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 MOTION TO DISMISS FOR LACK OF JURISDICTION

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COUNSEL FOR APPELLEE

COMES NOW the Appellee, by and through his counselor of record, Brett Chapman, and moves this Court to enter an order dismissing this appeal for lacking any jurisdictional basis under 22 O.S.Supp. 2022, § 1053, and the Appellant's noncompliance with § 1051(B) and Rule 2.1, *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024). In support, the Appellee proffers:

1. PROCEDURAL BACKGROUND

1.1. On August 31, 2021, Appellant filed a misdemeanor DUI prosecution. (O.R. 1-5).

1.2. On October 6, 2022, the Appellee filed his first motion to dismiss for lack of subject matter jurisdiction pursuant to McGirt v. Oklahoma, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020). (O.R. 17-18). The record is devoid of a written response because none was filed.

1.3. On January 11, 2023, the trial court held a hearing on that motion to dismiss. (O.R. 169). The controversy turned solely upon the Appellant's jurisdictional claim under the so-called Curtis Act of June 28, 1898, § 14, 30 Stat. 495, 499. The trial court, claiming to be bound by Hooper v City of Tulsa, 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022) (mem.), orally overruled the motion at the hearing in open court. (O.R. 169).

1.4. On January 13, 2023, the trial court filed a written order denying the first motion to dismiss solely by citing to Hooper. (O.R. 19). The Appellee petitioned for a writ of prohibition but was denied on the grounds that "extraordinary relief is not appropriate because the jurisdictional claim can be presented on direct appeal should [he] be convicted." Order Denying Request for Extraordinary Relief 2, O'Brien v. McCune (No. PR-2023-119) (Okla. Crim. App. Mar. 1, 2023).

1.5. On June 28, 2023, after the Tenth Circuit vitiated the entirety of the trial court's denial of the first motion to dismiss, Hooper, 71 F.4th 1270 (10th Cir. 2023), *rev'g and vacating as moot* 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022) (mem.), the Appellee filed a second motion to dismiss. (O.R. 21-60). The trial court set a hearing on July 26, 2023. (O.R. 152).

1.6. On July 24, 2023, two days prior to the hearing, the Appellant filed an emergency application to stay the Tenth Circuit's mandate with the Supreme Court of the United States. Emergency Application for a Stay of Mandate Pending the Filing and Disposition of a Petition for Writ of Certiorari, City of Tulsa v. Hooper, 143 S. Ct. 2556 (No. 23A73) (U.S. Jul. 24, 2023), 2023 WL 4844056. The entirety of the Appellant's application was premised on the § 14 claim. Id. at iii.

1.7. On July 26, 2023, a hearing was held on the Appellee's second motion to dismiss. (O.R. 154). At no time prior thereto did the Appellant file a written response. The Appellee raised his same anti-Curtis Act argument. (O.R. 114-136; Tr. 2:1-21:12). By happenstance, about ninety minutes before the hearing, Justice Neil Gorsuch had entered a temporary week stay in Hooper, just for written responses. Hooper, 2023 WL 4770797 (U.S. Jul. 26, 2023). Despite no Supreme Court stay being filed in the municipal court in this case or any other, the trial court claimed Justice Gorsuch's order was binding, thus postponing dismissal and delaying the case until August 9, 2023.

1.8. On August 4, 2023, the Supreme Court denied the Appellant's emergency application for stay. Hooper, 143 S. Ct. 2556 (U.S. Aug. 4, 2023) (mem.). In so doing, two justices, Brett Kavanaugh and Samuel Alito, appended a statement thereto remarking in dicta about how the state attorney general had filed an amicus brief in Hooper broaching the issue of concurrent jurisdiction under Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 213 L. Ed. 2d 847 (2022). Id.

1.9. On August 9, 2023, the parties appeared before the trial court for the final open court proceeding prior to the entry of the dismissal order. (O.R. 154). The trial court once again balked at dismissing the case *sua sponte* that day, this time due to Justice Kavanaugh's dicta in the order denying the Appellant a stay of the Tenth Circuit's Hooper mandate. In open court, it was decided that the parties could submit authority on the issue of whether a statement was binding.

1.10. On Friday, August 11, 2023, the Appellee filed a two-page notice of authority explaining why Justice Kavanaugh's dicta was not binding authority precluding dismissal on the Curtis Act grounds and Hooper. Exhibit 1. Later that day, an attorney for the Appellant otherwise unassociated with this case signed and filed a behemoth fifty-five-page instrument purporting to be responsive to the Appellee's second motion to dismiss in which the concurrent jurisdiction claim was raised for the first time. (O.R. 61-109). The attorney's certificate of service purports he "e-mailed, mailed, hand-delivered, and/or faxed a full, true and correct copy of the above MOTION on the date of filing to" the Appellee's undersigned counsel. (O.R. 90).

1.11. On Monday, August 14, 2023, the trial court placed an ad hoc telephone call to the undersigned outside of open court. The Appellant's actual trial counsel, Julianne Burton, was also telephonically connected and able to communicate. The spoken words indicated the case was being dismissed on motion of the Court, *i.e.*, under 22 O.S.Supp. 2022, § 815, a fact reflected upon the minutes. (O.R. 155) (reflecting case "DISMISSED MOTION OF THE COURT"). Ms. Burton later averred that she uttered words to the effect of pursuing review on a question reserved by the municipality. Appellant's 2d Am. Notice of Intent to Appeal, Ex. B at ¶ 4, hereinafter "Aff. Julianne Burton."

1.12. On August 17, 2023, the trial court entered an order dismissing the case with costs to the City of Tulsa. (O.R. 113). The order ignored the Appellee's repeated arguments against the Curtis Act claim in favor of dutifully addressing their concurrent jurisdiction claim miraculously conceived one business day earlier in Appellant's capacious fifty-five-page filing. (O.R. 110-113).

1.13. Between August 22, 2023, and August 28, 2023, the Appellant's appellate counsel, Becky Johnson, filed multiple versions of purported notices of intent to appeal. In each, Ms. Johnson staked the Appellant's claim under § 1053(7), a conditional immunity basis not uttered by Ms. Burton below on August 14. Appellant's 2d Am. Notice 2-3.

1.14. On October 3, 2023, Ms. Johnson filed the Appellant's petition in error, reiterating her appellate strategy subordinating § 1053(3) to § 1053(7), Appellant's paramount ground.

1.15. On January 11, 2024, Ms. Johnson filed the Appellant's brief in chief, devoting approximately 93 percent of her argument section to the Castro-Huerta claim. Br. Appellant 7-29.

1.16. On March 11, 2024, the Appellant filed his brief in chief.

2. ARGUMENT AND AUTHORITY

"The right of the state to appeal from any order or judgment of the trial court rests upon statutory authority, which cannot be enlarged by construction." State v. Gray, 1941 OK CR 42, 111 P.2d 514; State v. Shepherd, 1992 OK CR 69, ¶ 9, 840 P.2d 644 ("[T]he State's right to appeal rests on statutory authority that cannot be enlarged by construction."). In 1978, the state legislature authorized municipal political subdivisions operating state municipal criminal courts the limited ability to appeal "upon a question reserved by the state or a municipality." 22 O.S.Supp. 1978, § 1053(3). At present, a prosecutor is limited to seven appealable scenarios under 22 O.S.Supp. 2022, §§ 1053(1)-1053(7), only four of which have potential municipal application — § 1053(1), § 1053(2), § 1053(3) and § 1053(5). Of these, only two are even marginally arguable here: § 1053(1) and § 1053(3).[1] Appeals under § 1053 are to be governed by the same statutes and rules applicable to defendants seeking appellate review. State ex rel. Fallis v. Caldwell, 1972 OK CR 158, ¶ 9, 498 P.2d 426.

[1] This case cannot implicate § 1053(2) as it does not involve a trial court order arresting judgment made after a verdict at trial but prior to judgment and sentence based on a facially defective record, not alleged evidentiary defects at trial. State v. Robinson, 1975 OK CR 237, ¶ 5, 544 P.2d 545, *overruled on other grounds by* State v. Hammond, 1989 OK CR 25, ¶ 9, 775 P.2d 826, *and overruled on other grounds by* State v. Young, 1994 OK CR 25, ¶ 4, 874 P.2d 57. As § 1053(4) "confirms that motions to quash are limited to felony cases," State v. Hudson, 2022 OK CR 28, ¶ 6, 520 P.3d 388, it can never apply to municipalities. § 1053(5) is inapplicable as the trial court suppressed no evidence. § 1053(6) references procedure unique to felonies and can never apply to municipalities. Finally, § 1053(7) cannot apply as it was made to authorize appeals from Stand Your Ground rulings (21 O.S.2021, § 1289.25). State v. Bradford, 2024 OK CR 3, ¶ 1, __ P.3d __ (Lumpkin, J., concurring) (recognizing proper application of the *Rules* "to the statutory procedures contained in . . . § 1053(7), allowing this Court to hear appeals . . . on the issue of statutory 'immunity'").

2.1. No authority exists under § 1053 authorizing consideration of this appeal.

A. Appellant's failure to comply with procedural mandates under Rule 2.1(D).

In 1970, the state legislature delegated power to the Court to make rules having statutory effect. 22 O.S.Supp. 1970, § 1051(B). Rule 2.1(D) governs the initiation of state appeals and mandates, *inter alia*, that "[i]n appeals pursuant to 22 O.S. § 1053, the State *must* give notice *in open court* of the intent to appeal." Id. (emphasis added). The use of the word "shall" throughout the *Rules* is "unambiguously a mandatory directive." Anderson v. State, 2018 OK CR 13, ¶ 3, 422 P.3d 765; Kingdomware Technologies, Inc. v. United States, 579 U.S. 162, 171, 136 S. Ct. 1969 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement," synonymous and interchangeable with "must.").

The ordinary meaning of "open court" is one "which has been formally convened and declared open for the transaction of its proper judicial business . . . freely open to spectators." *Open Court, Black's Law Dictionary* (11th ed. 2019). The Appellee maintains that "in open court," as used in the *Rules*, reaches up to the level of a "public trial," which is guaranteed by the Constitution. A "public" court session is also "open" and is therefore a "public trial." *Public Trial, Black's Law Dictionary* (11th ed. 2019) ("A trial held in public, in the presence of the public, or in a place accessible and open to the attendance of the public at large."); Press-Enterprise Co. v. Superior Ct. of Cal., 478 U.S. 1, 6, 106 S. Ct. 2735 (1986) (ruling that the constitutional right to an open, public trial is one shared by the accused and the public and this right to access attaches to pretrial proceedings). At a minimum, "in open court" must mean all parties within an "open court room" in the physical sense, *see* Shepherd, 1992 OK CR 69 at ¶ 9, which did not occur herein as established simply by the face of the trial court's own description of this exchange of words

using "telephonic," the adjectival form of "telephony" which means "transmitting speech at a distance,"[2] somewhere away from the open court.

The analysis ends here as this Court's "judicial task is to effectuate the statute as written." State v. Cook, 1983 OK CR 59, ¶ 6, 663 P.2d 20. Since this Court was granted power to make its own court rules having statutory force, the ordinary rules of construction apply to analyzing revisions to individual rules. Two months after the out of court call of August 14, this Court made significant changes to Rule 2.1. *See* In re Rev. of Portion of the Rules, 2023 OK CR 16 (effective Nov. 7, 2023). In so doing, the Court not only elected against removing or otherwise altering the "in open court" mandate under Rule 2.1(D) but inserted *more* instances of the mandate in the same subsection. Due to the Court's recent reaffirmation that it is neither wise nor desirable to relax the statutory "in open court" mandate in tandem with the clear commitment to the propriety of that mandate, this appeal must be dismissed for want of jurisdiction. The Court cannot create an absurdity by enlarging the meaning of words to enlarge § 1053 by construction.

B. The trial court's failure to enter an appealable order under § 1053(3).[3]

As noted, Ms. Johnson chose to subordinate § 1053(3) to § 1053(7), claiming the trial court order found the Appellee "was immune from or not subject to criminal prosecution within the City of Tulsa" and "mov[ing] this Honorable Court to reverse the order . . . and to remand . . . ." for continued prosecution. Pet. in Error 2. In equating the operative effect of a trial court McGirt dismissal order with an order granting immunity from prosecution forever, Ms. Johnson failed to properly interpret the limited scope of § 1053(7) which can only apply to Stand Your Ground claims of statutory conditional immunity. § 1053(7) is not a serious claim, nor is § 1053(3) proper

[2] *Telephony*, *Wolfram|Alpha*, https://www.wolframalpha.com/input?i=word+telephony (accessed Mar. 22, 2024).
[3] Should the Court find merit in the foregoing Rule 2.1 argument, the Appellee strongly prefers that the argument raised hereunder be dispositive of the motion as if it were initially set out under the claim heading.

because the trial court order never expressly barred further prosecution. *See e.g.* State v. Tubby, 2016 OK CR 17, ¶ 2, 387 P.3d 918. This waiver of § 1053(1) must be respected because, as shown below, Ms. Johnson's failure to recognize the importance of this decision has great consequences.

In State v. Ward, 2022 OK CR 16, 516 P.3d 261, the Court triumphantly hauled a felony McGirt dismissal where the only American Indian involved was a witness back into state court after Castro-Huerta. The Court reached that end by means of judicially selecting the § 1053 ground on behalf of the appellant. During Ward's pendency, the Court entered an order "finding the [trial court] order was at least appealable as a reserved question of law under § 1053(3)." Id. at ¶ 2. In the decision, however, the Court selected § 1053(1) on the appellant's behalf, saying that the dismissal order was a judgment quashing or setting aside the information based on victim identity. The Court offered no explanation on § 1053(3)'s applicability, simply declaring that it is. The difference is crucial. § 1053(1) was chosen since "[t]he effect of sustaining a motion to quash is to eradicate the information and to leave the case in the same posture as it was before any information was filed," State v. Little Raven, 1975 OK CR 126, ¶ 1, 537 P.2d 446, 453 (Brett, P.J., specially concurring), meaning cases can be refiled under § 501. Thus, McGirt dismissal orders in like cases are no bar to further prosecution for the same offense once vacated. Ward, 2022 OK CR 16 at ¶ 6 (citing State v. Durham, 1976 OK CR 20, ¶ 19, 545 P.2d 805, *overruled in part by* Hammond, 1989 OK CR 25 at ¶ 6). Durham reveals that § 1053(3), taken pure, forever discharges appellees:

> This appeal is one under subparagraph 1 of 22 O.S. 1971, § 1053, upon judgment for the defendant on quashing or setting aside an information as opposed to . . . a question reserved by the State, and this Court desires to set at rest once and for all, whether the said case [viz., via § 1053(1)] may proceed to trial *or must the defendant be forever discharged as held by this Court many times in construing subparagraph 3 dealing with a question reserved by the State.*
>
> Durham, 1976 OK CR 20 at ¶ 19 (emphasis added).

At the other end of the spectrum is Ward, implicitly guaranteeing prosecutors can appeal McGirt dismissals under § 1053(3) then proceed to trial on remand upon this Court whitewashing an accused's American Indian status, Ward, 2022 OK CR 16 at ¶ 3, all while failing to distinguish between dismissal orders where the only American Indian involved is not a witness-victim, but the accused, and ignoring misdemeanor limitations. *See* Young, 1994 OK CR 25 at ¶¶ 3-4 (Lumpkin, P.J., specially concurring). Ward is inapposite and must be overruled to the extent it conflicts with the pure application of § 1053(3)'s discharge rule precluding further prosecution.[4]

[4] The discharge rule appears to derive from State v. Brown, 1912 OK CR 371, 126 P. 245, holding that the original statute (later becoming § 1053(3)) gives prosecutors the right to preserve any question arising at trial and seek review after acquittal of the accused. The rule developed and was often affirmed prior to judicial reform in 1969, and has continued to be reaffirmed since the creation of both the *Rules* and municipal amendments to § 1053(3) in the 1970's. *See e.g.* State v. Smith, 1925 OK CR 227, 235 P. 273; Gray, 1941 OK CR 42, 111 P.2d 514, 521 (holding prosecutors can only bring up the "question reserved and the judgment of acquittal, and if such question of law is decided in favor of the state, it simply settles a question of law, and does not affect the verdict of acquittal"); Robinson, 1975 OK CR 237 at ¶ 5, *overruled on other grounds by* Hammond, 1989 OK CR 25 at ¶ 9, *and overruled on other grounds by* Young, 1994 OK CR 25 at ¶ 4 ("We have examined every decision of this Court and are of the opinion that in order to appeal on a reserved question of law, the appeal must be taken from a judgment of acquittal . . . or from an order . . . which expressly bars further prosecution."); State v. Conaughty, 1975 OK CR 239, ¶ 2, 544 P.2d 553 ("If the State wishes to appeal on a reserved question of law under . . . § 1053(3), they should proceed to trial . . . and if the appellee is acquitted, the State may appeal[.]"); State v. Lemmon, 1978 OK CR 10, ¶ 5, 574 P.2d 1057 (finding no § 1053(3) jurisdiction where no absolute bar exists); State v. Cook, 1978 OK CR 15, 574 P.2d 1073 (deciding proper § 1053(3) appeal following acquittal); Matter of R.G.M., 1978 OK CR 28, ¶ 7, 575 P.2d 645 (finding § 1053(3) appeals "may only be taken from an acquittal . . . or from an order . . . which expressly bars further prosecution"); City of Tulsa v. Ellicott, 1981 OK CR 141, ¶ 3, 636 P.2d 377, *overruled on other grounds by* Young, 1994 OK CR 25 at ¶ 4 (finding "§ 1053 permits an appeal on a reserved question of law following an order . . . which bars further prosecution"); State v. Ogden, 1981 OK CR 57, ¶ 3, 628 P.2d 1167, *overruled on other grounds by* Hammond, 1989 OK CR 25 at ¶ 6, *and overruled on other grounds by* Young, 1994 OK CR 25 at ¶ 4 (reaffirming § 1053(3) procedure as only applying to review following judgment of acquittal or trial court order expressly barring further prosecution); State v. McBlair, 1983 OK CR 144, ¶ 1, 670 P.2d 606 (deciding proper § 1053(3) appeal brought after acquittal); State v. Booze, 1984 OK CR 75, 684 P.2d 1206 (mem.) (deciding proper § 1053(3) appeal made where appellee was not retried despite erroneous directed verdict); Shepherd, 1992 OK CR 69 at ¶ 9 (finding under § 1053(3) "questions were not properly reserved for appeal because they were not reserved by the State *at trial*") (emphasis added); State v. Polk, 1997 OK CR 34, ¶ 1, 941 P.2d 525 (deciding § 1053(3) appeal properly made after lower court sustained demur at trial); State v. Tolle, 1997 OK CR 52, ¶ 3, 945 P.2d 503 (*see* Polk); State v. Campbell, 1998 OK CR 38, ¶ 8, 965 P.2d 991 (reaffirming "[t]o pursue such an appeal [§ 1053(3)], there must be a judgment of acquittal or an order . . . which expressly bars further prosecution"); State v. Gaytan, 1998 OK CR 71, ¶ 1, 972 P.2d 356 (deciding § 1053(3) appeal properly made after an acquittal); State v. Paul, 2003 OK CR 1, ¶ 1, 62 P.3d 389 (deciding § 1053(3) appeal properly made where jeopardy had attached prior to trial court order suppressing evidence at trial); City of Norman v. Taylor, 2008 OK CR 22, ¶ 8, 189 P.3d 22 (deciding § 1053(3) appeal properly brought after lower court expressly barred future prosecution in municipal case involving preemption — circumstances quite similar to this case (citing with approval State v. Love, 2004 OK CR 11, ¶ 1 n. 1, 85 P.3d 849, quoting Campbell, 1998 OK CR 38 at ¶ 8)); Tubby, 2016 OK CR 17, ¶ 2, 387 P.3d 918 (reaffirming express bar rule in § 1053(3) appeal properly brought post-acquittal (citing Campbell, 1998 OK CR 38 at ¶ 8)).

Any prior decisions construing § 1053(3) to permit remand and refile of a previously discharged appellee upon answering a question reserved, should there be any, were wrongly decided and must be overruled to the extent they conflict with the forever discharge rule.

"In determining whether § 1053 affords the State an appeal, we review the nature of the judgment or order below to ascertain if it falls within § 1053's jurisdictional limits." State v. Gilchrist, 2017 OK CR 25, ¶ 10, 422 P.3d 182 (citing Campbell, 1998 OK CR 38 at ¶ 7). "Specifically, we review the substance of the relief requested regardless of the title affixed to the motion or pleading." Id. (internal citations omitted).

An examination of the legal underpinnings of the Appellee's request in the McGirt motions establishes that an American Indian person sought to be discharged from being held to answer for state misdemeanor offenses allegedly committed in Indian country where state trial courts lack jurisdiction. The substance of the relief requested by the Appellee in both was discharge from the trial court's imposition of state jurisdiction without authority of law solely under the baseless Curtis Act claim as set out in the Hooper memorandum order. Unlike Ward, the relief requested by the Appellee precludes any possibility that the trial court order fulfilled a non-existent request to quash and set aside the information as the order did not set aside the information for defects in the proceedings leading up to the filings, nor did the Appellee ever claim evidentiary insufficiencies. The nature of the trial court's second order is inextricable from that of the preceding order forcing state jurisdiction over the Appellee without authority of law via the Curtis Act. The nature of the order is manifested upon examination of the August 14 court minute: the trial court dismissed the case *sua sponte* and entered case "DISMISSED MOTION OF THE COURT" on the minutes. (O.R. 155). This implicates § 815, which authorizes further prosecution at any time should the Appellant

unilaterally choose to refile the same charges. Thus, § 1053(3) cannot apply because a dismissal of this nature is not a bar to further prosecution under § 817. Tubby, 2016 OK CR 17 at ¶ 2.

Even assuming, *arguendo*, the order is not construed as a *sua sponte* dismissal, § 1053(3) is still precluded because of the lengths to which the trial court went to avoid expressly disclaiming prospective reacquisition of jurisdiction over the same charge in a subsequent prosecution. (O.R. 113) ("While subject matter jurisdiction *could change in the future*, this Court must follow the law that is in place *at this time*.") (emphasis added).[5] The language of the order, far from expressly barring further prosecution, is so expressly conditional in nature that it provides no finality. Indeed, the trial court never exonerated the bond in the order, or even at all; a fact established in the petition in error filed long after the purported dismissal: "Appellee is out of custody with total bond set in the amount of $1,450." Pet. in Error 2 at ¶ V. In denying the Appellee a full discharge under § 499, the trial court has denied him operation of the judgment in violation of § 1056, granting him nothing but uncertainty and a clouded title to a useless piece of paper. *See* Gray, 111 P.2d at 514.

3. CONCLUSION

Should this Court ignore the foregoing just so it can reach the merits of the concurrent jurisdiction claim, it would give lie to the Court's recent claim that no anti-McGirt "base revolution [is] afoot." State v. Fuller, 2024 OK CR 4, ¶ 18, ___ P.3d ___.

WHEREFORE, the Appellee prays for an Order dismissing this moribund state appeal through means of a published decision clarifying the proper procedural basis of § 1053 appeals in McGirt cases and overruling Ward in the manner requested, supra, at § 2.1(B), and any other relief to which the Court deems the Appellee is entitled.

[5] *See also* Aff. Julianne Burton ¶ 4 ("The Judge indicated it was his belief that the municipal court did not have jurisdiction over the cases, *but that could change in a heartbeat*.") (emphasis added); *contra* State ex rel. Fallis v. Patton, 1981 OK CR 162, ¶ 2, 637 P.2d 1266; Robinson, 1975 OK CR 237 at ¶ 5.

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4. CERTIFICATE OF SERVICE

I, Brett Chapman, certify that on March 22, 2024, the date of filing, I deposited an envelope containing one filed copy of the same in the United States mail, with first-class postage prepaid, and properly addressed to Becky Johnson, Appellant's counsel of record, at the City of Tulsa's Legal Department, 175 E. Second St., Suite No. 685, Tulsa, Oklahoma 74103-3205. *See* USPS No. 9589071052700698787167.

I also sent copies in a like manner to the counsel for the prospective amicus curiae parties:

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IN THE MUNICIPAL CRIMINAL COURT OF RECORD OF THE CITY OF TULSA
TULSA COUNTY, THE STATE OF OKLAHOMA

THE CITY OF TULSA,	)	
	)	
Plaintiff;	)	
	)	
v.	)	Case No. 720766
	)	720766A
NICHOLAS RYAN O'BRIEN,	)	720766B
	)	720766C
Defendant.	)	720766D

DEFENDANT'S AUTHORITY ON THE ISSUE OF THE DENIAL OF APPLICATION FOR STAY

COMES NOW Brett Chapman, the counselor of record for Nicholas Ryan O'Brien in this matter and notifies this Court of the lack of authority that a statement attached to a denial of an application for a stay is binding.

"The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." United States v. Carver, 260 U.S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361 (1923); *see also* Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

As an initial matter, decisions by either a single Justice or the full Court to deny a stay application cannot have any precedential or binding effect. A denial of a stay is not a decision on the merits of the underlying legal issues. The statement is attached to a denial of an application for a stay. It is not even an in-chambers opinion, which themselves are not binding just like denials of writs.

Given that the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case," and that "opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits," Teague v. Lane, 489 U.S. 288, 296, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (quoting United States v. Carver, 260 U.S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361 (1923)), the

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same is true to the non-binding effect of a statement attached to a denial for stay. And, if the denial of a writ of certiorari has zero legal value, an opinion expressing an agreement or disagreement with the denial of certiorari (or stay) is worth less than zero. *See generally* Singleton v. Commissioner, 439 U.S. 940, 944-46, 99 S. Ct. 335, 58 L. Ed. 2d 335 (1978) (writing separately about a denied writ of certiorari, Justice Stevens explained "why [he has] resisted the temptation to publish opinions dissenting from denials of certiorari," noting that "if there was no need to explain the Court's action in denying the writ, there was even less reason for individual expressions of opinion about why certiorari should have been granted in particular cases").

"Needless to say, only this Court may overrule one of its precedents." Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983).

The idea that one justice's statement attached to a **denial** is somehow binding is simply not true. The Court's prior order denying O'Brien's first motion to dismiss for lack of subject matter jurisdiction by citing Hooper v. City of Tulsa, 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022) (mem.) is simply not valid and must be vacated and the case dismissed. *See* Hooper v. City of Tulsa, 71 F.4th 1270 (10th Cir. Jun. 28, 2023), *rev'g and vacating as moot* 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022) (mem.), and stay denied 2023 WL 4990789 (U.S. Aug. 4, 2023).

Respectfully submitted,

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