129 (1973)(Emphasis added)

However, the State of Oklahoma apparently has never acted pursuant to Public Law 280 or *Title IV* and assumed jurisdiction over the Indian country within its borders. See *Confederated Bands of the Yakima Indian Nation v. Washington*, 550 F.2d 443 (9th Cir. 1977) at note 3. Quoting *State v. LittleChief*, 573 P.2d 263, 1978 OK CR 2 (OCCA). The *LittleChief* court also stated that a determination of issue by United States federal district court judge was binding on the State unless and until determination was overturned by United States Court of Appeals or Supreme Court of the United States, in view of the fact that issue involved construction and application of federal statutes. *Civil Rights Act of 1968 §§ 401-406I*, 25 U.S.C.A. §§ 1321-1326.

When Oklahoma became a state, *Proclamation of November 16, 1907*, 35 Stat. 2160-

2161, it was already well settled that the authority of the United States to prosecute crimes not committed by or against Indians on reservations ended at statehood. *United States v. McBratney*, 104 U.S. 621, 624 (1881); *Draper v. United States*, 164 U.S. 240 (1896). Despite having no legal basis, federal and state officials acted as if statehood also marked the end of federal authority over prosecution of all crimes by or against Indians in Indian country under the General Crimes Act and on reservations under the Major Crimes Act. This viewpoint was contrary to an early Oklahoma Supreme Court decision, *Higgins v. Brown*, 94 P.2d 703, 730 (1908). Although *Higgins* did not involve claims that the crime occurred on a reservation, it provided guidance regarding any future cases involving Indian country jurisdiction. The Court found that § 1628 of the Enabling Act was intended to vest in the federal courts the continued prosecution of criminal cases of a federal character and to continue in the state courts, the prosecutions of a local or municipal character. *Id.* at 725.

It accordingly found that prosecutions under a general law relating to crimes against the United States of which a federal court would have had jurisdiction even had the crime been committed within a state, were to be transferred to the federal courts. *Id.* at 725. See also *Ex parte Buchanen*, 94 P. 943, 944-945 (Okla. Crim. App. 1908); *Ex parte Curlee*, 95 P. 414 (Okla. Crim. App. 1908)(of course, non-pending actions of a federal character would necessarily vest in the United States courts in the other states.) A few years after these Oklahoma decisions, the Supreme Court ruled that **Oklahoma statehood did not change the Indian country status of lands in Indian territory or the applicability of federal criminal laws on those lands**. *United States v. Wright*, 229 U.S. 226 (1913). In *Wright*, the United States charged the defendant in Federal Court in Oklahoma for violation of Rev. Stat. § 2139, which prohibited introduction of liquor into Indian country. *Id.* at 226-227. The Supreme Court concluded that § 2139 was

applicable to Indian country throughout the states and territories generally, and that the Enabling Act did not repeal its applicability in Oklahoma. *Id.* at 238; See also *United States Exp. Co. v. Friedman*, 191 Fed. 673, 678-679 (8th Cir. 1911)(rejecting broad contention "Indian Territory ceased to be Indian country upon the admission of Oklahoma as a state"); and *Southern Surety Company v. State of Oklahoma*, 241 U.S. 582, 585-586 (1916)(The test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were committed.) In sum, any claim that state prosecutions of all crimes in Pottawatomie Nation constituted universal acknowledgement of reservation, disestablishment cannot withstand the principles set forth in early state and federal judicial interpretations of the Enabling Act.(Emphasis added)

In the OCCA's denial of Petitioner's Post-Conviction application, the Court refers to *Matloff v. Wallace*, 2021 OK CR 21 stating that "*McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), shall not apply retroactively to void a conviction that was final when *McGirt* was decided." The Court goes on to state that the trial Court's denial of Post-Conviction relief is affirmed and that all other motions and pleadings filed in this matter are denied..

The State argues that the *McGirt*, supra, standard cannot apply retroactively since *McGirt* produced new procedural ruling. *McGirt* is neither a substantive rule nor a watershed rule of criminal procedure. The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced. *STATE EX REL. Mark Matloff v. Wallace*, --- P.3d ---, 2021 WL 3578089, 2021 OK CR 21 (2021). *Matloff* goes on to state "... but new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions."

An "old" rule is a rule that is "dictated by precedent existing when the judgment in question became final." *Stringer v. Black*, 503 U.S. 222, 227, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). In contrast, a rule is "new" if it "imposes a new obligation on the States or the Federal Government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final." *U.S. v. Keyes*, 558 F.Supp.2d 1169 (2007), citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Under *Teague*, as a general matter, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced, but two categories of decisions fall outside this general bar on retroactivity for procedural rules: (1) new substantive rules generally apply retroactively, and (2) new watershed rules of criminal procedure, which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will have retroactive effect. *Welch v. U.S.*, 136 S.Ct. 1257, 194 L.Ed.2d 387, 84 USLW 4195 (2016).

On April 6, 1906, a non-Indian by the name of R.A. Wright, was indicted for the murder of William Slattery within Kiowa county. The Supreme Court of the Territory of Oklahoma deemed the area where the crime allegedly occurred to be Indian reservation effectively relinquishing jurisdiction from the Territory of Oklahoma to the Federal Government. *Wright v. United States*, 18 Okla. 510 (1907). The aforementioned case shows that the jurisdiction for crimes committed in Indian territory, not necessarily by an Indian, falls to the Federal Government therefore effectively negating any "new" procedural rulings that are claimed to be found in *McGirt* since the publication of the Enabling Act, 34 U.S. St. at Large, pp.267-278 (1906). Since *McGirt* does not impose a new obligation on the States or the Federal Government, applying any retroactivity rule to cases on Direct Appeal or Collateral Review would be

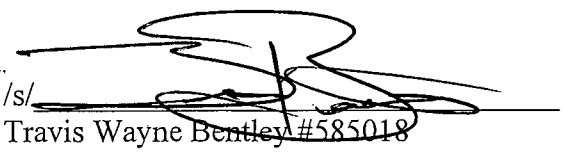
improper since *McGirt* is dictated by precedent existing when the judgment in question became final. In the event that *McGirt* is deemed to be a "new" procedural rule, *Teague* would apply in determining whether retroactivity would be applied to cases utilizing the *McGirt* standard effectively making any challenge to the State of Oklahoma's jurisdiction retroactive.

Mr. Bentley also argues the state did not allow him ample time to prepare a defense nor allow him the opportunity to procure indigent counsel knowledgeable in Federal and Indian law. Mr. Bentley, being ignorant of the law and proceedings in a court room, was forced to represent himself during what was considered a "critical stage" of proceedings by both Mr. White and Ms. Crabb. "Defendant who was granted in forma pauperis status when he filed for post-conviction relief was entitled to appointment of counsel for post-conviction proceeding, where defendant was deemed to be "indigent," and District Court held evidentiary hearing" "Denial of counsel to indigent defendant at evidentiary hearing to resolve post-conviction motion is not subject to harmless error analysis, but requires automatic reversal." *Green v. United States*, 262 F.3d 715. Mr. Bentley was essentially prejudiced by being denied the time to prepare a defense nor being able to prepare or call witnesses on his own behalf.

CONCLUSION

Mr. Bentley request's from this Honorable Court to have this matter remanded back to the Oklahoma Court of Criminal Appeals with instructions to remand back to the District Court for Evidentiary Hearing with an appointment of counsel knowledgeable in Federal and Indian law. It has been this Court that has stood to reign in such an egregious abuse of power and willful disregard of the law. Mr. Bentley asks for this Court to once again step in and right a wrong and declare the law: the State of Oklahoma does not have criminal jurisdiction over a Choctaw

Indian in Indian country. For the reasons address above, this Court should Grant a Writ of Certiorari for the second time to address the same issues that have been previously overturned by this Court.



/s/
Travis Wayne Bentley #585018
L.C.C. Unit 5-H2-J
PO Box 260
Lexington, OK 73051

Date: 11 / 16 / 2021