ORIGINAL

No. S-2023-715

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE CITY OF TULSA,

Appellant;

v.

NICHOLAS RYAN O'BRIEN,

Appellee.

AN APPEAL FROM THE MUNICIPAL CRIMINAL COURT OF THE CITY OF TULSA (TULSA COUNTY) CASE NO. 720766 – HON. MITCHELL MCCUNE, MUNICIPAL JUDGE

APPELLEE'S BRIEF

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1. STATEMENT OF THE CASE

On August 31, 2021, the Appellee was charged with various misdemeanor offenses stemming from a traffic stop within Tulsa in the Muscogee Nation. On October 6, 2022, the Appellee filed his first motion to dismiss challenging the basis of the Appellant's jurisdiction over his case. (O.R. 17-18). On January 11, 2022, the trial court denied the Appellee's first motion to dismiss. (O.R. 19-20). The entire basis of this was the Appellant's claim to jurisdiction pursuant to Hooper v. City of Tulsa, 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022) (mem.). The Appellee then filed for an extraordinary writ of prohibition before this Court, which denied the same. *See* O'Brien v. McCune, No. PR-2023-119 (Okla. Crim. App. 2023). On June 28, 2023, the Tenth Circuit Court of Appeals decided the case of Hooper v. City of Tulsa, 71 F.4th 1270 (10th Cir. 2023), *rev'g and vacating as moot* 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022) (mem.), *and stay denied* 143 S. Ct. 2556 (U.S. Aug. 4, 2023) (mem.), which overturned every aspect of the trial court's former claim to jurisdiction via the so-called Curtis Act of June 28, 1898, § 24, 30 Stat. 495. On that same day, the Appellee filed a second motion to dismiss. (O.R. 21-60). On July 26, 2023, a hearing was held on that motion. (O.R. 114-136). The Appellant never filed a written response prior thereto. On Friday, August 11, 2023, the Appellant filed what it claims to be a response raising for the first time the concurrent jurisdiction issue largely relied upon in its brief on appeal. (O.R. 61-109). On Monday, August 14, 2023, the trial court announced outside of court that it would grant the Appellee's second motion to dismiss. On August 17, 2023, the trial court dismissed the case by written order, addressing largely the concurrent jurisdiction claims made by the Appellant for the first time in the purported responsive pleading filed the business day prior to the trial court announcing outside of open court it would be granting the Appellee's second motion to dismiss.

The Appellee believes the Appellant failed to comply with Rule 2.1(B), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024), with regard to the improper commencement of the attempted state appeal without making the proper announcement in open court as provided by the rules;[1] however, the Appellee also believes that issue is most properly raised in a separate motion to dismiss and will make the challenge there in far more detail as procedural challenges do not seem proper in a responsive brief-in-chief since the purpose of such a brief is to answer the propositions of error raised.

2. STATEMENT OF THE FACTS

On August 30, 2021, the Appellee was arrested by a law enforcement officer employed by the Appellant's police department on suspicion of misdemeanor driving under the influence and misdemeanor traffic violations. (O.R. 1-5). The parties stipulated in the case below that the Appellee, a man of some American Indian descent, was a citizen of the Osage Nation, and that the arrest occurred within the Muscogee Nation and the corporate bounds of the City of Tulsa. *See* Br. of the Appellant 4, City of Tulsa v. O'Brien (No. S-2023-715) (Okla. Crim. App. Jan. 11, 2024).

Facts above these from the incident are not particularly relevant on appeal.

3. STANDARD OF REVIEW ON APPEAL

The standard of review of a state district court's rulings involving Indian country jurisdiction is as follows:

"We afford a district court's factual findings that are supported by the record great deference and review those findings for an abuse of discretion. We decide the correctness of

[1] This failure is made clear in the various notices of intent to appeal filed by the Appellant with this Court at the onset of this action. Indeed, in the Appellant's brief in chief, this is referred to as a "telephonic conference." Br. Appellant 3, City of Tulsa v. O'Brien (No. S-2023-715) (Okla. Crim. App. Jan. 11, 2024).

legal conclusions based on those facts without deference." Wadkins v. State, 2022 OK CR 2, ¶ 6, 504 P.3d 605, 608-609 (citing Parker v. State, 2021 OK CR 17, 495 P.3d 653) (internal citations omitted); *see also* Buck v. State, 2023 OK CR 2, ¶ 20.

4. RESPONSE TO PROPOSITIONS OF ERROR AND ARGUMENT

The Appellee responds to the three propositions of error raised by the Appellant in its brief in chief in turn:

A. The trial court correctly dismissed the case based on subject matter jurisdiction.

Under McGirt v. Oklahoma, 140 S. Ct. 2452, 207 L. Ed. 2d 985, 2020 U.S. LEXIS 3554 (2020), state courts lack jurisdiction over criminal prosecutions of American Indians for crimes within the Muscogee Nation. In this case, the Appellant stipulated that the Appellee was an American Indian person and that the alleged criminal misdemeanor offenses transpired within the Muscogee Nation. (O.R. 65). Insofar as the dismissal was the proper remedy under those two facts, the trial court's order of dismissal was not in error. (O.R. 112).

The analysis is quite simple and is properly answered by the above facts. The Appellant's attempt to draw in Deo v. Parish, 2023 OK CR 20, ¶ 9, is simply not relevant to the facts and posture of this case dismissed prior to the Deo decision.

B. The City of Tulsa does not have criminal jurisdiction derived from state jurisdiction.

Although the Appellant failed to raise this argument in the trial court, since it has been raised on appeal and was referenced in the trial court order (O.R. 112), the Appellee will address it. At the end of the day, even if this Court entertains the Appellant's argument premised on Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 213 L. Ed. 2d 847 (2022), the case and argument are inapplicable here because this matter only concerns state municipal criminal jurisdiction over American Indians within Indian country. The scope of municipal criminal

jurisdiction over American Indians in Indian country was not considered in Castro-Huerta, nor was it decided upon:

> All agree that the Federal Government has jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. The question is whether the Federal Government's jurisdiction is exclusive, or whether the State also has concurrent jurisdiction with the Federal Government.
>
> Id. at 2492.

In Castro-Huerta, the Court continually emphasized that it was only considering that question and not state jurisdiction over American Indians. *See generally e.g.*, Id. at 2495 n.2 (noting state authority over American Indians who commit crimes in Indian country was not before the Court); Id. at 2501 n.6 (noting that the Court expresses no views on state authority over American Indian defendant); Id. at 2500 (noting the "narrow jurisdictional issue in this case" did not encompass state jurisdiction over American Indians). Notably, the Court expressly limited its Castro-Huerta holding to the question before it, neither considering nor addressing state jurisdiction over American Indians at all. Id. at 2502. The Court must be taken at its word.

The Appellant's attempted repurposing of the Castro-Huerta analysis in an effort to support otherwise baseless claims to force state criminal jurisdiction over American Indians fails because the Court expressly excluded that issue from the decision. *See* State v. Busby, 2022 OK CR 4, ¶ 10 n. 3, 505 P.3d 932, 935 n. 3 (quoting Brown v. State, 2018 OK CR 3, ¶ 47, 422 P.3d 155, 167) (stating that dicta is "an expression in a court's opinion which goes beyond the facts before the court and is therefore an individual view of the author and is not binding in subsequent cases"). Regardless, as the Supreme Court made clear in Castro-Huerta, "the Court's dicta, even if repeated, does not constitute precedent," Castro-Huerta, 142 S. Ct. at 2498 (citing NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021)), and just as "[d]icta that does

not analyze the relevant statutory provision cannot be said to have resolved the statute's meaning," a decision that expressly disclaims consideration of an issue cannot possibly be said to have resolved that issue. Id. Thus, Castro-Huerta has no effect on municipal jurisdiction in this case, neither with respect to White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980), nor upon any other ground.

Such a conclusion is confirmed when taking into consideration the Castro-Huerta decision itself. In ruling that "[s]tates have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country," Castro-Huerta, 142 S. Ct. at 2494, the Court principally relied on two cases, those being United States v. McBratney, 104 U.S. 621 (1881) and Draper v. United States, 164 U.S. 240 (1896). Castro-Huerta, 142 S. Ct. at 2496, 2497, 2500, 2503. The McBratney case concerned a crime committed "by a white man upon a white man" on an Indian reservation, and in that case the defendant sought to have his federal conviction dismissed on the basis federal courts generally lack jurisdiction over crimes committed by people who are not American Indians against others who are not American Indians, even when on Indian reservations. McBratney, 104 U.S. at 621-622. In McBratney, the Court ruled that admission to the federal union resulted in a state having "criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits," except as otherwise provided by treaty. Id. at 624. In McBratney, the case presented "no question" regarding "the punishment of crimes committed by or against Indians." Id.

In Castro-Huerta, the Court found the Draper case to be an application of what it called the "McBratney principle." Castro-Huerta, 142 S. Ct. at 2494. Draper involved a jurisdictional challenge in federal court by a defendant who was not American Indian accused of committing

an on-reservation crime against another non-American Indian. In Draper, the Court noted that a state acquires jurisdiction over "its own citizens and other white persons" upon admission to statehood and found that "McBratney is . . . decisive of the question now before us, unless the enabling act of the state of Montana contained provisions taking that state out of the general rule." Draper, 164 U.S. at 243. The Court in Draper found that the enabling act creating Montana did not contain such a provision. Id. at 2453. In so holding, the Draper Court stated that it was not deciding any of the questions McBratney reserved. Id. at 247.

In Castro-Huerta, the Court merely extended these principles to uphold state jurisdiction over crimes by those who are not American Indians against those who are, while at the same time denying application of its decision to state jurisdiction over crimes committed by American Indians. Thus, while "[t]he McBratney principle remains good law," the Court in Castro-Huerta only applied it to determine whether the State of Oklahoma could prosecute crimes committed by non-American Indians against American Indians in Indian country. Castro-Huerta, 142 S. Ct. at 2494.

Indeed, Castro-Huerta left untouched the well-settled legal principles that serve to deny jurisdiction to states over crimes by American Indians in Indian country absent express congressional authorization. First, under the Constitution, federal power over Indigenous nations is exclusive. United States v. Lara, 541 U.S. 193, 200 (2004) (stating "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes," which the Supreme Court "ha[s] consistently described as plenary and exclusive"); *accord* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996); Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985). Second, American Indians maintaining tribal relations "were, and always have been, regarded as . . . a separate people, with the power of regulating their internal and social

relations, and thus far not brought under the laws of the Union, or of the state within whose limits they resided." Talton v. Mayes, 163 U.S. 376, 384 (1896) (quoting United States v. Kagama, 118 U.S. 375, 381-382 (1886)). This power unquestionably includes criminal jurisdiction over all American Indians. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 572-573 (1846) (noting that within provisions of the 1834 Nonintercourse Act that exempted American Indian on American Indian crime from federal jurisdiction, Congress "does not speak of members of a tribe, but of the race generally, — of the family of Indians" and "intended to leave" American Indians "as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs"). Congress recognized this when it protected this inherent authority by statute. Pub. L. No. 102-137, 105 Stat. 646 (1991), *codified at* 25 U.S.C. § 1301(2); *see* Lara, 541 U.S. at 200-202 (Congress' plenary power authorizes it to "enact legislation that both restricts and, in turn, relaxes . . . restrictions on tribal sovereign authority"). Third, Indigenous nations "remain 'separate sovereigns pre-existing the Constitution,'" resulting in the settled rule that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (citations omitted).

The decision of whether to grant state jurisdiction over American Indians in Indian country is ultimately a matter for Congress. In that regard, the Supreme Court "has long 'require[d] a clear expression of the intention of Congress' before the state . . . may try Indians for conduct on their lands." McGirt, 140 S. Ct. at 2477 (quoting Ex parte Crow Dog, 109 U.S. 556, 572 (1883)); *see* United States v. Antelope, 430 U.S. 641, 642 n. 1 (1977) (describing statute conferring federal jurisdiction over certain crimes by American Indians in Indian country as an "intrusion of federal power into the otherwise exclusive jurisdiction of the Indian

tribes to punish Indians for crimes committed on Indian land"). This rule is founded upon the principle that state courts "generally have no jurisdiction to try Indians for conduct committed in 'Indian country,'" McGirt, 140 S. Ct. at 2459. "Thus, when a case [is] brought against a tribe or its members arising from conduct in Indian country, state courts lack jurisdiction absent clear congressional authorization." Ute Indian Tribe v. Lawrence, 22 F.4th 892, 900 (10th Cir. 2022) (quoting Navajo Nation v. Dalley, 896 F.3d 1196, 1204 (10th Cir. 2018)); *accord* Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, ¶ 22, 315 P.3d 359, 366.

Castro-Huerta did nothing to unsettle the law such as it applies in barring state criminal jurisdiction over Indians in Indian country. Indeed, the Court relied on McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973), which previously made clear how "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference,'" Id. at 170, and that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." Id. at 170-171. And while McClanahan acknowledged that "the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law," has "undergone considerable evolution in response to changed circumstances," Id. at 171, the case still made clear that the fundamental rule remains unchanged. Specifically, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" Id. at 171-172 (quoting Williams v. Lee, 358 U.S. 217, 219-220 (1959)). McClanahan also made clear that "Congress has now provided a method whereby States may assume jurisdiction over reservation Indians [via Public Law 280]. But the Act expressly provides that the State must act 'with the consent of the tribe occupying the particular

Indian country,' 25 U.S.C. § 1322(a), and must 'appropriately (amend its) constitution or statutes.' 25 U.S.C. § 1324." Id. at 177-178; *see also* Id. at 178 and n. 19. Castro-Huerta did not consider the application of these principles to criminal jurisdiction over Indians in Indian country, nor did it disturb the precedents controlling that question in this case.

In applying these principles, courts have consistently found that the State of Oklahoma lacks authority to prosecute American Indians for their conduct in Indian country. This is because Oklahoma has not followed the process for obtaining such jurisdiction. Such process requires consent of the Indigenous nations as well as an amendment of the state's disclaimer of jurisdiction over American Indians in Article I, Section 3 of the state constitution. Specifically, Public Law 280 sets forth the process by which states may obtain criminal jurisdiction over American Indians in Indian country. States may do so only "with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption." 25 U.S.C. § 1321(a)(1); State v. Klindt, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 402-403; Sheffer, 2013 OK 77, ¶ 22 n. 24. Importantly, "P.L. 280, by defining the limits of the jurisdiction granted 'P.L. 280 states' . . . necessarily preempts and reserves to the Federal government or the tribe jurisdiction not so granted." Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658-659 (9th Cir. 1975) (citing McClanahan, 411 U.S. at 172 n.8 and Kennerly v. Dist. Ct., 400 U.S. 423 (1971) (per curiam)). The State of Oklahoma has yet to obtain the required consent to exercise jurisdiction within Indian country pursuant to Public Law 280 and therefore cannot avail itself of that authority to exercise jurisdiction over American Indians in Indian country.

Indeed, in order to exercise this jurisdiction, the State of Oklahoma must also take affirmative steps to change its own laws. Specifically, under 25 U.S.C. § 1324, state lawmakers

must repeal Article I, Section 3 of the Oklahoma Constitution disclaiming state jurisdiction over Indians in Indian country. Public Law 280 mandates "affirmative action on the part of the state . . . to effectuate the assumption of jurisdiction . . . [and] no one with the right or power to speak for and bind Oklahoma has done so." State v. Burnett, 1983 OK CR 153, ¶ 10, 671 P.2d 1165, 1167-1168, *overruled on other grounds by* Klindt, 1989 OK CR 75 at ¶ 6; *see also* Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 493 (1979) (noting "disclaimer States must still take positive action before Pub.L. 280 jurisdiction can become effective"); *and see* Kennerly, 400 U.S. at 427. This state constitutional barrier remains in place until the state government removes it. Thus, there is no compliance with the strictures of Public Law 280 for state municipal criminal jurisdiction to exist in this matter.

In State v. Littlechief, 1978 OK CR 2, 573 P.2d 263, this Court adopted the conclusion of the United States District Court for the Western District of Oklahoma that this constitutional provision "constitutes . . . a legal impediment" to state assumption of "criminal and civil jurisdiction over 'Indian country,'" and since the State of Oklahoma had yet to amend its constitution in order to remove this clear impediment, state prosecutors lacked jurisdiction to prosecute an American Indian with a crime that was committed on an allotment held in trust. Id. at ¶¶ 2, 5. In Littlechief, the Court concluded that the federal decision was "binding on the State of Oklahoma since it involves the construction and application of Federal Statutes" until such time as "it is overturned by the United States Court of Appeals for the Tenth Circuit or the Supreme Court of the United States." Id. at ¶ 2.

In the subsequent case of C.M.G. v. State, 1979 OK CR 39, ¶ 2, 594 P.2d 798, 799, the Court relied on Littlechief to find that state prosecutors lacked jurisdiction to prosecute a crime committed on the lands of the Chilocco Indian School due to this state constitutional provision.

Id. (stating "[t]o date, the State of Oklahoma had made no attempt to repeal Art. I, § 3, of the Constitution of the State of Oklahoma, which prohibits state jurisdiction over Indian country, so the federal government still has exclusive jurisdiction over Indian country located within Oklahoma boundaries"). Ultimately, the Court concluded that Chilocco was a so-called dependent Indian community and that the lands at issue were therefore Indian country. Id. at ¶¶ 11-12.

In Klindt, this Court concluded that a restricted allotment of a Cherokee citizen constituted Indian country where state prosecutors lacked jurisdiction to prosecute Indians. Id. 1989 OK CR 75 at ¶¶ 2-3. In that case, this Court found it "necessary" for criminal defendants to prove their "status as an Indian under federal Indian law" in order to "claim exemption from prosecution under state law" because "federal jurisdiction over crimes committed in Indian country does not extend to crimes committed by non-Indians against non-Indians," Id. at ¶ 5, and ultimately remanded that particular case for a determination of whether the criminal defendant could establish that he was "an Indian." Id. at ¶ 11.

"[T]he federal government still has exclusive jurisdiction over Indian country located within Oklahoma boundaries" until such time as state officials remove the constitutional impediment to state jurisdiction. C.M.G., 1979 OK CR 39 at ¶ 2 (citing Littlechief, 1978 OK CR 2, 573 P.2d 263); *see also* Indian Country, U.S.A., 829 F.2d at 980 (stating the "[e]ffect of the disclaimer of jurisdiction over Indian land within the borders of these States — in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished"). The law is settled that the State of Oklahoma has failed to comply with these strictures. *See generally* C.M.G., 1979 OK CR 39 at ¶ 2; United States v. Sands, 968 F.2d 1058, 1062 (10th Cir. 1992); Indian Country,

U.S.A., 829 F.2d at 980; Ross v. Neff, 905 F.2d 1349, 1352 (10th Cir. 1990); Seneca-Cayuga Tribe, 1985 OK 54 at ¶ 19; *and* Burnett, 1983 OK CR 153 at ¶ 7. A court cannot simply undo the congressionally prescribed process for state jurisdiction over American Indians in Indian country, because "'[i]t is for Congress to determine when and how'" the State may exercise jurisdiction over Indians in Indian country. C.M.G., 1979 OK CR 39 at ¶ 21 (quoting United States v. Celestine, 215 U.S. 278, 290 (1909)).

Lastly, unless the State of Oklahoma complies with Public Law 280, the first section of the Oklahoma Enabling Act of June 16, 1906, Pub. L. No. 59-234, §§ 1, 34 Stat. 267, serves to bar state jurisdiction due to the fact that the provision expressly preserved federal authority over Indians in Indian country to the exclusion of state criminal jurisdiction. The first section of the law provides:

> [N]othing contained in the constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.
>
> 34 Stat. at 267-268.

Thus, it is patently clear that Congress, by explicitly reserving exclusive jurisdiction in matters of American Indian affairs to the federal government, provided an independent barrier to state jurisdiction over American Indians in Indian country that overcomes any far-reaching interpretation of McBratney and Castro-Huerta. *See generally* The Kansas Indians, 72 U.S. (5 Wall.) 737, 756 (1866) (cited in McBratney, 104 U.S. at 624); *and* McBratney, 104 U.S. at 623-625; *see also* Bd. of Comm'rs v. Seber, 130 F.2d 663, 668 (10th Cir. 1942) ("Aside from the historically paramount power of Congress . . . the State of Oklahoma, has by acceptance of

statehood under Section 1 of the Enabling Act . . . conceded the power and authority of the United States government to make any law or regulation respecting Indians, their lands, property, or other rights by treaties, agreement, law or otherwise.") (citations omitted).

This has been so held by the various applicable precedents. For example, in Mashunkashey v. Mashunkashey, 1942 OK 314, 134 P.2d 976, the Oklahoma Supreme Court explained:

> Prior to statehood, the power of Congress to legislate with respect to the Indians, their lands and property, was plenary. This plenary power was fully preserved to the Congress by the provisions of the Enabling Act and the acceptance of said provisions by the people of this state.
>
> Id. at ¶ 22.[2]

Likewise, the Tenth Circuit has also determined that the 1906 Enabling Act retained this federal supremacy in Indian country to the exclusion of state jurisdiction over American Indian affairs. In Indian Country, U.S.A., the Court concluded that the 1906 Enabling Act's first section is a "general reservation of federal and tribal jurisdiction over 'Indians, their lands, [and] property,'" reasoning that "Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally-owned land base — events that never occurred and goals that Congress later expressly repudiated." Id., 829 F.2d at 979; *see also* Seneca-Cayuga Tribe, 874 F.2d at 712; Sands, 968 F.2d at 1061-1062 (stating that the 1906 Enabling Act "preserved federal authority" and that a state cannot prosecute American Indians for crimes within Indian country). Indeed,

[2] *See also* Molone v. Wamsley, 1921 OK 27, ¶ 1, 195 P. 484, 485; Neal v. Travelers Ins. Co., 1940 OK 314, ¶ 24, 106 P.2d 811, 817.

the Supreme Court recently reaffirmed that the 1906 Enabling Act's "statutory language reserving jurisdiction and control to the United States was meant to preserve federal jurisdiction to the extent that it existed before statehood." Castro-Huerta, 142 S. Ct. at 2504. This alone precludes the Appellant's assertions that it has jurisdiction over the Appellee on a state appeal.

Thus, the Appellant cannot overcome this significant barrier of precedent without doing serious and unwarranted violence to existing and well-settled law. Castro-Huerta did not purport to change any federal precedents, let alone to the drastic extent desired by the Appellant. Put simply, Castro-Huerta does not unsettle this Court's interpretation of the state constitution under existing stare decisis.

Neither is Bracker applicable, nor would that case change the outcome here, even if it were. The Appellee believes that the Appellant waived any such contention by not raising it in the trial court, and that the posture of the case makes it improper to consider application of Bracker, but if the Court should venture to this area, Bracker is inapplicable by its own terms since this case concerns only the conduct of an individual American Indian formerly charged with state misdemeanor crimes allegedly committed within Indian country. Bracker considered only "the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation." Bracker, 448 U.S. at 137, 144; *see also* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 110 (2005) (reaffirming that the balancing test addresses state authority over those who are not American Indians).

Even if Bracker were applied, the settled principles of federal law embraced by state law preempt state jurisdiction over the on-reservation misdemeanor offenses levied against the Appellee here. First, Bracker states the general rule that "[w]hen on-reservation conduct

involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." Id. at 144. McClanahan makes clear that under the general rule, a state has "no choice but to" concede that it "can exercise neither civil nor criminal jurisdiction over reservation Indians" absent compliance with Public Law 280. Id. at 178 and n. 19. The general rule applies here since the State of Oklahoma is not in compliance with this law, making further consideration of Bracker unnecessary. Even if there were further consideration of Bracker, it would only confirm that state authority is preempted as the federal laws discussed earlier in this brief establish. The reasons for this are summarized as follows: Oklahoma lacks authority over American Indians in Indian country because it disclaimed such authority in its constitution, because of the congressionally-required state as a condition of statehood, and because exercise of state jurisdiction over American Indians on the Muscogee Reservation without the consent of that nation as required by Public Law 280 would infringe on Muscogee self-government and deviate from federal law. "[A]gainst these statutory imperatives," the Appellant's assertion of authority is "simply untenable." McClanahan, 411 U.S. at 179; *see also* Id. at 173-179 (finding state jurisdiction preempted in light of treaty, disclaimer provisions of enabling act, federal law exempting Indians in Indian country from provisions giving states authority to tax income in areas under federal authority, and the provision of Public Law 280 regarding repeal of constitutional disclaimer clauses and obtain tribal consent to exercise jurisdiction in Indian country); *and see* Id. at 178, n. 19 (citing Kennerly).

Finally, Bracker also explained the preemption of state law when it "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'" Bracker, 448 U.S. at 142 (quoting Williams, 358 U.S. at 220). That right is understood against

the "important 'backdrop'" of "traditional notions of Indian self-government" that are "deeply engrained in our jurisprudence." Id. at 143 (quoting McClanahan, 411 U.S. at 172); *and see* Id. at 151 (noting "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations," quoting United States v. Mazurie, 419 U.S. 544, 558 (1975)).

Determining whether self-government is infringed is accomplished through a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." Id. at 145. Under this test, the laws governing state authority in Indian country show the Appellant lacks jurisdiction to prosecute the Appellee. The state interest is "minimal" at best, considering "on-reservation conduct involving only Indians is at issue" in this particular case, resulting in the conclusion that "state law is generally inapplicable." Id. at 143-144. Although the Appellant cannot claim to be a proxy of its state due to its status as a municipal political subdivision, even if it could, the State of Oklahoma has disclaimed jurisdiction over Indians in Indian country and has never obtained the Muscogee Nation's consent to jurisdiction under Public Law 280. As a direct result of having disclaimed jurisdiction over matters just like this, both the state and its municipal political subdivisions lack "an applicable regulatory interest." Id. at 144. The balances do not favor the Appellant as they tip strongly against state jurisdiction on account of the well-known principle that Indigenous nations have jurisdiction over American Indians on the reservation in conjunction with the United States government's interest in supporting Indigenous self-government. *See generally* Id. at 143, 151.

Further inquiry, while unnecessary, would require a very particularized inquiry into the Indigenous, state, and federal interests in the Appellee's alleged conduct, which would require

a factual record. *See* Id. at 148 (discussing expenditures and such of a non-American Indian company whose activities were at issue); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 326-329, 338-340 (1983) (applying extensive record regarding hunting and fishing and state and tribal game management to weigh regulatory interests); White Mountain Apache Tribe v. Ariz. Dep't of Game and Fish, 649 F.2d 1274, 1286 (9th Cir. 1981) (remanding for fact-finding for Bracker analysis). There is none available here because the Appellant only asserted jurisdiction under Section 14 of the Curtis Act and the parties did not develop facts to address the questions the Appellant attempted to raise on appeal at the last possible moment without due process. Moreover, in the trial court, the Indigenous governments whose interests are at stake never participated in developing the record at all. That forecloses determinations of fact by this Court, as "[f]actfinding is the basic responsibility of district courts, rather than appellate courts." King v. King, 2005 OK 4, ¶ 12 n. 16, 107 P.3d 570, 586 (Opala, J., dissenting). The process which resulted in this attempted state appeal was devoid of any meaningful opportunity to present evidence and confront and cross-examine witnesses on this issue prior to the dismissal.

Ultimately, the Appellant cannot claim to have jurisdiction to prosecute the Appellee for alleged state misdemeanor crimes within the Muscogee Nation because no such authority exists.

C. The Appellant has no criminal jurisdiction derived from the Curtis Act.

The entire basis of both of the Appellee's two motions to dismiss filed in the trial court centered around the lack of jurisdiction by the Appellant under the Act of June 28, 1898, § 14, 30 Stat. 495. (O.R. 21-60). The case of Hooper v. City of Tulsa, 71 F.4th 1270 (10th Cir. 2023), *rev'g and vacating as moot* 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022) (mem.), *and stay denied* 143 S. Ct. 2556 (U.S. Aug. 4, 2023) (mem.), stands for this proposition and the Appellee

stands on that holding. (O.R. 17-18; 21-60). Insofar as the dismissal order addressed this, it accurately captures the state of the law with regard to this proposition of error by the Appellant. (O.R. 110-113).

Additionally, as argued in the trial court, the Appellee states that Congress never granted criminal subject matter jurisdiction over ordinance violation proceedings to any municipality in the Indian Territory at any time prior to the admission of the State of Oklahoma in the federal union in 1907. Under § 32 of the Act of May 2, 1890, 26 Stat. 81, Congress mandated that "all prosecutions therein [meaning in the Indian Territory] shall run in the name of the 'United States.'" This provision relevant to criminal prosecutions was never repealed prior to the incorporation of the Indian Territory with the Oklahoma Territory and admission of both to statehood as the State of Oklahoma in 1907. Since there existed at the time municipal courts, § 32 divested all of them of criminal jurisdiction over ordinance violations. In fact, the case law — never cited by the Appellant — is well-settled that Congress only conferred civil subject matter jurisdiction over ordinance violation proceedings to municipalities incorporated in the Indian Territory prior to statehood. Fortune v. Incorporated Town of Wilburton, 142 F. 114, 73 C.C.A. 338, 4 L.R.A.N.S. 782, 6 Am.Ann.Cas. 565 (U.S. Cir. Ct. App. 8th Cir. 1905), *aff'g* 1904 IT 21, 82 S.W. 738, 5 Am.Ann.Cas. 287 (U.S. Ct. App. Indian Terr. 1904); Everts v. Town of Bixby, 1909 OK 164, 103 P. 621.

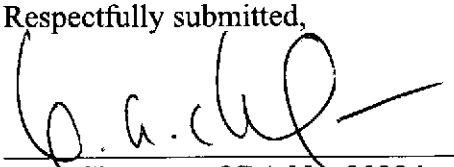
Thus, the Appellant never had authority under the so-called Curtis Act, or any other, to commence post-McGirt ordinance violation proceedings because the moment Oklahoma became a state in 1907, the state government succeeded Congress as the sovereign. City of Sapulpa v. Oklahoma Natural Gas Co., 1920 OK 139, ¶ 19, 192 P. 224, *appeal dismissed for no federal question* 258 U.S. 608, 42 S. Ct. 316, 66 L. Ed. 788 (1922). In 1915, the state

legislature first delegated its criminal subject matter jurisdiction to municipalities. 1915 Okla. Laws 234 (An Act to Regulate Appeals from Judgments of Municipal Courts). Ever since, the state legislature has regulated this limited jurisdiction. At present, the state legislature has not conferred civil subject matter jurisdiction over ordinance violation proceedings to municipal criminal courts, but rather limited criminal jurisdiction. The Appellant's claim to jurisdiction under the Curtis Act has no basis in reality, nor did it ever. In real life, during the entire territorial period (May 2, 1890, to November 16, 1907), every municipality located in the Muscogee Nation, the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Seminole Nation, and the Quapaw Nation lacked an express grant of criminal jurisdiction from their sovereign during the period, the U.S. government.

5. CONCLUSION

In sum, the trial court did not err in dismissing the case. As such, the dismissal should not be overturned or disturbed.

Respectfully submitted,



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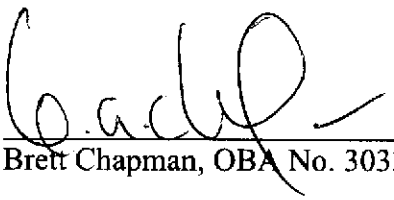
6. CERTIFICATE OF SERVICE

I hereby certify that I delivered an identical copy of this filing on March 11, 2024, via United States mail to the attorney of record for the Appellant, Becky Johnson, at the City of Tulsa's Legal Department located at 175 East Second Street, Suite No. 685, Tulsa, Oklahoma 74103.



Brett Chapman, OBA No. 30334