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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CITY OF TULSA **Plaintiff/Appellant,**	) **APPEAL CASE NO. S-2023-715**)
v.	) **MUNICIPAL COURT CASE NOS.**) **720766, 720766A,**) **720766B, 720766C,**) **720766D**
NICHOLAS RYAN O'BRIEN, **Defendant/Appellee.**	)) **CITY APPEAL**

BRIEF OF THE APPELLANT

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The City of Tulsa will be referred to as "the City" or "Appellant" in this City's appeal, and the City of Tulsa Police Department will be referred to as "TPD." Nicholas Ryan O'Brien is the Defendant in the Municipal Court and will be referred to as the "Appellee." The Muscogee (Creek) Nation will be referred to as "the MCN." Numbers in parentheses refer to page citations from the Original Record (O.R.).

Statement of the Case

On August 31, 2021, the City of Tulsa filed by Information five misdemeanor criminal charges against Appellee in the Municipal Court for the City of Tulsa Case Numbers 720766, 720766A, 720766B, 720766C, and 720766D. (O.R. 1-5.) Appellee was charged with: (1) Driving under the Influence in violation of 37 TRO[1] § 649 (720766); (2) Transporting an Open Container in violation of 37 TRO § 657 (720766A); (3) Expired Tag in violation of 37 TRO § 409 (720766B); (4) Traveling Left of Center in violation of 37 TRO § 637 (720766C); and (5) Improper Use of Left Lane in violation of 37 TRO § 640 (720766D). (O.R. 1-5.) Appellee was arraigned on or about September 1, 2021, (O.R. 140), and the case was continued several times until Appellee filed a motion to dismiss. (O.R. 140-145.)

On October 6, 2022, Appellee filed a Motion to Dismiss arguing that he is Indian and that the crime occurred within the MCN reservation boundaries giving MCN jurisdiction over his actions. (O.R. 17-18.) The Honorable Mitchell McCune, Judge of the Municipal Court, found Appellee was an Indian and his crime occurred on the MCN reservation but denied said motion finding the Curtis Act provided the Municipal Court with jurisdiction and because the Northern District of Oklahoma found as such in the *Hooper v. City of Tulsa* case. (O.R. 19.) Ex. A.

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[1] TRO is the City of Tulsa Revised Ordinances, certified copies of which are in the record, O.R. 6-10, and online versions can be found here: https://library.municode.com/ok/tulsa/codes/code_of_ordinances/.

Appellee filed a Second Motion to Dismiss for Lack of Subject Matter jurisdiction on June 28, 2023, after the Tenth Circuit issued a decision reversing the Northern District's decision in *Hooper* and holding the City is no longer organized under the Mansfield Digest's Arkansas law and therefore the Curtis Act does not currently give the City jurisdiction over Indians. (O.R. 21-60.) A hearing was held on this Second Motion to Dismiss on July 26, 2023, at which Appellee argued that the Municipal Court lacked subject matter jurisdiction and that because the Municipal Court's prior reliance on the Hooper decision, which was overturned by the Tenth Circuit, the case should be dismissed. (O.R. 117, ll. 11-15; 119 at 9-12.) At that hearing, there was a discussion of the stay of the Tenth Circuit *Hooper* Decision issued by the United States Supreme Court, and the Court took the Second Motion to Dismiss under advisement and set it for hearing giving Appellee the opportunity to choose a date convenient to him and his attorney. (O.R. 123, ll. 15-25.) Judge McCune then stated that since he had already found the Appellee was Indian and the offense occurred in Indian Country that he would dismiss the case if the *Hooper* Decision was not overturned or stayed, and the mandate issued. (O.R. 124, ll. 7-22.) The Municipal Court went on to decide that if it did not dismiss the case on its own motion, the Court would need to render a new order taking into account new arguments raised by Appellee at the hearing. (O.R. 127, ll. 16-20.) There was also discussion about sending the Appellee's case to MCN to be filed with his other outstanding cases in that court. (O.R. 128, ll. 6-24.) As discussion went on, the Appellee specifically asked if there would be a setting for a second hearing, and the Municipal Court responded, "Right." (O.R. 17.) The court then proceeded to set the hearing on August 9 at which time the Appellee stated that as long as an appealable order was issued, he did not need an in-court hearing on August 9. (O.R. 131, ll. 15-25.) The Court then stated it would stick to the October 19 date but that it could summarily dismiss the case. (O.R. 132, ll. 1-4.)

On August 9, 2023, a hearing was held, and the Second Motion to Dismiss was taken under advisement. (O.R. 242.) The parties agreed to, and Judge McCune ordered, additional briefing to be submitted by August 11, 2023, and the City filed its Response to Defendant's Second Motion to Dismiss on August 11, 2023, addressing the Tenth Circuit's Curtis Act decision and raising the argument of concurrent jurisdiction with the Indian Tribes under *Oklahoma v. Castro-Huerta,* 597 U.S. ___ 142 S. Ct. 2486 (2022) ("*Castro-Huerta*"). (O.R. 61-109.)

Judge McCune issued his written Order Dismissing Case for Lack of Subject Matter Jurisdiction on August 17, 2023 ("the Dismissal Order"). (O.R. 110-113.) However, on August 14, 2023, a "telephonic conference" was held during which Judge McCune and both parties' counsel were present. (O.R. 137). The parties disagreed about the nature of the call resulting in the Municipal Court holding a hearing to reconcile the record as to the August 14, 2023, phone call. *Id.* Ultimately, a reconciliation order was issued showing that Judge McCune announced for the first time on the August 14 phone call that the Court was dismissing for lack of subject matter jurisdiction and would follow up with a written order. (O.R. 137.) Judge McCune then issued a written order on August 17, 2023, granting the Appellee's motion and dismissing the case: (1) because the Tenth Circuit found that the Curtis Act no longer granted jurisdiction to the City to prosecute Indians once the City reorganized under the State of Oklahoma, and (2) because *Castro-Huerta* did not provide jurisdiction to the City because that case involved a non-Indian offender and an Indian victim whereas the Appellee here is Indian. (O.R. 110-113). The City announced its intent to appeal on the telephonic hearing, (O.R. 137), and the Order dismissing the case noted the City gave notice it was reserving the question of law as to whether or not the City retains jurisdiction over Indians. (O.R. 111, ¶ 11.)

The Dismissal Order found that Appellee is Indian and that the offense occurred within Indian Country. (O.R. 112.) The City does not dispute that Appellee is Indian or that the offenses occurred within the reservation boundaries of the MCN. The Dismissal Order found that *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023) (the "*Hooper* Decision"), required a finding that the Municipal Court no longer had subject matter jurisdiction to prosecute Appellee under the Curtis Act. (O.R. 113). Lastly, the Dismissal Order found that *Castro-Huerta* did not give the State concurrent jurisdiction over Indians, and therefore the City did not have such jurisdiction derived through the State over Indians, because, the trial court reasoned, *Castro-Huerta*'s application is limited to non-Indian offenders. (O.R. 112.) The City appeals the dismissal to this Court arguing that the City has jurisdiction over Indians under *Castro-Huerta*, and in the alternative, that the City maintains jurisdiction under the Curtis Act because the *Hooper* Decision was incorrectly decided.[2]

Statement of the Facts

Appellee was stopped by TPD Officers at or near 1300 South Denver Avenue within the City of Tulsa for multiple traffic violations, and upon being stopped, was found to be intoxicated while driving and to possess an open container of alcohol. (O.R. 1-5.) Based on their investigation, TPD Officers arrested Appellee and presented charges to the City Prosecutors who charged Appellee with misdemeanor DUI, Transporting an Open Container, Expired Tag, Traveling Left of Center, and Improper Use of Left Lane. *Id.* No hearings were held involving the facts relevant to the substance of the offenses. However, the parties stipulate that: (1) Appellee is a member of the Osage Nation with some amount of Indian blood (O.R. 17, 112); (2) the Osage Nation is a federally recognized Indian Tribe, *Id.*; (3) the locations of the offenses lie within the boundaries

[2] The City has made these same arguments in a case which has already been briefed and is currently before this Court. See, *Stitt v. City of Tulsa*, M-2022-984, filed Nov. 7, 2022.

of what the United States Supreme Court recognized as the reservation of MCN in *McGirt v. Oklahoma*, 591 U.S. __, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020) ("*McGirt*"), *Id.*

In the lower court, the City alleged the offenses occurred within the City limits, (O.R. 1-5), and stipulated that the location of the offenses was within the City limits and the reservation boundaries both of which lie fully within the State of Oklahoma. (O.R. 65.) The City also stipulated that the City incorporated as required by the Curtis Act, 30 Stat. 495, § 14 (1898). *Id.* The City also stipulated that the offenses occurred on unrestricted, non-trust property. *Id.* Although Appellee did not stipulate to these facts, he also neither objected to nor countered said facts. The Court made no findings of fact other than Appellee is Indian and the offenses occurred on the MCN reservation. (O.R. 110-111.)

ARGUMENT AND AUTHORITIES

This case involves questions of law which this Court reviews de novo. *King v. State*, 2008 OK CR 13, ¶ 4, 182 P.3d 842.

PROPOSITION I: THE LOWER COURT ERRED IN DISMISSING THE CASE BASED ON SUBJECT-MATTER JURISDICTION.

The City properly exercised subject-matter jurisdiction over Appellee because the Oklahoma Constitution grants the Municipal Court jurisdiction over the type of controversy at issue in this case, to wit, jurisdiction over crimes and traffic proceedings. Okla. Const. art. 7, § 1. Here, the trial court ruled it did not have subject-matter jurisdiction over Appellee because he is Indian, and the crimes occurred in Indian Country. (O.R. 112-13). However, since the trial court's decision, this Court has ruled that Indian Country jurisdictional questions do not go to the courts' subject-matter jurisdiction but instead go to personal and territorial jurisdiction. *Deo v. Hon. Lawrence Parish*, 2023 OK CR 20 at ¶ 9, ---P.3d---, 2023 WL 8711572 (Okla. Crim. App. 2023).

As such, the lower court's decision to dismiss this case based on lack of subject-matter jurisdiction is contrary to *Deo* and should therefore be overturned.

In the *Deo* case, the defendant was an Indian who pled guilty to Burglary in the Second Degree occurring within the MCN reservation and was sentenced to a seven-year deferred sentence. *Id.* at ¶ 2. He later was charged with additional felonies to which he pled guilty, and he stipulated to the State's application to accelerate his deferred sentence in the original case. *Id.* He was allowed to enter drug court with delayed sentencing, but later the State filed a motion to terminate Deo's participation in drug court. *Id.* at ¶ 3. Deo then filed a motion to dismiss based on lack of subject-matter jurisdiction which the trial court denied in response to which the defendant sought a writ of mandamus to order the trial judge to dismiss his case. *Id.* This Court held that "Ultimately, subject matter jurisdiction considers the *type of controversy* before the district court." *Id.* at ¶ 9 (emphasis in original).

The *Deo* Court then applied *Oklahoma v. Castro-Huerta*, 597 U.S. ___, 142 S. Ct. 2486 (2022) which held that a State has jurisdiction within its territory unless federal law preempts such jurisdiction. *Deo* at ¶ 10. Ultimately, the Court found it was "no longer convinced that Congress has preempted Oklahoma State Courts' subject matter jurisdiction." *Id.* at ¶ 12. The Court went on to hold that Congress has chosen to exercise authority over territorial and personal jurisdiction when it makes laws in relation to jurisdiction over crimes committed by Indians in Indian Country. *Id.* The Court went on to rule that once these territorial and personal jurisdiction "components are satisfied" by findings that a criminal defendant is an Indian, and his/her crime occurred in Indian Country, the *Bracker* balancing test must be applied to determine if State personal and territorial jurisdiction are preempted, but that *Bracker* balancing does not preempt subject-matter

jurisdiction. *Id.* at ¶ 14. Because the *Deo* defendant entered a plea, the Court found he had waived any jurisdictional defects as to personal and territorial jurisdiction. *Id.* at ¶ 17.

Thus, the trial court erred in finding that it had no subject matter jurisdiction over Appellee based on *McGirt* and its reading of *Castro-Huerta*. However, this case is different from *Deo* in that the Appellee here did not enter a plea and did file a formal challenge to the trial court's jurisdiction before the first actual hearing in the case even though there were several "status" type settings where the case was continued. (O.R. 140-45.) The lower court did make findings that the Appellee is Indian and that the crimes occurred in Indian Country, (O.R. 110-11), findings which trigger the *Bracker* balancing test under *Deo*.

PROPOSITION II: THE CITY HAS CRIMINAL JURISDICTION DERIVED FROM THE STATE'S JURISDICTION, AND THUS THE CITY HAS JURISDICTION CONCURRENT WITH THE TRIBES OVER MUNICIPAL OFFENSES COMMITTED BY INDIANS WITHIN THE CITY LIMITS.

The City properly exercised jurisdiction over Appellee because the City maintains jurisdiction derived from the State which is concurrent with that of the Tribes over criminal offenses committed by Indians in Indian Country. Although there are previous cases often cited for the assertion that States do not have jurisdiction in any criminal case on a reservation if an Indian is involved as victim or perpetrator,[3] in 2022, the Supreme Court in *Castro-Huerta* found that a State is presumed to have jurisdiction unless preempted. 142 S. Ct. at 2493. The broad language of *Castro-Huerta* called into question prior analyses regarding criminal offenses committed by Indians in Indian Country and indicates that States have concurrent jurisdiction with

[3] *See, e.g., Williams v. United States*, 327 U.S. 711, 66 S. Ct. 778 (1946) (suggesting no State jurisdiction over crimes by non-Indians committed against Indians in Indian Country in what the *Castro-Huerta* Court called *dicta*); *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978) (recognition of inherent Tribal jurisdiction to prosecute members committing offenses on Indian Country).

the Tribes and/or federal governments over such cases. In *Castro-Huerta*, the Court held "that Indian country within a State's territory is part of a State, not separate from a State. Therefore, a State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted." 142 S. Ct. at 2504. In Oklahoma, the State has provided both criminal and traffic jurisdiction to the City.

> Municipal Courts in cities or incorporated towns ... shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.

Okla. Const. art. 7, § 1 (1967); *see also* 11 O.S. § 28-102(A) (2007), 11 O.S. § 27-113 (1990). Thus, the City has derived jurisdiction from the State for certain types of infractions. As such, the question is whether the City's State-derived jurisdiction has been preempted as it applies to Indians who commit municipal offenses within the City limits or whether the City retains concurrent jurisdiction over such offenses.

In *Castro-Huerta*, the Court ruled the State had concurrent jurisdiction in Indian Country over a non-Indian offender who committed child neglect upon an Indian victim. 142 S. Ct. at 2488. The defendant argued that only the federal government could prosecute him under its exclusive jurisdiction over major crimes in Indian Country, *Id.* at 2492, and that there was Supreme Court precedent indicating that when an offense on an Indian reservation is committed by a non-Indian against an Indian, the United States courts have jurisdiction as opposed to the State courts. See, *Williams v. United States*, 327 U.S. 711, 716, 66 S.Ct. 778, 780 (1946). The *Castro-Huerta* Court used broad language and found the State maintained concurrent jurisdiction over non-Indians who commit major crimes in Indian Country but left unanswered the question of a State's jurisdiction over Indians who commit offenses in Indian Country. 142 S. Ct. at 2504. The Court stated that

"the default is that States may exercise criminal jurisdiction within their territory." *Id.* at 2503. Ultimately, the Court held that States have jurisdiction in Indian country which can only be preempted: "i) by federal law under ordinary principles of federal preemption, or ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government." *Id.* at 2494. See also, *Deo* at ¶ 10.

To determine whether interference with Tribal self-government preempts concurrent State jurisdiction, the *Castro-Huerta* Court then applied the so-called *Bracker* balancing test evaluating Tribal interests in self-government, federal interests in fulfilling the trust relationship with Tribes, and State interests in the law(s) at issue. 142 S. Ct. at 2501. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-45, 100 S. Ct. 2578, 2583-85 (1980); see also, *Deo v. Honorable Lawrence Parish*, 2023 OK CR 20, ¶ 10 (*Castro-Huerta* considered infringement on tribal self-government, whether state prosecution would harm federal interest in protecting Indians, and strength of State interest in ensuring public safety and criminal justice within its territory). The Court also noted there is a presumption that the State is "'entitled to the sovereignty and jurisdiction over all the territory within her limits.'" 142 S. Ct. at 2493 (internal citation omitted). The City's State-derived jurisdiction is thus presumed unless tribal and/or federal interests outweigh the City/State interests.

Although *Castro-Huerta* involved a non-Indian defendant, the Court's analysis and language called into question State jurisdiction over Indians. Indeed, this Court has noted, "Because the State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted, *Castro-Huerta* leaves unresolved whether the State's jurisdiction to prosecute Indians for crimes under the General Crimes Act in Indian country is preempted." *State*

v. Brester, 2023 OK CR 10, ¶ 36; 531 P.3d 125, 137-38 (internal quotations and citations omitted; emphasis added). Further, the Presiding Judge of this Court has noted:

> Although *Castro-Huerta* involved a non-Indian, the Supreme Court made clear that the text of [18 U.S.C. 1152] would not preempt state jurisdiction against an Indian in similar circumstances .... Thus, under the General Crimes Act, courts must now apply the so-called *Bracker* balancing test to determine if state jurisdiction is preempted in cases of crimes committed by Indians in Indian Country.

State ex rel. Ballard v. Hon. Terrell Crosson, 2023 OK CR 18, ¶ 3 (P.J. Rowland concurring) (internal citations and quotations omitted) (emphasis added). Finally, in *Deo*, this Court ruled that once there are findings for territorial jurisdiction, to wit, the crimes occurred in Indian Country, and personal jurisdiction, to wit, the defendant is Indian, the Court should apply the *Bracker* balancing test to determine if jurisdiction is preempted. *Deo* at ¶ 14.

Although the Court below did not consider preemption, here, the Court should find there is no federal preemption and that an exercise of the City's jurisdiction as derived from the State of Oklahoma does not unlawfully infringe on tribal self-government and thus City/State criminal jurisdiction exists and is concurrent with the Tribes when a crime is committed by an Indian within City limits.

1. THERE IS NO FEDERAL LAW THAT PREEMPTS THE CITY'S STATE-DERIVED AUTHORITY TO PROSECUTE INDIANS.

There is no federal law which grants exclusive jurisdiction to the Tribes or federal government, nor is there one which removes City/State jurisdiction over nonmajor crimes committed by Indians in Indian Country. As such, as to non-major crimes committed by Indians, concurrent State and Tribal jurisdiction is not prohibited by federal law, and the Court should find the City/State retains concurrent jurisdiction over Indians under the *Castro-Huerta* analysis.

The *Castro-Huerta* defendant argued that several federal statutes preempt State jurisdiction, and the Court rejected each argument. First, he argued that the General Crimes Act ("the GCA"),[4] 18 U.S.C. § 1152 (1948), provides the federal government jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country because the Act makes Indian Country essentially a federal enclave. 142 S. Ct. 2492. The *Castro-Huerta* Court held:

> the General Crimes Act does not say that Indian country is equivalent to a federal enclave for jurisdictional purposes. Nor does the Act say that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country. ... [T]herefore, both the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed in Indian Country.

Id. at 2495. Second, *Castro-Huerta* argued the Major Crimes Act, 18 U.S.C. § 1153 (2013) ("the MCA")[5] provides the federal government with exclusive prosecutorial jurisdiction over the crimes enumerated therein, 142 S.Ct. 2496, but the Court recognized that the MCA applies only to Indian defendants and subjects them to the same laws as defendants in federal enclaves. *Id.* Lastly, the Court held Public Law 280, 25 U.S.C.A. §§ 1321 et seq. (2010), "contains no language preempting state jurisdiction," and found that that statute overlaps with a State's "preexisting jurisdiction with respect to crimes committed in Indian country," and held its creation of an explicit grant of authority was proper because not all criminal issues had been resolved by the courts at the time of its passage. 142 S. Ct. at 2500.

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[4] The General Crimes Act states: "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."

[5] The MCA states in part: (a) Any Indian who commits against the person or property of another Indian or other person any of the following ... within the Indian country, shall be subject to the same law and penalties as all other persons ... within the exclusive jurisdiction of the United States.

Other statutes historically associated with Indian law may be asserted as preempting City/State jurisdiction, but none of them provide exclusive federal or Tribal jurisdiction nor do any specifically remove City/State jurisdiction. First is the Assimilative Crimes Act which courts have related to criminal law in Indian Country. 18 U.S.C. § 13 (1996).[6] However, like the GCA, it merely allows extension of State law onto federal areas when there is no applicable federal law. *Id.* Because the Assimilative Crimes Act does not mention Indian Country and does not provide exclusive jurisdiction to the Tribal or federal governments, it does not preempt State jurisdiction.

Similarly, although the Indian Civil Rights Act ("ICRA") defines a Tribe's "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians," 25 U.S.C.A. § 1301(2) (1990), it does not grant exclusive criminal jurisdiction over all Indians within Indian Country. Further, in 1990 Congress enacted new language, commonly called "the *Duro* fix," which changed the ICRA's language to include "all Indians" to supersede the U.S. Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990), 110 S. Ct. 2053, *recognized as superseded by statute in U.S. v. Lara*, 541 U.S. 193, 124 S. Ct. 1728 (2004). The *Duro* Court held that Tribes do not have inherent authority to assert criminal jurisdiction over people that are not members of the Tribe such as nonmember Indians, 495 U.S. at 685, 110 S. Ct. 2060, although the *Lara* Court later found that Congress' amendment to ICRA recognized the Tribes' inherent authority to prosecute nonmember Indians. 541 U.S. at

[6] The Assimilative Crimes Act reads in relevant part: (a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

197, 124 S. Ct. at 1632. In any case, ICRA does not foreclose City/State concurrent jurisdiction with Tribes over non-major crimes committed by Indians in Indian Country.

Notably, a recently amended federal law granted Tribal jurisdiction over non-Indians for certain crimes committed in Indian Country, but State jurisdiction was not preempted and was explicitly retained. *See, e.g.*, 25 U.S.C. § 1304 (2022). This "special Tribal criminal jurisdiction" gives Tribes jurisdiction they "could not otherwise exercise" and, specifically states that the Tribal jurisdiction "shall be concurrent with the jurisdiction of the United States, of a State, or of both." 25 U.S.C.A. § 1304(b)(2). The law goes on to clarify that it does not eliminate any State criminal jurisdiction over Indian country." 25 U.S.C.A. § 1304(b)(3)(A). Where Congress wants to grant exclusive jurisdiction to Tribes, it has done so. *See, e.g.*, 25 U.S.C.A. § 1911(a) (1978) (granting Tribes "jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe"). Because there is no federal statutory preemption, the Court must then determine whether City/State concurrent jurisdiction would unlawfully infringe on Tribal self-government.

2. THE CITY'S STATE-DERIVED AUTHORITY TO PROSECUTE INDIANS DOES NOT INTERFERE WITH TRIBAL SELF-GOVERNMENT.

Under the second prong of the *Castro-Huerta* analysis, the exercise of concurrent State-derived jurisdiction exercised by the City does not unlawfully infringe on Tribal self-government, and *Bracker* balancing weighs in favor of concurrent jurisdiction between the Tribes and City/State. *See Castro-Huerta* at 142 S. Ct. at 2494. At least one State of Oklahoma District Court has ruled that the State maintains jurisdiction over crimes committed by Indians within the Nation's reservation boundaries. *State v. Long*, District Ct. McIntosh Co., Okla., CF-23-86[7], Order

[7] https://www.oscn.net/dockets/GetCaseInformation.aspx?db=mcintosh&number=CF-2023-86.

on Jurisdictional Issues Raised by Def., filed October 4, 2023. In *Long*, after applying the *Castro-Huerta* analysis and the *Bracker* balancing test, "the Court [found there is a] presumption of the State's ability to enforce its laws. With this presumption in mind, the Court finds subject matter jurisdiction exists for the State to prosecute the Defendant for violating State laws ...." *Id.* at *9. The criminal laws at issue in *Long* involved a felony of bringing contraband into a penal institution and misdemeanor trespass. *Id.* That case is currently on appeal to this Court. Okla. Crim. App. Case No. RE-2023-884[8], filed Nov. 1, 2023.

a. THE FEDERAL INTERESTS: Concurrent jurisdiction by the City/State with the Tribes causes no harm to federal interests and enhances the federal interest in protecting Indians. Congress, even though it has plenary power to do so, has repeatedly chosen not to preempt State concurrent jurisdiction over nonmajor crimes in Indian Country and has chosen not to give the Tribes exclusive jurisdiction. Indeed, Municipal and State prosecution of Indians was expected when the Curtis Act was passed, see Proposition II infra at 29, because the Tribal courts were abolished in the same legislation where cities were granted jurisdiction over all inhabitants of a city. 30 Stat. at 504-05, §28. The Oklahoma Indian Welfare Act, 25 U.S.C.A. § 5203 (1967) ("OIWA"), which allowed for re-establishment of the tribal courts of the Five Tribes,[9] did not limit or withdraw the jurisdiction granted by the Curtis Act, nor did it grant the renewed Tribal courts exclusive jurisdiction over Indians in Oklahoma. Further, even though the MCA provides for federal prosecution over major crimes, it was noted in *Castro-Huerta* that federal prosecutors have been accepting "only 22% and 31% of all felony referrals in the Eastern and Northern Districts of Oklahoma." 142 S. Ct. at 2492. Thus, it is unlikely the Federal government has any interest in

[8] https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=RE-2023-884.
[9] See *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010, 109 S. Ct. 795.

nonmajor crimes especially those handled by the City which include only traffic offenses and misdemeanors. Thus, City/State concurrent jurisdiction over Indians does not interfere with Federal interests, and such concurrent jurisdiction will only enhance accountability for criminal behavior in Indian Country and further the federal interests in protecting Tribal citizens.

Although not present in the fact pattern here, even federal case law shows the federal interests are of even less weight when there is a case involving both Indians and non-Indians. See, e.g., *United States v. Brown*, 2023 WL 8438575 (N.D. Okla. 12/05/2023) Case No. 23-CR-339-GKF-3, unpublished. Ex. B. The *Brown* decision involved a five-count indictment alleging that the non-Indian defendant Brown aided and abetted two Indians in robbing and kidnapping another individual in Indian Country. *Id.* at *2. The non-Indian defendant in that case argued that he could not be charged by the federal government because he was not an Indian which is a necessary jurisdictional element under the Major Crimes Act. *Id.* The Court held that even though the non-Indian defendant aided and abetted the Indian defendants as defined in federal statute, *Id.*, the federal government "may not properly indict non-Indian defendants under the Major Crimes Act through the use of accomplice liability under 18 U.S.C. § 2." *Id.* at *3. Even though the *Brown* case involved a Major Crimes Act crime, this logic will likely apply to all other crimes when Indian Country is the jurisdictional hook under federal law. Thus, the federal interest cannot outweigh that of the State when the federal courts have ruled federal prosecutors cannot even prosecute all of the defendants involved in a case. Since neither the tribal nor federal governments would have jurisdiction over all the defendants in such a case, the State's interests in protecting the public and ensuring criminal justice is properly implemented are even stronger where there is a mixture of Indian and non-Indian perpetrators because prosecution by a single sovereign ensures all

defendants are charged and punished under the same laws and subject to the same penalties, and it reduces piecemeal litigation which could even result in one perpetrator escaping justice entirely.

b. THE CITY/STATE INTERESTS: The City/State interests weigh in favor of concurrent jurisdiction. Both the City and State have "a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims. … The State also has a strong interest in ensuring that criminal offenders … are appropriately punished and do not harm others in the State." *Castro-Huerta*, 142 S. Ct. at 2501-02 (internal citations omitted). The City prosecutes violent and non-violent misdemeanor victim offenses but also so-called "victimless" crimes which endanger others, including drunk driving, drug possession, and aggravated speeding as was committed here.[10] The Appellee committed an offense against the People of the City of Tulsa where the population is 95.5% non-Indian,[11] and, according to the MCN website, only 11,194[12] of the 411,867 citizens, or about 2.7%, of the citizens are members of the MCN. Contrast this percentage with the percentage of Indian people on the White Mountain Apache Tribe reservation involved in the *Bracker* case where the reservation population is approximately 93% American Indian and Alaska Native.[13]

Further, nearly 100% of the area of the MCN reservation within the City limits is non-Tribal fee land; of the almost 130,000 acres in the City, only 211 acres, or 0.15%, are held in trust, and not all of those 211 acres is held in trust for the MCN.[14] This is in stark contrast to the lands

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[10] The safety concern to the general public caused by persons believing they can speed and drink and drive without repercussion is clear. But the issue is even more grave considering the fact that the City has seen a significant increase in traffic collisions, including fatality collisions, since *McGirt*. In 2021, the City set a record for fatality collisions. There were 11,509 collisions reported to TPD, 299 resulting in severe injuries, and 69 deaths occurred on Tulsa streets. (O.R. 101).

[11] https://www.census.gov/quickfacts/fact/table/tulsacityoklahoma/PST045222.

[12] https://www.muscogeenation.com/citizenship/citizenship-facts-and-stats/.

[13] https://naair.arizona.edu/sites/default/files/2023-10/White%20Mountain%20Apache%20Tribe%20Census%20Data.pdf.

[14] https://tulsaplanning.org/docs/maps/Tulsa-Reservation-and-Trust-Land-Map.pdf. Trust land in Osage County is

in *Bracker* where 100% of the timber involved was "on reservation land [] owned by the United States for the benefit of the Tribe and cannot be harvested for sale without the consent of Congress." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138, 100 S. Ct. 2578, 2581 (1980). Here, the location of Appellee's offense was neither restricted nor trust land, and unlike the roads where the logging vehicles were driving in *Bracker* which were maintained by the tribe and Bureau of Indian Affairs, *Id.* at 140, the road where Appellee was stopped by police is maintained by the City. (O.R. 65). Indeed, all surface streets and highways within the City limits are maintained by either the City or State with MCN only recently requesting to enter a memorandum of understanding to possibly enter an agreement in the future to improve a roughly two-mile stretch of a single street[15] unrelated to this case.

Although the analysis might be different on a mostly intact reservation with little fee land held by private parties and little municipal or State government involvement, within the City of Tulsa, the Tribes' interests are outweighed by those of the City and State. Within the City limits, the City's interests significantly outweigh the Tribes. Within the City, the City maintains all public roadways not maintained by the State, including providing traffic control devices, and does so with City taxes and bond issues along with some federal and State funding. See n. 15. The City provides stormwater drainage. *Id.* The City provides water and sewer utilities and maintains such utility infrastructure.[16] Within the City, electricity and gas are provided by private non-tribal entities. See

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outside the reservation boundaries of the MCN and Cherokee Nations. See also, Cherokee Nation's website https://vmgis4.cherokee.org/portal/apps/webappviewer/index.html?id=d890e55c04c04c31a658301f9d020521.

[15] Affid. of Terry Ball, Director of Streets and Stormwater: https://www.tulsapolice.org/jurisdiction-affidavit-2. Notably, the MCN's memorandum of understanding acknowledges that the City owns and maintains the roadways and, even if the MCN does eventually improve the road, the City will still be responsible for road maintenance and own the road. *Id.* at Ex. A.

[16] Affid. of Eric Lee, Director of Tulsa Water and Sewer Department: https://www.tulsapolice.org/jurisdiction-affidavit-3.

n.16, ¶ 8. The City is the primary provider of governmental utility and infrastructure services to everyone in the City including, Tribal, federal, and State buildings and residences of Indians and non-Indians.

The City also provides virtually all first responder services that are not privatized. The City maintains the only Fire Department. Indeed, the City provides the vast majority of policing within the City. Even though *McGirt* ruled the tribal boundaries of MCN were not disestablished, three years later, virtually all policing, including the investigation of crimes committed by Indians, from murder all the way down to failing to stop at a stop sign, is conducted by the Tulsa Police Department. The City's police exercise jurisdiction over Indians through cross-deputization agreements with the Tribes and various federal agencies including the FBI. However, the City is part of those agreements by choice so the City can best protect the public; the City is not required to enter into nor remain a party to those agreements, and the City does not receive reimbursement for its police services from the MCN or the federal government on cases that become federal because the perpetrator is an Indian[17]. As the Oklahoma Supreme Court recently noted, the Tribal and City/State goals of public safety are, at the very least, equally significant:

> The Tribe and the State here have an identical goal: to provide each individual citizen a swift path to safety, with the combined weight of all the involved sovereigns ready to enforce it. ... A terrified person may be trying to escape physical or sexual violence. ... The swiftest and surest path to aid is to find the closest avenue for legal protection. Maybe the tribal courthouse is nearby. Maybe it is in another county — another part of the state, even — but a county courthouse is near to hand. The most effective way to achieve the combined tribal and State goal here is to give that scared victim every option to find their swift path to safety.

[17] On September 28, 2023, after this Court ordered supplemental briefing of *Castro-Huerta* in the *Stitt* v. *City of Tulsa* case, see n.2, the Cherokee Nation awarded the City $150,000 for "first responders". https://www.newson6.com/story/6515e3ba0ebeb3071b49fec6/cherokee-nation-signed-agreement-to-award-150000-in-grants-to-tulsa-first-responders. Various federal agencies provide some overtime funding and vehicle assistance for officers who are considered "federal task force" officers, but those officers are not assigned to do *McGirt* cases. While appreciated, this assistance is negligible in the context of the Tulsa Police Department's FY24 budget of $155,297,000. See https://www.cityoftulsa.org/government/departments/finance/financial-reports/city-budget/fy-2023-24-budget/.

Milne v. Hudson, 2022 OK 84, ¶ 19, 519 P.3d 511, 516. Indeed, with a vast majority of Tulsa residents being non-Indian, the City and State arguably have a greater interest in maintaining public safety and enforcing criminal laws than the Tribe does.

Another significantly important interest the City has is in maintaining the safety of its police officers and easing the burden on them as they navigate the jurisdictional morass. These jurisdictional questions are not easily answered by lawyers who are able to sit in a room with significant time and comfort to consider the issues, but the officer on the street is subject to more danger the longer s/he is on a traffic stop or at a domestic situation attempting to determine which jurisdiction's procedures to follow. Indeed, as recently as December 18, 2023, a Tulsa Police Officer was kicked by an MCN member during his arrest on an outstanding warrant from the City's Courts, and when the City arrested the MCN member for the felony Assault and Battery on a Police Officer, the MCN Prosecutor declined the charge stating that, "The City can take care of its cases first.[18]" Declining a case where an individual is alleged to have attacked a cross-deputized police officer because the City needs to "take care of its cases first" fails to protect Tulsa's Officers.

The City prosecutes a significant number of cases each year. In 2022 alone, the Municipal Court received about 95,986 citations and 10,335 arrest cases.[19] (O.R. 99, Affid. of W. Franklin at ¶ 8.) In addition to the issues Tulsa police officers already endure with the perceived lack of authority, despite cross-deputization agreements, to enforce criminal laws since the *McGirt* and *Hooper* Decisions,[20] there will also be a significant change to the traffic-stop process and

[18] https://www.tulsapolice.org/jurisdiction-affidavit-4.

[19] These numbers do not include State or Federal charges or those charges that are currently sent to the Tribes, which consist primarily of non-federal felony charges and domestic assault and battery misdemeanors.

[20] See O.R. 100, Affid. of W. Franklin at ¶ 11 for examples of individuals challenging TPD authority even though officers have commissions from both Tribes.

misdemeanor arrest process for Tulsa Police if the City loses municipal jurisdiction over Indians. Cross-deputization does not resolve these challenges.[21]

Protection of its police officers and efficient use of limited resources also weigh in favor of City/State concurrent jurisdiction. As Police Chief Franklin sets forth in his Affidavit, if TPD officers are required to apply the complicated Indian Country jurisdiction analysis to every citation and misdemeanor arrest, it will change every single stop and extend those stops measurably requiring Officers to determine whether a Tribe is actually a real, federally recognized tribe[22], whether the suspect is recognized by that Tribe and has some Indian blood, whether the location of the crime is on an Indian reservation, and if so, which one, and then whether the Tribe has a law pertaining to the offense at issue. O.R. 101-04, ¶¶ 13-17. Just two years ago, in a case involving Tribal officers' authority to temporarily detain non-Indians, the U.S. Supreme Court noted that "workability" issues, almost identical to those confronting Tulsa Police as noted by Chief Franklin, counseled in favor of Tribal authority where a Tribal police officer might have to first determine whether a suspect is non-Indian which "would produce an incentive to lie." *U.S. v. Cooley*, 593 U.S. ---, 141 S. Ct. 1638, 1645 (2021) (non-Indian DUI suspect detained for controlled drugs and firearms by Tribal police). Here, these issues weigh in favor of the City.

Additionally, neither Tribe has zoning, building, structural and mechanical, health and safety, or fire codes which can be enforced in relation to many issues common in a major city, and the lack of concurrent jurisdiction between the Tribes and the City/State over Indian offenders would extend to more areas of governance than just traffic violations. Although the MCN might

[21] The Wall Street Journal noted many of these problems in a recent article, "No Speed Limit For Native Americans". https://www.wsj.com/articles/oklahoma-mcgirt-supreme-court-neil-gorsuch-native-americans-traffic-laws-justin-hooper-e9c88dbd.

[22] https://www.tahlequahdailypress.com/news/fake-tribes-can-threaten-federally-recognized-ones-genealogist-says/article_79c715a4-f9ac-5bba-8871-f1599342d07d.html.

argue that its Supplemental Crimes Act allows application of Municipal law in Tribal courts, that law only allows for application of those laws that were passed prior to January 1, 2021, so no new ordinances addressing emerging issues can be enforced against Indians.[23] The Cherokee Nation has no such adoptive law. Additionally, although City police are cross-deputized, other City employees who write regulatory citations are not sworn officers and thus not eligible for cross-deputization and thus cannot send citations to Tribal Court for code enforcement issues such as overgrown yards and habitability issues, animal control, safety codes, and similar issues.

Importantly, neither Tribe operates its own jail, and at any time, both tribes could be without a jail at all should the Sheriffs of the Oklahoma Counties decide to withdraw from their contracts with the Tribes. Indeed, a withdrawal of such contracts has already occurred where the MCN no longer contracts with either the Creek County or Okmulgee County Jails to house MCN prisoners. If Tulsa County withdraws its contract with the MCN or the Tulsa County Jail is full and unable to take prisoners at any time, the nearest MCN jail to the City of Tulsa would be in Muskogee, Oklahoma, a 99.2 mile roundtrip from TPD Headquarters which would result in the City having to determine if it would even make arrests on certain types of crimes committed within the MCN jurisdiction. Such a problem has arisen recently where the nearest Cherokee Nation-contracted jail in Rogers County, about a 44-mile roundtrip from Tulsa Gilcrease Police Division that serves most of the Cherokee's reservation within the City, has repeatedly refused to accept any non-Rogers County inmates due to limited space. On several occasions, when a Cherokee arrestee cannot be jailed in Rogers County, the Cherokee Marshals have advised its cross-deputized Tulsa Police to take Cherokee prisoners as far away as Adair County Jail, about a 190-

[23] http://www.creeksupremecourt.com/wp-content/uploads/NCA-22-048.pdf

[redacted]

mile roundtrip from the same police division, or to Muskogee County Jail, an almost 104-mile roundtrip from that division. Because any out-of-City transport of an arrestee requires two officers, this situation is becoming untenable and will likely result in arrestees being released back into the community rather than arrested. Although MCN currently has a contract with the Tulsa County Jail in City limits, there is no guarantee the contract will continue. It is unknown what the effect would be on the Tulsa County Jail if the City begins booking all of its Indian offenders at the County instead of processing many of them into the Municipal Jail.

Another problem that has arisen with multiple tribes having jurisdiction within the State is that because the Tribes have no jails of their own, County Sheriffs who do not have a contract with a specific tribe will not accept prisoners who are arrested on a warrant issued by that specific tribe. For instance, TPD Officers have on several occasions arrested individuals on outstanding warrants issued by Choctaw Nation but could not book those individuals into a local jail for extradition because no jail in or near the City has a contract with Choctaw Nation. Because of this problem, the Officers must either drive all the way to Choctaw Nation or release these individuals back into the City with outstanding warrants where they can then roam free. Although it is unknown where the nearest Choctaw Nation-contracted jail is, the distance from the Tulsa Police Headquarters to the Choctaw Nation Headquarters is approximately 328 miles roundtrip. This conundrum has made almost half of Oklahoma a hiding place for Tribal members with outstanding warrants from other Tribes just as the eastern side of the State was a hideout for outlaws such as the James Brothers, Bonnie and Clyde, Pretty Boy Floyd, and others.[24] Allowing for State jurisdiction would remove

[24] https://www.muskogeephoenix.com/archives/floyd-other-outlaws-hid-in-cookson-hills/article_1e9459b5-87f7-5190-a365-6d65ca492526.html.

this barrier because the State can issue warrants that would be accepted by any Sheriff so long as the issuing County places a hold on the arrestee which occurs on an everyday basis.

Due to the City's interests in ensuring the safety of its residents and visitors and protecting and conserving its resources, this *Bracker* factor weighs heavily in favor of City/State concurrent jurisdiction over Indians within City limits.

c. THE TRIBAL INTERESTS.

Congress has not delegated exclusive jurisdiction to the Tribes over any crimes committed by Indians in Indian Country even in those instances where Congress has stated that Tribal jurisdiction over crimes exists. "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564, 101 S. Ct. 1245, 1258 (1981) (internal citations omitted). Thus, the Tribes have no greater interest than the State and City in prosecuting nonmajor crimes. In fact, the Tribes have less interest within the City limits where there is almost no Tribal government presence. Although the Lighthorse have stated they have 23 total officers in their northern division which "covers the City of Tulsa,"[25] that is insufficient to handle the Indian-related crime in the City. As comparison, TPD has authorized and budgeted for 944 sworn officers and 238 additional non-sworn police personnel. There is no Tribal courthouse in the City, and the only known MCN Courthouse is an average of almost 80 miles roundtrip from the various TPD Divisions. (O.R. 104-05, ¶ 19.) Even when the MCN exercises its jurisdiction and its own officers are involved in a pursuit that results in a collision, TPD is called to work the collision even if there are ten Lighthorse

[25] See, e.g. *Muscogee Creek Nation v. City of Tulsa*, Case No. 23-CV-490-CVE-SH Doc. 10 Declaration of D. Wind, III, Lighthorse Deputy Chief of Special Operations, ¶¶ 13-18 (N.D. Okla. Filed Nov. 15, 2023).

on scene, as occurred in a fatality pursuit in February 2023 when MCN pursued a motorcyclist within the City[26].

There is virtually no land held in trust for the MCN and Cherokee Tribes, and only 4.5 % of the population is American Indian/Alaska Native, and many of those are nonmember Indians. Because the Tribe's interests do not outweigh the State's and/or City's, the Tribe and State, and the City through delegation, have concurrent jurisdiction over such crimes. To be clear, the City does not argue that the Tribes have no jurisdiction at all within the City limits but only that there is shared concurrent jurisdiction with the City/State over Indians. Indian citizens who live within the Tribes' reservation boundaries are also citizens of the State and many are citizens of or visitors to the City as well. All of these governments hold at least an equal interest in maintaining the safety of all citizens and visitors although the City has shown it has a paramount interest in governing within the City. Concurrent jurisdiction serves only to further the common goal of public safety.

i. The Tribes share concurrent jurisdiction with the City/State over all Indians within the City limits.

The Tribes may assert that they have a paramount interest in prosecuting their own Tribal members, but that is not the question arising from *Bracker*; the question is whether the City/State prosecution of an Indian unlawfully infringes on the Tribe's right to self-governance. While *Bracker* does state, "the State's regulatory interest is likely to be minimal" in regard to "on-reservation conduct involving only Indians," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S. Ct. 2578, 2584 (1980), the *Bracker* case involved a completely different situation compared to prosecution of crime within the City limits. *Bracker* involved a State's attempt to tax a non-Indian business operating exclusively on the reservation, and the activity occurred "solely

[26] TRACIS 2023-008542.

on tribal and Bureau of Indian Affairs roads ... built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors." 448 U.S. at 150. There is no such area within the City limits. In fact, water and sewer utilities, traffic signals, and the roads are maintained by the City or State, including those roads and utilities taking traffic to federal buildings and Tribal trust land within the City limits. Thus, the *Bracker* situation is not present here.

The City's situation is more like that in the *Brendale* case where a Tribe was found not to have authority to impose zoning regulations on non-Indian fee land located in an "open" area of the reservation where nearly half the acreage was owned by nonmembers and 80% of the population were nonmembers. *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 445-46 109 S. Ct. 2994, 3017 (1989). Almost 100% of the land within the City's limits is held in fee, and 95.5% of citizens are non-Indian. Thus, criminal behavior of Tribal citizens is much more likely to affect noncitizens when it occurs within the City. The City does not argue that the Tribes do not have jurisdiction over their own members, but in weighing the interests of the Tribes within the City of Tulsa, the "open" status of the reservation is relevant and shows an exercise of City/State concurrent jurisdiction will not unlawfully infringe on Tribal self-government within the City limits. Because virtually all of the land within the City is in fee status and virtually all citizens are non-Indians or nonmember Indians, the City/State should have concurrent jurisdiction over all Indians engaging in criminal activity on such fee lands.[27]

It is important to note that City/State prosecution of any Indian will not infringe on the Tribe's right to prosecute the same person for the same offense because the two entities gain their powers from separate sovereigns. As held in *Lara*, prosecution by separate sovereigns is not

[27] The City does not seek to exercise criminal jurisdiction over Tribal trust lands or restricted allotments.

forbidden by the Double Jeopardy clause. *U.S. v. Lara*, 541 U.S. at 197, 124 S. Ct. at 1632. Further, such concurrent jurisdiction over all Indians would allow the City/State and Tribes to continue to work together to determine which cases are best prosecuted by each sovereign based on prosecutorial resources, services available to victims, and ability to punish and/or rehabilitate offenders.

ii. City/State jurisdiction does not infringe on Tribal sovereignty when prosecution of a nonmember is involved.

Even if the Court determines that the City's exercise of jurisdiction over a Tribal member would interfere with the MCN's right to self-government, the Appellant in this case is a nonmember Indian, and therefore, the MCN members' rights to make their own laws and be ruled by them are not implicated. The State has taken this position in *Hooper*, *see* n.1 *supra*, and in the *Crosson* case recently decided by this Court.[28]

Notably, Supreme Court cases often refer to non-Indians and nonmember Indians interchangeably when discussing Tribal jurisdiction. For example, in the seminal case *Montana v. United States*, the Court analyzed a Tribe's ability to regulate non-Indian hunting and fishing on non-Indian fee land. 450 U.S. 544, 101 S. Ct. 1245 (1981). Although the case involved non-Indian hunters and fishermen, the Court frequently used the term "nonmembers" when describing the limits of the Tribe's authority; for example, the Court found that the "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no relationship to tribal self-government or internal relations." *Id.* at 564 (emphasis added). In fact, the so-called *Montana* test even uses "non-Indian" and "nonmember" interchangeably, providing that a Tribe

[28] See Petition for Writ of Mandamus and Br. in Supp., *State v. Hon. Terrell Crosson*, MA-2023-623, filed July 27, 2023 at 27-29.

(1) "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and (2) "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66 (emphasis added).

In the 2021 *Cooley* case, the U.S. Supreme Court applied *Montana* in the criminal context and further emphasized the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 141 S. Ct. at 1643. In that case, the Court ultimately found that Tribal police had some limited authority to stop and detain non-Indians traveling on a public right-of-way on the reservation, since the officers' ability to do so affected the "health or welfare of the tribe." *Id.* at 1643 (quoting *Montana*, 450 U.S. at 566). The health and welfare of the City is no less affected by an Indian traveling on a public right-of-way especially those rights of way that are maintained by the City.

Here, where the City is asserting concurrent—not exclusive—jurisdiction over a nonmember Indian on fee land, there is simply no infringement on the MCN's self-government nor any negative effect on the "health and welfare" of the MCN. Because Appellant is a nonmember, he can have little to no effect on the self-government of the MCN. There is no showing that Defendant has any connection with the MCN. Because he is not an MCN citizen, Appellant cannot hold elected office, Muscogee Nation Const. Art V. § 1(b) (Principal Chief); Art. VI, § 2(c) (National Council), and although Appellant is subject to the MCN's laws, he cannot vote for the elected officials who control the enactment and execution of those laws because only

citizens can vote in elections. Muscogee Nation Art. IV, § 2; *see also*, 26 CNCA § 21 (2022). Such facts have been considered by the Supreme Court in multiple cases. The *Cooley* Court noted that:

> Our prior cases denying tribal jurisdiction over the activities of non-Indians on a reservation have rested in part upon the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them.

141 S. Ct. at 1644. *See also, Plains Commerce Bank*, 554 U.S. 316, 337, 128 S. Ct. 2709, 2724 (2008). Thus, when balancing the Tribal interests when a nonmember Indian is being prosecuted, there is virtually no effect on the Tribe's sovereignty especially where both the State/City and/or the Tribe can exercise concurrent jurisdiction over the nonmember Indian and where, as here, the offense does not involve domestic relations or a relationship with the Tribe nor Indian land.

Because Appellant is a nonmember, his prosecution by the City/State does not impair the right of self-government, because he is not part of the MCN's "self." Further, to find that "all Indians" are subject exclusively to the MCN jurisdiction assumes that all "Indians" are the same rather than citizens of separate and distinct political entities. Such treatment would treat the Tribes as interchangeable resulting in the status of "Indian" being based on the race of the persons rather than their citizenship in their respective Tribes, and such treatment is contrary to the Constitution's equal protection clause. U.S. Const. Amend. 5 and 14. *See also* Petition for Writ of Mandamus and Br. in Supp., *State v. Hon. Terrell Crosson*, MA-2023-623, filed July 27, 2023, at 29-32. As noted by the State of Oklahoma in another case currently before this Court, there are many examples where State jurisdiction over nonmember Indians has been upheld. *See id.* at 27-29.

The City has been properly delegated authority from the State's concurrent jurisdiction over Indian offenses within the reservation boundaries of the MCN. To quote the U.S. Supreme Court, "under the Constitution and this Court's precedents, the default is that States may exercise

criminal jurisdiction within their territory. ... States do not need a permission slip from Congress to exercise their sovereign authority." *Castro-Huerta*, 142 S. Ct. at 2503. Here, the Court should find that the City has a permission slip from Congress in the Curtis Act, see *infra* at 24, but even if it does not, the Court should hold the City can exercise concurrent jurisdiction with the Tribes from the State's delegation of its sovereign authority especially over nonmember Indians.

PROPOSITION III: THE CITY MAINTAINS JURISDICTION OVER INDIANS UNDER THE CURTIS ACT OF 1898.

The City argued below that it retains jurisdiction under the federal Curtis Act which vested properly incorporated municipalities with authority to enforce municipal ordinances over "all inhabitants" "without regard to race." Curtis Act of 1898, § 14, 30 Stat. 495, 499-500. The question of the City's jurisdiction over Indians pursuant to Section 14 was at issue in the *Hooper* Decision where the Tenth Circuit ruled that the City no longer has jurisdiction under the Curtis Act because the City is now an Oklahoma municipality as opposed to an Arkansas one. *Hooper v. City of Tulsa*, 71 F.4th at 1286-87. The municipal court followed the Tenth Circuit's ruling when dismissing the case below. However, the City maintains that the *Hooper* Decision was incorrectly decided and that the City has jurisdiction over this and other cases involving Indians.

This Court has an independent duty and authority to interpret federal statutes and U.S. Supreme Court decisions and that this Court is not bound by lower federal court interpretation.

> While it is true that the Supremacy Clause of the United States Constitution demands that state law yield to federal law, it is also true that neither the federal Supremacy Clause nor any other principle of law requires that this state court's interpretation of federal law give way to a lower federal court's interpretation. ... [A] state appellate court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. ... If this Court follows the interpretation of a federal district court or a circuit court of appeals, it is because it chooses to do so, not because it is required to do so.

Brown v. State, 1997 OK CR 1, ¶ 24, 933 P.2d 316, 323-24 (internal citations omitted); *see also, Martinez v. State*, 2019 OK CR 7, 442 P.3d 154. Thus, this Court may independently review and interpret §14 and hold the City maintains jurisdiction over Indians under the Curtis Act. The present-day applicability of the Curtis Act was not addressed in *McGirt v. Oklahoma*, 590 U.S. --, 140 S.Ct. 2452 (2020) (*"McGirt"*). Further, §14 has not been repealed, and the *Hooper* Decision did not rule that it was. Section 14 allowed inhabitants of certain-sized cities to petition to the United States court where the city was located:

> to have the same incorporated as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas ... and such city or town, when so authorized and organized, shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas.
>
> ...
>
> [A]nd all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges and protection therein.

30 Stat. 495, 499, §14 (1898). The *Hooper* Decision finds the City was incorporated "according to chapter twenty-nine of Mansfield's Digest" and that the City had "jurisdiction over municipal violations committed by all its inhabitants, including Indians, at the time it was enacted," 71 F.4th at 1284. However, the court found that the City is now an Oklahoma incorporated city and that because the City is no longer incorporated under the Mansfield's Digest, §14 no longer grants jurisdiction over Indians to the City. 71 F.4th at 1285. The Court read the phrase "when so authorized and organized" to mean that a city's jurisdiction would last only "as long as," or "while" the City was continuously organized under the laws of Arkansas. *Id.* at 1283-84. Thus, the Court reasoned, when the City organized under the State of Oklahoma, the City lost the jurisdiction over Indians granted by §14. *Id.* at 1285. Respectfully, the *Hooper* Decision distorts the plain meaning

of Congress's words and the goals expressed in the Curtis Act. Section 14 empowered Indians and non-Indians to incorporate cities, borrowing incorporation procedures from the laws of the State of Arkansas, and provided equal protection in those cities.

It makes no sense that once a city was granted jurisdiction and began to equally enforce its laws to all races that such grant could be removed by implication. However, the Tenth Circuit accepted a strained reading of the clause "when so authorized and organized" and interpreted it to mean that a city's ordinances would apply to all inhabitants, without regard to race, only as long as the city is specifically and continuously organized under the Mansfield's Digest. 71 F.4th at 1283-84. Had Congress intended equal protection of the law for all inhabitants to survive statehood, the Tenth Circuit reasoned, instead of "when so authorized and organized," Congress should have said "'*after* being so authorized and organized' or '*once* so authorized and organized....'" *Id.* It is highly unlikely that the "when so authorized and organized" clause, served as a *de facto* sunset clause for Congress's commitment to equal application of laws "without regard to race." It is more appropriate to use the plain meaning of "when" at the time the Act was written.[29] Webster's Dictionary published in 1898 defines "when" as follows:

1. At the time. We were present *when* General La Fayette embarked at Havre for New York.
2. At what time; *interrogatively*. When shall those things be?
3. Which time. I was adopted heir by his consent; Since *when*, his oath is broke.
4. After the time that. *When* the act is passed, the public will be satisfied.
5. At what time. Kings may take their advantage *when* and how they list.

When, An American Dictionary of the English Language by Noah Webster (2nd Ed. 1898), *Ex. 1.*

[29] "When a term goes undefined in a statute, we give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566, 132 S. Ct. 1997, 2002, 182 L. Ed. 2d 903 (2012).

This Court's reading of the Curtis Act will bear two observations. First, its drafters knew how to write a sunset clause when they wanted one. Section 4, for example, provides that noncitizens who made improvements on tribal lands "shall have possession thereof until and including December thirty-first, eighteen hundred and ninety-eight." 30 Stat. at 496, §4. Second, this Court will note the drafters used the word "when" 37 out of 37 times to describe the prevailing results of an action, rather than a continuing requirement, after which something would come to an end. For example:

> The rolls so made, when approved by the Secretary of the Interior, shall be final....
>
> ...
>
> Said acts ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

30 Stat. at 503, 512 (emphasis added). As the U.S. Supreme Court has said, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan. Pac. Saipan, Ltd.*, 566 U.S. 560, 571, 132 S. Ct. 1997, 2004-05 (2012) (internal quotations omitted). By contrast, the Act's drafters used "*while*" and "*only while*" throughout the Act to describe a window of time, after which something would end.

> All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent....
>
> [W]here coal leases are now being operated and coal is being mined there shall be reserved from appraisement and sale all lots occupied by houses of miners actually engaged in mining, and only while they are so engaged ....

30 Stat. at 507, 511 (emphasis added). It stands to reason that cities in a new future state would not have the same exact powers and rights of cities in Arkansas. It does not stand to reason that Congress meant for its promise of equal protection, which it cultivated so assiduously, to simply

evaporate at statehood.[30] Moreover, under that interpretation, no sovereign would have had jurisdiction over minor crimes by Indians at statehood if the City's jurisdiction simply ended because Tribal courts were abolished by § 28 of the Act. 30 Stat. at 504-05.

Importantly, the Tenth Circuit's ruling is contrary to U.S. Supreme Court precedent involving interpretation of laws in the Indian Territory after Oklahoma Statehood. For the Tenth Circuit's interpretation to be correct, the rule must be that jurisdictional law changed at Statehood versus substantive law. However, the Supreme Court ruled the laws of Oklahoma supplanted those of Arkansas and then the Oklahoma Territory. *Jefferson v. Fink,* 247 U.S. 288, 38 S. Ct. 516 (1918). *Jefferson* involved the inheritance of a Creek allotment and a question of whether Arkansas law, put into force in the Indian Territory, should be applied. *Id.* at 288. The allotment was made, and the tribal deeds were issued in the Indian Territory before Oklahoma became a state. *Id.* The allottee died after statehood. *Id* at 288-289. The Supreme Court held that the laws of Oklahoma applied noting that, "It seems very plain that the provisions before quoted from the Enabling Act were intended to result, at the time of the admission of the new state, in the substitution of the Oklahoma law of descent for that of Arkansas theretofore put in force in the Indian Territory. The

[30] Equal application of the laws for Indians and non-Indians alike was the fundamental value underpinning federal Indian legislation after 1887 until the New Deal legislation of the 1930s. The Senate Select Committee on the Five Tribes, explained that it was "imperative[]" to "establish[] a government over [non-Indians] and Indians" in the territory "in accordance with the principles of our constitution and laws." *Id.* at 12–13. In 1896, Congress declared it "the duty of the United States to establish a government in the Indian Territory which shall rectify the many inequalities and discriminations now existing in said territory, and afford needful protection to the lives and property of all citizens and residents thereof." Act of June 10, 1896, 29 Stat. 340. In 1900, the House Committee on Indian Affairs emphasized that "[t]he policy of the Government to abolish classes in Indian Territory and make a homogeneous population [wa]s being rapidly carried out," and all Indians "should at once be put upon a level and equal footing with the great population with whom they [were] intermingled." H. R. Rep. No. 1188, 56th Cong., 1st Sess., 1 (1900). Congress granted U.S. citizenship to all Indians living in Indian Territory, Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447, to further "[t]he policy of the Government to abolish classes in Indian Territory," H.R. Rep. 56-1188, at 1 (1900). Then, in 1904, Congress "continued and extended" operation of Arkansas law to cover all lands and persons "whether Indian, freedmen, or otherwise." Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573. Congress's commitment to equal protection did not waver in forming the new State. For the first time in American history, an enabling act expressly gave Indians full rights to participate in a state's constitutional convention "in the same manner" as all other citizens. Oklahoma Enabling Act § 2, ch. 3335, 34 Stat. 268 (1906).

recognition given to the Oklahoma law by Congress in the Act of 1908 hardly can be explained on any other theory." *Id* at 294. Thus, Oklahoma's substantive law was put into effect by the Oklahoma Enabling Act, but it did not change jurisdiction of the courts within the State, including the municipal courts.

In 1906 with the adoption of the Enabling Act and Oklahoma Constitution, the *substantive* law of the State of Oklahoma was established as adopting the laws of Nebraska. The Enabling Act provided that "the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof." 34 Stat. 267, 275 (June 16, 1906). Importantly, the substantive change in laws did not affect municipal jurisdiction to enforce laws regardless of race. The *Fink* Court determined that Oklahoma law substituted Arkansas law previously put in place in the Indian Territory, 247 U.S. 288 at 294, but this substitution did not override Congress' jurisdictional grant to the cities. As no subsequent Congressional Acts addressed municipal jurisdiction over Indian people, Section 14 of the Curtis Act remains good law with the laws of Oklahoma supplanting those of Arkansas as discussed in *Jefferson.*

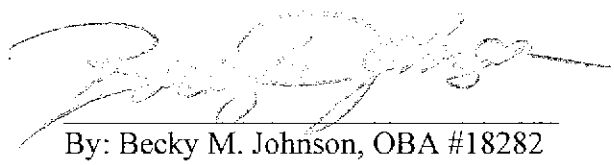
Lastly, for the *Hooper* Decision to be correct, it would require that no one had jurisdiction over Indian crimes within the cities from the date of Oklahoma Statehood until 1947 when the Oklahoma Indian Welfare Act, 25 U.S.C.A. § 5203 (1967) ("OIWA"), re-established the courts of the Five Tribes. This fact, combined with the specific retention of Section 14 in the 1901 Creek Agreement, Act of March 1, 1901, 31 Stat. 861, § 41, shows that Congress intended for cities to retain jurisdiction over Indians as granted pursuant to the Curtis Act.

CONCLUSION

WHEREFORE, premises considered, the City of Tulsa prays that this Honorable Court issue an Order ruling that the City has criminal jurisdiction over Indians who violate municipal ordinances even when the offense occurs within a reservation boundary.

Respectfully submitted,

CITY OF TULSA, Oklahoma
A municipal corporation
Jack C. Blair, City Attorney



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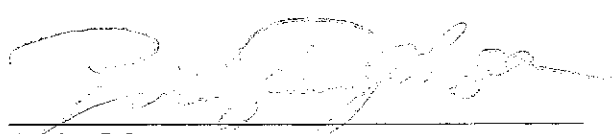
CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on the 10 day of January, 2024, the above and foregoing, was served with a hard copy by placing said copy in the mail, postage prepaid, to the following:

Brett Chapman
15 West 6th Street, Suite 2800
Tulsa, Oklahoma 74119
Attorney for Appellee



Becky Johnson

2022 WL 1105674
Only the Westlaw citation is currently available.
United States District Court, N.D. Oklahoma.

Justin HOOPER, Plaintiff/Appellant,
v.
The CITY OF TULSA, Defendant/Appellee.

Case No. 21-cv-165-WPJ[1]-JFJ
|
Filed 04/13/2022

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

WILLIAM P. JOHNSON, UNITED STATES DISTRICT JUDGE

*1 THIS MATTER comes before the Court upon Defendant City of Tulsa's Motion to Dismiss Plaintiff's Complaint and Brief in Support ("Motion") (Doc. 6). Having reviewed the parties' submissions and the applicable law, the Court finds that the Motion is well-taken and therefore **GRANTS** it as to Count II (declaratory judgment), which renders Count I (appeal from municipal court judgment) moot.

BACKGROUND[2]

Plaintiff, as a member of the federally recognized Choctaw Tribe, is an Indian[3] by law. On or about August 13, 2018, he received a speeding ticket from the City of Tulsa within the boundaries of the Creek Reservation. On or about August 28, 2018, he was found guilty by Tulsa's municipal criminal court and was ordered to pay a $150 fine, which was paid.

Years later, on or about December 17, 2020, Plaintiff filed an application for postconviction relief in the Municipal Criminal Court of the City of Tulsa. After arguments, the court found that it had jurisdiction pursuant to the Curtis Act, 30 Stat. 495 (1898), and denied postconviction relief. The Municipal Criminal Court found that the appropriate court to which Plaintiff (there Defendant) could appeal his municipal conviction would be the U.S. Federal District Court. Doc. 1-1 at 12. Accordingly, Plaintiff appeals that decision here as Count I. For Count II, Plaintiff seeks a declaratory judgment that municipalities, such as the City of Tulsa, do not have subject matter jurisdiction over "Indians" within the boundaries of a reservation. Plaintiff's case therefore contains both a criminal appeal (Count I) *and* a civil request for declaratory judgment (Count II), an unusual procedural posture. Defendant moves to dismiss the case in its entirety pursuant to Rule 12(b)(6). Doc. 6.

DISCUSSION

I. Procedural Posture

Given the uncommon form this case takes, the Court begins with a logistical question: can it rule on a civil motion to dismiss when Count I is an appeal from Tulsa's municipal *criminal* court?

The parties agree that Count II, as a civil request for declaratory judgment, is appropriately subject to a motion to dismiss under Rule 12(b)(6). *See* Doc. 22 at 7 ("[A] ruling on the City's Motion to Dismiss is proper as to the declaratory judgment aspect of the case."); Doc. 23 at 19–20 ("[I]f the issue of subject matter jurisdiction is taken as a legal issue, the declaratory judgment could be addressed, but not the appeal from the denial of post-conviction relief."). Further, the parties agree that the Count II declaratory judgment issue might render the Count I appeal moot. *See* Doc. 22 at 7 ("Depending on how this Court rules on the declaratory judgment action, such a ruling could serve to render any further proceedings on the appeal moot."); Doc. 23 at 19 ("[T]he

Court's resolution of the Curtis Act issue and the potential retroactive application of the *McGirt* decision will be dispositive of the post-conviction relief since the sole basis for post-conviction relief is that the City is lacking jurisdiction to prosecute him.").

*2 Therefore, mindful of the possibility of overstepping with a different approach, the Court first addresses the declaratory judgment issue in Count II to determine whether reaching Count I is necessary.

II. Count II: Declaratory Judgment

Declaratory judgment is appropriate where "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1244 (10th Cir. 2008) (citation omitted). Here, Plaintiff seeks declaratory judgment that the Curtis Act does not confer upon municipalities jurisdiction over crimes committed by Indians within the boundaries of a reservation. Plaintiff asserts that because of this lack of subject matter jurisdiction, any such judgment would be void. Doc. 1 at 5–6. This decision could resolve the dispute regarding Defendant's subject matter jurisdiction over Plaintiff's traffic ticket. Doc. 23 at 19. Accordingly, there is a substantial, real, and immediate controversy between the adverse parties here, and declaratory judgment is an appropriate avenue to consider.[4]

Defendant moves to dismiss Plaintiff's request for declaratory judgment because, it argues, Plaintiff's legal theory is incorrect. Doc. 6 at 1. Defendant maintains that the Curtis Act remains good law and grants the City of Tulsa municipal authority over everyone within city limits, whether or not that land is part of a reservation. *Id.* at 11. The Court first outlines the relevant provisions of the Curtis Act, then examines the parties' arguments.

A. Relevant Provisions of the Curtis Act

The Curtis Act, 30 Stat. 495, became federal law in 1898. It contained many sections dealing with different issues, largely for the shameful purpose of weakening tribal sovereignty by abolishing tribal courts, *id.* § 28, and enacting an allotment policy that parceled out land to individual tribal members, *id.* § 11. The section of the law at issue in this case, however, is Section Fourteen.

The relevant portions of Section Fourteen deal with Indian Territory state and municipal law and ordinances. On a state law level, this provision copied over Arkansas law to part of what would be Oklahoma, which was not yet a state and was referred to as Indian Territory. *See id.* § 14. Federal district courts had the authority to punish violations of Arkansas state law within Indian Territory because, since the land was not yet a state, there was not a state court to do so. *See id.* On a municipal law level, this provision allowed for incorporation of cities and towns with two hundred or more residents. *Id.* It stated that incorporation would take place "as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas"[5] and that once incorporated, the city or town government "shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas." *Id.* Additionally, Section Fourteen granted city or town councils the authority to pass ordinances and gave the mayors of such towns "the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States Commissioners in the Indian Territory[.]" *Id.* And most importantly, the law provided that "all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protections therein." *Id.*

*3 Plaintiff makes a variety of arguments about how to interpret this language. First, he asserts that Section Fourteen grants only legislative and executive powers to municipalities while reserving judicial powers to the federal district court. Doc. 12 at 4–5.[6] He goes so far as to contend that the Curtis Act does not permit municipalities to create municipal courts. *Id.* at 6. This stance is patently incorrect; the same section of the Curtis Act recognizes mayoral civil and criminal jurisdiction "coextensive with[ ] United States Commissioners in the Indian Territory." Curtis Act § 14. The Curtis Act therefore explicitly recognizes mayoral courts. *Id.* Additionally, the language of Section Fourteen governs incorporation based on the provisions of Mansfield's Digest, chapter twenty-nine. Section 765 of this chapter provides:

> By-laws and ordinances of municipal corporations may be enforced by the imposition of fines, forfeitures, and penalties, on any person offending against or violating such by-laws or

> ordinances, or any of them; and the fine, penalty, or forfeiture, may be prescribed in each particular by-law or ordinance, or by a general by-law or ordinance made for that purpose; and municipal corporations shall have power to provide in like manner for the prosecution, recovery and collection of such fines, penalties and forfeitures.

Mansfield's Digest, ch. 29, § 765 (1884). Additionally, the same chapter grants jurisdiction to "police courts" reminiscent of the municipal court at issue in this case: "The police judge shall provide over the police court, and perform the duties of judge thereof, and shall have jurisdiction over all cases of misdemeanor arising under this act, and all ordinances passed by the city council in pursuance thereof." *Id.* § 812. These sections together make it quite clear that the Curtis Act, which incorporates the provisions of Mansfield's Digest by reference, explicitly authorizes the jurisdiction of a variety of municipal courts and court functions.

Plaintiff shifts to a more technical approach on this point in his supplemental brief, claiming that municipal judges—not mayors—exercise municipal jurisdiction today. Doc. 23 at 16–17. It is true that mayoral courts did not survive Indian Territory's conversion to statehood as Oklahoma. *Hillis v. Addle*, 35 Okla. 122, 128 P. 702, 702 (Okla. 1912). Therefore, the mayoral courts to which the Curtis Act refers are no longer in existence. However, as described above, the provisions of Mansfield's Digest incorporated by reference into the Curtis Act expressly authorize other forms of municipal jurisdiction, including the jurisdiction to enforce municipal ordinances and misdemeanors.

Plaintiff also argues that the language "all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments" fails to consider the difference between race (indigenous heritage) and the political status of being an Indian (membership in a federally recognized tribe). Doc. 23 at 18. This argument loses sight of the forest for the trees. The statutory language plainly covers *all inhabitants*. It clarifies, during an era of history in which "all" often made racial exclusions,[7] that this statement covered individuals of all racial backgrounds. But this clarification supplements "all," not restricts it. Plaintiff's argument could just as easily be used to say that "without regard to race" does not cover other interpersonal differences, such as sex, and therefore that "all" did not include women, whom the Curtis Act had already separated from the rest of the political citizenry by forbidding them to vote. Curtis Act § 14. Even if "without regard to race" does not cover the political difference of whether a person is legally an Indian, or a woman, or a member of any other group treated differently under the law based on a trait other than race, that does not diminish the coverage of the phrase "all inhabitants." The plain meaning of this phrase is to cover *everyone* inhabiting the city or town.

*4 Oklahoma's statehood did not put an end to municipalities' powers under the Curtis Act. The Oklahoma Constitution provided that "[e]very municipal corporation now existing within this State shall continue with all of its present rights and powers until otherwise provided by law, and shall always have the additional rights and powers conferred by the Constitution." Okla. Const. Art. 18 § 2. In fact, the Oklahoma Constitution explicitly permitted the operation of municipal courts. Article 7, § 1 stated,[8]

> The judicial power of this state shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law.

Ex parte Bochmann, 20 Okla.Crim. 78, 201 P. 537, 539 (1921). Therefore, statehood did not terminate the continued power of municipalities to operate municipal courts.

Plaintiff also argues that the Curtis Act has been repealed by *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988). This case did not involve Section Fourteen of the Curtis Act; it addressed Section Twenty-Eight of the Curtis Act, which pertained to the abolition of tribal courts. *Hodel*, 851 F.2d at 1440, 1442–43. Accordingly, *Hodel* did not repeal Section Fourteen.

B. State and Municipal Authority

Pursuant to the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, state courts do not have jurisdiction over major crimes committed by Indians in "Indian country," which includes reservation lands. Federal courts have exclusive jurisdiction over these crimes, which include offenses such as murder, arson, and assault. *Id.* Plaintiff argues that a regulatory scheme that would grant the City of Tulsa, but not the state of Oklahoma, criminal authority over an Indian defendant does not make sense because municipalities are political subdivisions of the state. Doc. 12 at 6. Defendant counters, correctly, that "a municipality may be granted powers by the federal government different than those granted to the state." Doc. 13 at 6 (emphasis removed).

Defendant cites *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). In this case, the City of Tacoma sought to build a power project on a river that ran through it. It received a federal license to do so. The State of Washington opposed the project and the license because it would destroy one of the state's fishing hatcheries. Although Tacoma was a political subdivision of Washington, the federal government has authority over navigable waters and it used that authority to issue a license to Tacoma—so, the Supreme Court held, Tacoma could use the license and build the project even though the state opposed it. *Id.* at 339, 78 S.Ct. 1209.

The circumstances here are analogous. Congress has plenary power over Indian affairs, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), just like it does over navigable waters. Although this case does not involve a license, the same principle applies—Congress affirmatively granted authority to a municipality that it did not give to the state. Even if the mechanism by which the city receives power is different (a license vs. a statutory act), the basic holding that cities can hold powers separate from and contradictory to the wishes of the state is sufficient.

C. *McGirt* and the Curtis Act

When the United States Supreme Court ruled on *McGirt v. Oklahoma*, 591 U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), the decision had a tremendous impact on the state of Oklahoma. *McGirt* examined whether the Creek reservation covering much of the eastern half of Oklahoma had been disestablished: taken out of political existence by an act of Congress. *Id.* at 1, 7. It found that the reservation was still intact, and thus, the area in which the petitioner had committed his crime was, and is, "Indian country" under the MCA. *See id.* at 27–29. Accordingly, the State of Oklahoma had no jurisdiction over the petitioner because the federal government had exclusive jurisdiction over his major crime. *See id.* at 36.

*5 Plaintiff contends that because of *McGirt's* holding, "the state of Oklahoma and its political sub-divisions are without subject matter jurisdiction to try criminal cases against defendants that are classified as 'Indian' under federal law" and that because of this, the municipal court lacked subject matter jurisdiction over his conviction. Doc. 12 at 1–2. This characterization of *McGirt's* holding is incorrect. *McGirt* makes no mention of municipal jurisdiction and only briefly mentions the Curtis Act in the dissent. 140 S. Ct. at 2490 (Roberts, C.J., dissenting). This mention is made in the context of Congress "laying the foundation for the state governance that was to come," i.e., that the Curtis Act was an indication of Congress's intent to disestablish the reservation in the future. *Id.* at 2491. *McGirt* says nothing about repealing or overriding the Curtis Act, and it does not deal with municipal law at all. Its holding is that the Creek reservation is still intact, which has implications for felony crimes within the scope of the MCA.

In contrast, Congress passed the Curtis Act to, among other things, give municipalities jurisdiction over local ordinance violations—a classification of crimes entirely distinct from the MCA's litany of serious offenses. *See* 18 U.S.C. § 1153 (MCA). Plenty of other criminal violations also do not trigger the MCA's jurisdiction; for example, it is not federal courts but tribal courts that have jurisdiction over misdemeanors that Indians commit within reservation boundaries. *See United States v. Lara*, 541 U.S. 193, 199, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). It is not contradictory that Congress granted federal jurisdiction over major crimes through the MCA and municipal jurisdiction over violations of local ordinances through the Curtis Act. *McGirt's* implications for the former do not demonstrate an effect on the latter.

D. Conclusion

Plaintiff requested declaratory judgment "finding that the Curtis Act confers no jurisdiction to municipalities

located within the boundaries of a reservation and any judgment rendered by such municipalities against an Indian would have been made without subject matter jurisdiction and is therefore void." Doc. 1-1 at 5–6. Defendant moves to dismiss this request. Doc. 6. The Court **GRANTS** the motion to dismiss this request for declaratory judgment and finds for the above reasons that the Curtis Act grants the municipalities in its scope jurisdiction over violations of municipal ordinances by any inhabitant of those municipalities, including Indians.

Accordingly, Plaintiff's appeal of the decision denying postconviction relief for his speeding ticket fine (Count I of the Complaint) is **MOOT**.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 1105674

Footnotes

1 Chief United States District Judge William P. Johnson of the District of New Mexico was assigned this case as a result of the Tenth Circuit Order designating Judge Johnson to hear and preside over cases in the Northern District of Oklahoma.

2 Unless the Court notes otherwise, these facts are derived from the Complaint and are to be taken as true for the purposes of ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

3 The Court recognizes that some individuals find the term "Indian" to be antiquated or offensive to indigenous communities. The term holds legal significance as it refers specifically to members of federally recognized indigenous tribes and was the language Congress used when enacting statutes relevant to this matter. Therefore, other terms such as "First Nations," "indigenous," or "Native American" do not convey the precise legal meaning that "Indian" does. The Court uses the term "Indian" for clarity.

4 The parties also dispute the mechanism by which this Court has subject matter jurisdiction to resolve this dispute, although they agree that jurisdiction is proper. *See* Doc. 6 at 3; Doc. 12 at 4. Because the Curtis Act is a federal statute, a dispute about its extent or validity is a federal question. *See* 28 U.S.C. § 1331.

5 Mansfield's Digest of the Statutes of Arkansas, or Mansfield's Digest, is a publication from 1884 which compiled the statutes of Arkansas. It can be read online at https://llmc.com/docDisplay5.aspx?set=99989 & volume=1884 & part=001.

6 Plaintiff cites to two cases describing how the Act of April 28, 1904 stripped tribal courts of jurisdiction and vested that jurisdiction in the United States courts of the Indian Territory. Doc. 12 at 5. These cases do not stand for the proposition that federal courts had sole jurisdiction over all matters, including municipal matters, in the Territory. They refer only to the divestment of *tribal* judicial authority. *See Colbert v. Fulton*, 74 Okla. 293, 157 P. 1151, 1152 (Okla. 1916); *In re Poff's Guardianship*, 103 S.W. 765, 766 (Ct. App. Indian Terr. 1907).

[7] See, famously, the Declaration of Independence's "all men are created equal" penned while slavery remained legal.

[8] This provision has since been amended.

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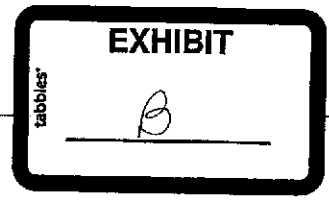

2023 WL 8438575
Only the Westlaw citation is currently available.
United States District Court, N.D. Oklahoma.

UNITED STATES OF AMERICA, Plaintiff,
v.
ROYAL DALE JUAN BROWN, Defendant.

Case No. 23-CR-339-GKF-3
|
Filed 12/05/2023

OPINION AND ORDER

GREGORY K. FRIZZELL UNITED STATES DISTRICT JUDGE

*1 Before the court is defendant Royal Dale Juan Brown's Motion to Dismiss Counts One, Two, and Five of the Indictment. [Doc. 49]. He argues that Counts One and Five fail to allege that he is an Indian, a necessary element of an offense under the Major Crimes Act, 18 U.S.C. § 1153, and that Count Two must be dismissed because it is predicated on his commission of the crime alleged in Count One. For the reasons stated below, the motion is granted.

Count One of the Indictment alleges that, on or about September 14, 2023, within Indian country in the Northern District of Oklahoma, defendants Keenan Duke Lamont Brown II and Isaac Emiliano Littleman-Ortega, both Indians, committed the crime of Robbery in Indian Country by taking property of approximately $200 in value from the person of Brittany Hester by force, violence, and intimidation, and that defendant Royal Brown willfully caused the robbery to be done pursuant to 18 U.S.C. § 2(b). It alleges the acts were in violation of 18 U.S.C. §§ 1151, 1153, and 2111.

Count Two of the Indictment alleges that the three defendants, aiding and abetting each other, knowingly carried, used, and brandished a firearm during and in relation to the crime of violence, that is, Robbery in Indian Country, as alleged in Count One. It alleges that the acts were in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

Count Five of the Indictment alleges that, on or about September 14, 2023, within Indian Country in the Northern District of Oklahoma, the two Indian defendants, aiding and abetting each other, knowingly kidnapped Ivan Vega, and that defendant Royal Brown willfully caused the kidnapping to be done, pursuant to 18 U.S.C. § 2(b). It alleges the acts were in violation of 18 U.S.C. §§ 1151, 1153, 1201(a)(2) and 1201(d).

"The Major Crimes Act allows federal courts to try serious crimes listed in the Act when they are committed by Indians in Indian country ..." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[1], at 491 (Nell Jessup Newton ed., 2012).[1] "In order to prosecute under [the Major Crimes Act], the Government must prove, as a jurisdictional requisite, that an Indian committed one of the fourteen enumerated crimes against another Indian, or any person, within Indian country." *United States v. Torres*, 733 F.2d 449, 453-54 (7th Cir. 1984). Or, as the Eighth Circuit puts it, to establish federal jurisdiction under § 1153, "the burden is on the Government to prove that the major crime was committed by an Indian in Indian country." *United States v. Jewett*, 438 F.2d 495, 497 (8th Cir. 1971). And in *United States v. Graham*, 572 F.3d 954, 956 (8th Cir. 2009), *rehearing en banc denied*, 598 F.3d 930 (8th Cir. 2009), the Eighth Circuit observed that "[t]he plain language of § 1153 covers any 'Indian' who commits [one of § 1153's enumerated offenses]." The Indictment in that case, which failed to allege that Graham was an Indian, was deficient since Indian status is an essential element of § 1153. *Id.*

*2 The fourteen enumerated crimes of the Major Crimes Act include robbery, the crime charged in Count One, and kidnapping, the crime charged in Count Five. In the instant case, the Indictment does not allege that Royal Brown was an Indian who committed either of those crimes.

Although Indian status is a necessary jurisdictional element of an offense under § 1153, the plaintiff argues this court "has jurisdiction over [Royal] Brown because [Royal] Brown aided and abetted Keenan Brown and Ortega in the commission of the robbery of Hester and the kidnapping of Vega." [Doc. 58, p. 4]. It contends that Royal Brown is properly before this Court as an aider and abettor under 18 U.S.C. § 2(b).

As an initial, somewhat technical matter, the Court notes

that the Indictment does not allege that Royal Brown "aided and abetted" Keenan Brown and Ortega pursuant to 18 U.S.C. § 2(a). Rather, it alleges, pursuant to 18 U.S.C. § 2(b), that Royal Brown "willfully caused" Keenan Brown and Ortega to rob Hester and to kidnap Vega. However, under either theory, aiding and abetting liability or willful causation liability, Section 2 abolishes the common law distinction between a principal and an accessory. Someone who either aids and abets or willfully causes another to commit a crime is as guilty as the principal actor.

But can the plaintiff cure the absence of the necessary "Indian status" jurisdictional element in Counts One and Five by charging Royal Brown pursuant to 18 U.S.C. § 2(b) as one who caused defendants Keenan Brown and Ortega to rob Hester and to kidnap Vega? The parties cite no controlling authority, and this court has found none.[2] However, in *United States v. Graham*, the Eighth Circuit held that "§ 2 does not extend federal jurisdiction to [a non-Indian] accomplice charged under § 1153." 572 F.3d at 957. The court first noted that the Government had cited no authority applying aider-and-abettor liability in the Indian law context, then turned to its previous decision in *United States v. Norquay*, 905 F.2d 1157 (8th Cir. 1990), in which it considered an Indian defendant's argument that, because his non-Indian accomplice could be prosecuted only under Minnesota law, he should be sentenced under Minnesota law to avoid disparate treatment. Norquay, the Indian defendant, had pled guilty to burglary under § 1153, but his non-Indian accomplice was outside the reach of federal jurisdiction under § 1152 because the victim of the burglary was also a non-Indian. The *Graham* court also referenced *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), wherein the court stated "[w]hen the indictment is questioned *prior* to trial, reference to a statute cannot cure a defect in the indictment where it fails to allege the elements of the crime." *Id.* at 1318.[3]

*3 Plaintiff urges the court to give *Graham* short shrift due to "an anemic analysis of 18 U.S.C. § 2" and its analysis of *Norquay*, which was not concerned with 18 U.S.C. §§ 2 and 1153. But the Eighth Circuit's discussion of aider-and-abettor liability, though short, draws attention to the absence of authority applying that liability in the context of the Major Crimes Act, wherein a necessary jurisdictional element is the Indian status of the defendant. Though a defendant can, in other contexts, be convicted as an aider and abetter without proof that he participated in each and every element of the offense, *see United States v. Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987), neither the government in *Graham* nor in this case have pointed to authority applying aider-and-abettor liability in a case where the Indian status of the defendant is a necessary *jurisdictional* element. As for the panel's analysis of *Norquay*, that case involved the alleged accomplice liability of a non-Indian who was outside the reach of federal jurisdiction under 18 U.S.C. § 1152 because the victim was also a non-Indian. By analogy, the circuit panel in *Graham* concluded that accomplice liability under § 2 did not extend federal jurisdiction to an accomplice charged under § 1153. Though two Eighth Circuit judges dissented from the denial of the petition for rehearing *en banc*, the dissenters did not address the jurisdictional nature of the Indian status element contained in § 1153.

This court concludes that here, as in *Graham*, the Indictment fails to allege the necessary "Indian status" jurisdictional element of the two § 1153 claims brought against the non-Indian defendant, Royal Brown. It further concludes that the plaintiff cannot invoke federal jurisdiction against Royal Brown by alleging under 18 U.S.C. § 2 that he caused his Indian co-defendants to commit the § 1153 crimes alleged in Counts One and Five. Finally, it concludes that Count Two must be dismissed as against defendant Royal Brown, as it is explicitly predicated on his commission of the robbery alleged in Count One.[4]

A prudential basis also exists for today's ruling. In the absence of controlling authority on the issue, and in light of the federal government's characterization in *Keeble* of the Major Crimes Act as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land," this court declines to permit the expansion of federal jurisdiction under § 1153 by virtue of a federal prosecutor's use of 18 U.S.C. § 2. Absent approval by the Tenth Circuit, federal prosecutors may not properly indict non-Indian defendants under the Major Crimes Act through the use of accomplice liability under 18 U.S.C. § 2.

WHEREFORE, the Motion of defendant Royal Dale Juan Brown to Dismiss Counts One, Two, and Five [Doc. 49] is granted.

DATED this 5th day of December, 2023.

All Citations

Slip Copy, 2023 WL 8438575

Footnotes

1 The history behind the enactment of the Major Crimes Act is discussed in *Keeble v. United States*, 412 U.S. 205, 209-212 (1973). There, the Government characterized the Act as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." *Id.* at 209.

2 Both parties cite *United States v. Prentiss*, 206 F.3d 960 (10th Cir. 2000), *vacated and remanded to the panel*, 256 F.3d 971, 985 (10th Cir. 2001) (en banc), *conviction vacated*, 273 F.3d 1277 (10th Cir. 2001). In *Prentiss*, the circuit panel ultimately held that, in a prosecution under 18 U.S.C. § 1152 (the "General Crimes Act"), the indictment's failure to allege the status of victims or the defendant as being Indian or not was not harmless. 273 F.3d at 1283. *Prentiss* does not address the issue of whether 18 U.S.C. § 2 extends federal jurisdiction to a non-Indian accomplice charged under § 1153.

3 In *James*, the Indian defendant, who had been convicted of rape in Indian country, argued on appeal that the indictment was defective because it failed to state the jurisdictional fact that he was an Indian. The court of appeals held that the defect was cured at trial by uncontested evidence that the defendant was an enrolled Indian.

4 The docket reveals that on October 27, 2023, the plaintiff sought a Writ of Habeas Corpus ad Prosequendum for defendant Royal Brown, that this Court immediately issued that writ, and that Royal Brown was taken into federal custody on November 2, 2023. However, Royal Brown remains in the primary custody of the State of Oklahoma, as the State previously brought charges against him in Tulsa County District Court Case No. CF-2023-3340 for Robbery with a Firearm in violation of 21 Okla. Stat. § 801 and Conjoint Robbery in violation of 21 Okla. Stat. § 800. The two state criminal charges arise out of the same incidents charged in Counts One and Two of this federal Indictment, and they remain pending.

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