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

VICTOR MANUEL CASTRO-HUERTA,)
)
Defendant/Appellant,) **OCCA No. F-2017-1203**
)
v.)
) **Tulsa County No. CF-2015-6478**
THE STATE OF OKLAHOMA,)
)
Plaintiff/Appellee.)

STATE'S BRIEF ON CONCURRENT JURISDICTION

Appellant was convicted of child neglect. His victim, A.C., is a member of the Eastern Band of Cherokee Indians. Appellant claims the crime occurred within the boundaries of an Indian reservation and that, therefore, the State of Oklahoma lacks jurisdiction pursuant to 18 U.S.C. § 1152 ("General Crimes Act").[1] The Oklahoma Court of Criminal Appeals ("OCCA") remanded Appellant's case for this Court to "address only . . . A.C.'s status as an Indian . . . [and] whether the crime occurred in Indian Country . . . ." At a status conference on September 25, 2020, the State expressed its desire to preserve its position that the State has concurrent jurisdiction over crimes committed by non-Indian defendants against Indian victims in Indian Country, although such is not among the questions this Court may reach. This Court is permitting the parties to brief the question of concurrent jurisdiction so that the OCCA will have a complete record.

[1] This Court will hold a hearing on October 15, 2020, to determine whether the Cherokee Nation has a reservation that has not been disestablished. For purposes of this brief only, the State will assume Appellant's crime occurred in Indian Country.

Although there exists a longstanding assumption about the scope of state jurisdiction, if *McGirt* makes one thing clear, longstanding assumptions cannot substitute for clear text. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462-63, 2468-74 (2020). Here, the text of the General Crimes Act does nothing to preempt state jurisdiction:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152. Although the statute refers to the "exclusive jurisdiction of the United States," it does not confer exclusive jurisdiction on the United States. Rather, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian Country. As the Supreme Court has already held, the phrase "within the sole and exclusive jurisdiction of the United States" specifies what law applies (*i.e.* the law that applies to federal enclaves that are within the exclusive jurisdiction of the United States), not that the federal government's jurisdiction is exclusive. *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the General Crimes Act "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and exclusive,' in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it"); *see also Donnelly v. United States*,

228 U.S. 243, 268 (1913); *United States v. White*, 508 F.2d 453, 454 (8th Cir. 1974). As *McGirt* said with respect to reservation status, *see McGirt*, 140 S. Ct. at 2462, when Congress seeks to withdraw state jurisdiction, it knows how to do so. *See, e.g.*, 25 U.S.C. § 1911(a) (providing that tribes "shall have jurisdiction, exclusive as to any State, over any child custody proceeding involving an Indian child" on a reservation). Here, the text of the General Crimes Act does not so exclude state jurisdiction over crimes committed by non-Indians like that perpetrated by Appellant.

Thus, under the principles firmly established by *McGirt*—where the analysis begins and ends with the text—while the General Crimes Act confers federal jurisdiction over Appellant's crime, nothing in the text of that law deprives the State of concurrent jurisdiction over the same crime. Under *McGirt*, the inquiry should end there. This is especially true because there exists a strong presumption against preemption of state law, so "unless that was the clear and manifest purpose of Congress," courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted).

Although the OCCA has sometimes indicated in dicta that the state lacks jurisdiction over non-Indians that victimize Indians, those cases did not involve non-Indian defendants and did not analyze the question presented here, much less issue a binding holding on the matter. *See Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277; *State v. Klindt*, 1989 OK CR

75, 782 P.2d 401. And as *McGirt* noted, such dicta cannot overcome the text of the statute. *McGirt*, 140 S. Ct. at 2473 n.14.[2]

To be sure, a handful of state courts have held that states lack jurisdiction over non-Indians who commit crimes in Indian country. *See, e.g.*, *State v. Larson*, 455 N.W.2d 600 (S.D. 1990); *State v. Flint*, 756 P.2d 324, 327 (Ariz. Ct. App. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178, 1182-83 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *but see Greenwalt*, 633 P.2d at 1183-84 (Harrison, J., dissenting); *State v. Schaefer*, 781 P.2d 264 (Mont. 1989). But the reasoning of these decisions lacks merit.

First, these decisions rely on statements from the Supreme Court suggesting the state lacks jurisdiction over crimes such as this, but they admit this is mere dicta. *See Larson*, 455 N.W.2d at 601 (citing *Williams v. United States*, 327 U.S. 711, 714 (1946); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)); *Flint*, 756 P.2d at 325-26. Again, such dicta cannot substitute for the lack of clear statutory text. Indeed, the Supreme Court had earlier stated that by admission into the Union, a state on equal footing with other states "has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, . . . and that [a] reservation is no longer within the sole and exclusive jurisdiction

[2] Similarly, although the OCCA once affirmed dismissal of the prosecution of several individuals, one of whom was not Indian, because the crime occurred on Indian Country, *State v. Burnett*, 1983 OK CR 153, 671 P.2d 1165, that case did not discuss the jurisdictional issues raised here and was later overruled by *Klindt*, which held that "one's status as an Indian is a factor in determining jurisdiction," 1989 OK CR 75, ¶ 6, 782 P.2d 401, 403.

of the United States," unless Congress expressly provides otherwise. *United States v. McBratney*, 104 U.S. 621, 623-24 (1881).

This statement was in the context of a holding that, despite the General Crimes Act, jurisdiction over crimes between two non-Indians is within the exclusive jurisdiction of the *state*, and that the federal government lacks jurisdiction over such crimes. *Id.*; *see also Draper v. United States*, 164 U.S. 240 (1896). To be sure, these cases were later limited by *Donnelly v. United States*, 228 U.S. 243 (1913), but that case held only that the federal government had jurisdiction over crimes committed by a non-Indian against an Indian, not that such jurisdiction was exclusive or that the state lacked it. There is no reason to assume that, merely because the federal government has jurisdiction over a certain matter, such jurisdiction necessarily precludes concurrent state jurisdiction. Rather, in general, the state and federal governments "exercise concurrent sovereignty." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). Thus, "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Id.* (citing *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) ("It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.")). Indeed, there is a "'deeply rooted presumption in favor of concurrent state court jurisdiction' over federal claims," and that presumption applies with even more force against arguments attempting to "strip[] state courts of jurisdiction to hear their own *state* claims"—Congress does not "take such an extraordinary step by implication," and to do so Congress must be "[e]xplicit, unmistakable, and clear." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (citation omitted). That

takes us back to the text of the General Crimes Act which, as explained, does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians.[3]

Second, some state courts suggest that states lack jurisdiction over crimes by non-Indians against Indians because of the federal government's general control over Indian affairs. *See Flint*, 756 P.2d at 325. But while this means states usually lack jurisdiction over Indians (*e.g.*, states lack jurisdiction over major crimes committed by Indians, *see McGirt*, 140 S. Ct. at 2459), this general presumption says nothing about state jurisdiction over *non-Indians*, including those who commit crimes against Indians. After all, states presumptively have jurisdiction over non-Indians, including on reservations. *See, e.g.*, *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (noting "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands").

States also have jurisdiction over non-Indians in Indian Country even when they are interacting with Indians, so long as such jurisdiction would not "interfere with reservation self-government or impair a right granted or reserved by federal law"—neither of which is true of concurrent jurisdiction here. *Id.*; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding concurrent state and tribal jurisdiction to tax non-Indian

[3] *See also Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (although federal bankruptcy courts can exercise jurisdiction over claims against the estate, that does not necessarily preclude concurrent state court jurisdiction over such claims); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186, 207 (1937) (upholding concurrent jurisdiction so long as the state's exercise of jurisdiction was "consistent with federal functions").

oil & gas activities on Indian trust land). Thus, in the closest analogous civil context, the U.S. Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country," because "tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984).[4]

To hold otherwise, and say that the state is presumptively preempted from all jurisdiction over non-Indians when interacting with Indians on reservations, would be absurd. For example, the federal government provides education, health care, and housing services to Indians on reservations. *See, e.g.*, 25 U.S.C. §§ 1601 *et seq.* But that exercise of federal authority in no way precludes the State from treating Indians at state-run hospitals, educating Indians in state schools, or providing housing to Indians who need it. Nor does it mean that the State lacks the ability to license and discipline non-Indian doctors who are treating Indians at private or state-run hospitals, or to do the same with teachers teaching Indians at state-run or private schools. By the same token, federal jurisdiction to protect Indians from non-Indian criminals like Appellant does not divest the State from providing the same service of police protection and criminal justice to those Indian victims.

Arguments that states lack any authority over non-Indians interacting with Indians ultimately rely on outdated notions that on reservations Congress's purpose is "segregating

[4] This can only be more true in the criminal context where it is the State, not the victim, that brings prosecution. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

[Indians] from the whites and others not of Indian blood." *Donnelly*, 228 U.S. at 272. But Congress has long since moved away from the segregationist policies of the early Republic, and the Supreme Court has recognized the significance of that shift for presumptions about state jurisdiction on reservations, especially over non-Indians. *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-74 (1962). Thus, the Court has held:

> State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.

Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (internal citations, quotation marks, and footnote omitted; alteration adopted). For these reasons, nothing in the general policies of Indian law can overcome the clear text of the General Crimes Act, which is not exclusive of state jurisdiction, particularly where—as here—the defendant is not an Indian.

Third, courts have noted that some commentators support the idea that states lack jurisdiction over non-Indians who victimize tribal members. *See Larson*, 455 N.W.2d at 602; *Flint*, 756 P.2d at 327. Other commentators, however, recognize that there is no adequate justification for precluding state jurisdiction over crimes by non-Indian offenders against Indians because (1) "[n]o tribal interest appears implicated by state prosecution of non-Indians for Indian country crimes, since tribes lack criminal jurisdiction over non-Indians," and (2) no federal interest is impaired because "state prosecution of a non-Indian does not bar a subsequent federal prosecution of the same person for the same conduct." AM. INDIAN LAW DESKBOOK § 4:9 (citing, *inter alia*, *Oliphant v. Suquamish Indian Tribe*,

435 U.S. 191 (1978); *Abbate v. U.S.*, 359 U.S. 187 (1959)). As *McGirt* makes clear, Felix Cohen isn't always right. *McGirt*, 140 S. Ct. at 2463.

Fourth, some courts have pointed to Public Law 280, *Flint*, 756 P.2d at 327-28, which allows "any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume" such jurisdiction "with the consent of the Indian tribe," 25 U.S.C. § 1321—with courts implying that the states otherwise lack that jurisdiction over crimes committed "against Indians." But Public Law 280 has nearly the same language with respect to *civil* jurisdiction, allowing "any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe," such civil jurisdiction. 25 U.S.C. § 1322. And yet, as noted above, this language has *not* precluded the U.S. Supreme Court from ruling that, even without Public Law 280, states generally have jurisdiction over civil actions with Indians as parties, that is, as plaintiffs. *See Three Affiliated Tribes*, 467 U.S. at 148-49. For this reason, mere implications from a later congressional enactment like Public Law 280 cannot overcome the clear text of the General Crimes Act, which does not preclude the exercise of state jurisdiction. *Cf. McGirt*, 140 S. Ct. at 2473 n.14.

Ultimately, state jurisdiction here furthers both federal and tribal interests by providing additional assurance that tribal members who are victims of crime will receive justice, either from the federal government, state government, or both. *Cf. Three Affiliated Tribes*, 476 U.S. at 888 ("tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a

claim arising in Indian country"). It minimizes the chances abusers and murderers of Indians will escape punishment and maximizes the protection from violence received by Native Americans. This is especially important because, as commentators have expressed in fear after *McGirt*, federal authorities frequently decline to prosecute crimes on their reservations.[5] While *McGirt* leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act, there is no reason to perpetuate that injustice by assuming without textual support exclusive federal jurisdiction over non-Indian on Indian crimes covered by the General Crimes Act. Nor is there reason to believe the State of Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century. *See Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608–09 (1943) ("Oklahoma supplies [Indians] and their children schools, roads, courts, police protection and all the other benefits of an ordered society."). In fact, this very case proves it will. To hold otherwise would amount to "disenfranchising" and "closing our Courts to a large number of citizens of Indian heritage who live on a reservation," thereby "denying protection from the criminal element of the state." *Greenwalt*, 663 P.2d at 208-09 (Harrison, J., dissenting).

The text of the General Crimes Act controls, and its plain terms do not preclude the state's jurisdiction in this case. Such jurisdiction over non-Indians who victimize Indians does not interfere with the federal government's concurrent jurisdiction over such crimes, nor does it impinge on tribal sovereignty, but instead advances the interests of tribal

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[5] *See, e.g.*, David Heska Wanbli Weiden, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country And that's a problem — especially for Native American women, and especially in rape cases*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html.

members in receiving justice. And the contrary conclusion unjustifiably intrudes into state sovereignty. For all of the foregoing reasons, even assuming the existence of a Cherokee Reservation, the State had jurisdiction to prosecute Appellant.

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