ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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

REPLY BRIEF OF THE APPELLANT

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A. COURTS MUST UNDERGO *BRACKER* BALANCING TO DETERMINE IF CITY JURISDICTION IS PREEMPTED.

Castro-Huerta 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." *Oklahoma v. Castro-Huerta*, 597 U.S. ---, 142 S. Ct. 2486, 2504 (2022) ("*Castro-Huerta*"). Although *Castro-Huerta* analyzed preemption over a case with a non-Indian defendant, the Court required *Bracker* balancing for jurisdiction over criminal cases involving an Indian victim, *Id.* at 2500-01, in what appears to be the first time the Court applied the test in a criminal case. As for this Court's cases discussing *Castro-Huerta*'s applicability to Indian defendants, Appellee calls the *Deo* decision irrelevant, Appellee Br. at 3[1], and, even though the case issued before Appellee's brief was filed, Appellee does not mention *State v. Fuller*, 2024 OK CR 4, ---P.3d--- (Okla. Crim. App. 2024). *Fuller* involved State prosecution of an Indian on an Indian reservation for a DUI. *Id.* at ¶ 2. This Court limited its holding to the reservation question but took the "opportunity to reiterate that in cases involving offenses falling under the General Crimes Act ... the jurisdictional analysis does not end upon the finding that a crime was committed in Indian country." *Id.* at ¶ 6, 14. Here, the municipal court did just that and refused to analyze jurisdictional preemption over an Indian offender using *Bracker* balancing. (O.R. 112.) The *Fuller* opinion analyzed *Castro-Huerta* noting the case:

> held that neither the General Crimes Act nor Public Law 280, 67 Stat. 588, preempts the State's prosecutorial authority over crimes committed in Indian country. To determine whether preemption nevertheless occurs, it is incumbent upon a reviewing court to apply the *Bracker* balancing test ....

Id. at ¶ 14. The Court stated, "the Supreme Court held that the General Crimes Act, by its very

[1] Although MCN has filed a motion for permission to file an amicus brief, the brief has not been accepted by the Court as of the date of printing this brief. The City responds only to Appellee's Brief in Chief as required by this Court's rules. Rules of the Court of Criminal Appeals, Rule 3.4(F)(1) (2024).

text, does not preempt state jurisdiction in any case and that any such preemption comes about as a result of the so-called *Bracker* balancing test." *Id.* ¶ 19. Thus, this Court requires application of *Bracker* balancing to determine if City/State jurisdiction exists over Indian defendants.

B. APPELLEE INCORRECTLY ASSERTS THE CITY/STATE CANNOT HAVE JURISDICTION EXCEPT WHEN EXPRESSLY AUTHORIZED BY CONGRESS

Appellee argues the City/State cannot exercise criminal jurisdiction on Indian Country unless expressly authorized by Congress. Appellee Br. at 6-8. The same argument was made by the *Castro-Huerta* dissent and rejected by the majority which stated:

> [U]nder the Constitution and this Court's precedents, the default is that States may exercise criminal jurisdiction within their territory. See Amdt. 10. States do not need a permission slip from Congress to exercise their sovereign authority. In other words, the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is *preempted*. In the dissent's view, by contrast, the default is that States do *not* have criminal jurisdiction in Indian country unless Congress specifically *provides* it. The dissent's view is inconsistent with the Constitution's structure, the States' inherent sovereignty, and the Court's precedents.

597 U.S. at 653. Appellee argues this presumption exists only in cases with a non-Indian defendant, and that the presumption goes the opposite direction with an Indian defendant. Yet that argument ignores the text of *Castro-Huerta* and ignores the fact that that case did involve an Indian. The State/City have jurisdiction under the State's inherent sovereignty because criminal law enforcement is an area "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564, 115 S. Ct. 1624, 1632 (1995). Although the Constitution's so-called "Indian Commerce Clause" grants Congress power over Indians, U.S. Const. Art. I, § 8, cl. 3, the Supreme Court recognizes this power to be one to legislate regarding Indian affairs and that while "well established and broad," the power is not absolute, nor does it give Congress "a series of blank checks." *Haaland v. Brackeen*, 599 U.S. 255, 275-76, 143 S. Ct. 1609, 1628-29 (2023). The clause does not operate as an absolute reservation of federal power over Indians in all situations, and there

is no showing of a federal statute preempting State/City jurisdiction here. Appellee gives no explanation for how a State's prosecution of cases involving Indian victims should be treated differently than prosecutions of Indian offenders—both types of cases involve Indians so the argument that "States have no jurisdiction over Indians" cannot stand in light of *Castro-Huerta*.

C. PUBLIC LAW 280 DOES NOT BAR STATE/CITY JURISDICTION.

Appellee argues Public Law 280 prohibits State/City jurisdiction over Indian Country within the City limits. Appellee Br. at 7, 9, 12. *See*, 25 U.S.C. §§ 1321, 1322, 1326; Public Law 280, Act of August 15, 1953, Ch. 505, 67 Stat. 588, amended by Public Law 90-284, Act of April 11, 1968, 82 Stat. 80 ("PL280"). The original criminal section named six states as having exclusive criminal jurisdiction over Indian Country, 18 U.S.C.A. § 1162(a), while later enactments referred to "any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State ...." 25 U.S.C.A. § 1321 (1968). The law does not say that States do not have jurisdiction over Indian crimes. In his arguments, Appellee neglects to mention that this Court reads *Castro-Huerta* as holding PL280 is not a bar to State, and therefore municipal, prosecution. *Fuller* at ¶¶ 14-15. Further, PL280 cannot logically be a bar to State/City jurisdiction over Indian offenders if it is not a bar to State/City jurisdiction over Indian victims, as held by *Castro-Huerta*, since both are referenced in the plain language of PL280.

> The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume ... such measure of jurisdiction over any or all of such offenses committed within such Indian country ... to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country ... as they have elsewhere within that State.

25 U.S.C.A. § 1321(a)(1) (emphasis added). The *Castro-Huerta* defendant argued that PL280 barred Oklahoma jurisdiction because his offense was "against Indians" as addressed in the

language above, but the Court rejected this argument. 597 U.S. at 2499. The Court found PL280 does not preempt "preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in Indian Country." *Id.* The Court did not limit this particular statement to non-Indian defendant cases, and the Court has previously recognized States' historical inherent sovereignty over criminal law enforcement. *See supra* at 2. The *Castro-Huerta* defendant also argued that PL280 would be surplusage[2] and unnecessary if Oklahoma already had jurisdiction in Indian Country, and the Court rejected this argument as well. *Id.* at 2500. The Court addressed Indian offenders in its discussion, stating:

> Absent Public Law 280, state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government. ... So our resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280 in affording States broad criminal jurisdiction over other crimes committed in Indian country, such as crimes committed by Indians.

597 U.S. at 649, 142 S. Ct. at 2500 (internal citations omitted; emphasis added). Thus, the Court did not hold that PL280 prohibits Oklahoma jurisdiction over Indians but found that in non-PL280 states, courts must undergo *Bracker* balancing preemption analysis to determine if the exercise of jurisdiction "could implicate[] principles of tribal self-government." *Id.* Notably though, PL280 does not prohibit States from exercising jurisdiction in Indian Country, nor does it address whether a State has jurisdiction under its inherent sovereignty.

Castro-Huerta's holding that PL280 does not bar State jurisdiction over a crime committed against an Indian, 597 U.S. at 629, is significant because the exact same language in PL280 referring to crimes committed against an Indian also refers to crimes committed by an Indian. The

[2] PL280's language is not surplusage in Oklahoma's situation. Even if this Court finds the State/City have concurrent jurisdiction, such State/City jurisdiction would not cover all cases. PL280 jurisdiction would still be required for the State/City to have jurisdiction over Indian offenses on trust or restricted land or when the crime committed by an Indian is specified under the Major Crimes Act as held in *McGirt*.

same language cannot possibly operate as a bar to State jurisdiction over crimes committed by an Indian if it does not bar State jurisdiction over crimes committed against an Indian as held by *Castro-Huerta*. Again, "the default is that States may exercise criminal jurisdiction within their territory." 597 at 653. *See also*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214–15, 107 S. Ct. 1083, 1091(1987) (overruled on other grounds) ("Our cases, however, have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent.").

D. THE OKLAHOMA CONSTITUTION DOES NOT PRECLUDE EXERCISE OF MUNICIPAL/STATE JURISDICTION.

Appellee argues part of the Oklahoma Constitution must be repealed before the State can exercise jurisdiction over Indians. Appellee Br. at 9-11. However, Indian lands addressed in the Constitution are not the same as those in the "Indian Country" statute which includes fee lands within the reservation boundaries, 18 U.S.C.A. § 1151 (1948). The pertinent section disclaims:

> all right and title in or to ... all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

Okla. Const. art. I, § 3 (1907) (emphasis added). This language disclaims only lands where the title remains in the United States, or, in modern terms, is held in trust or restricted status, and does not include those lands held in fee within a reservation boundary as contemplated by the Indian Country statute as are the lands where the case at bar occurred. This language cannot be read to mean that when Indian title no longer exists, jurisdiction goes to the Tribes rather than the State; such a reading makes no sense. Although some cases cited by Appellee use "Indian Country" to explain why Article I, § 3 precludes State jurisdiction, the framers of the Oklahoma Constitution could not have intended to include all those lands included in the statutory definition of "Indian

Country," such as any fee land within a reservation boundary, because that definition did not exist until 1948 while Article 1, § 3 went into effect in 1907. Appellee cites cases finding § 3 precludes jurisdiction over "Indian Country," but these cases are not on point because they involve either Major Crimes Act crimes or, more importantly, involve land held in trust or restricted status, land and cases over which the City does not argue it has jurisdiction. See Appellee Br. at 9-12[3].

E. THE OKLAHOMA ENABLING ACT DOES NOT PRECLUDE JURISDICTION.

Appellee argues that the Oklahoma Enabling Act, Public Law 59-234, Act of June 16, 1906, ch. 3335, 34 Stat. 267, makes it "patently clear that Congress" reserved exclusive jurisdiction over "Indian affairs to the federal government" thereby preventing the City's prosecution of Indians. Appellee Br. at 12-13. Again, this argument ignores the language of the majority opinion in *Castro-Huerta*. The high Court addressed the Oklahoma Enabling Act and found it does not contain language that removed Oklahoma's jurisdiction over Indian Country:

> As this Court has previously concluded, "admission of a State into the Union" "necessarily repeals the provisions of any prior statute, or of any existing treaty" that is inconsistent with the State's exercise of criminal jurisdiction "throughout the whole of the territory within its limits," including Indian country, unless the enabling act says otherwise "by express words." ... The Oklahoma Enabling Act contains no such express exception. Therefore, at least since Oklahoma's statehood in the early 1900s, Indian country has been part of the territory of Oklahoma.

597 U.S. at 654, 142 S. Ct. at 2503 (internal citations omitted, emphasis added). Appellee goes on to assert that the *Castro-Huerta* Court "reaffirmed that the 1906 Enabling Act's 'statutory language

[3] *State v. Littlechief*, 1978 OK CR 2, ¶ 2, 573 P.2d 263, 264 (Murder 2); *State v. Klindt*, 1989 OK CR 75, ¶ 2, 782 P.2d 401, 402 (assault and battery with a dangerous weapon); *State v. Burnett*, 1983 OK CR 153, ¶ 11, 671 P.2d 1165, 1168, *overruled by State v. Klindt*, 1989 OK CR 75, ¶ 11, 782 P.2d 401 (Murder on restricted Indian allotment); *C. M. G. v. State*, 1979 OK CR 39, ¶ 15, 594 P.2d 798, 802 (land held in trust by United States for Indian school); *Indian Country, U.S.A., Inc. v. State of Okla. ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 979 (10th Cir. 1987) (unallotted lands held by United States for Creek Nation); *United States v. Sands*, 968 F.2d 1058, 1060 (10th Cir. 1992) (murder on restricted allotment); *Ross v. Neff*, 905 F.2d 1349, 1351 (10th Cir. 1990) (land held in trust by United States for Cherokee Nation); *State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 1985 OK 54, ¶ 10, 711 P.2d 77, 82, disapproved in later proceedings sub nom. *Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) (land held in trust by United States for tribes).

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. Sct. at 2504." Appellee Br. at 13-14. However, Appellee took this quote out of context and omitted a clause at the end of the sentence which specifically contradicts his theory that the federal government has exclusive authority over Indian Country. That part of the *Castro-Huerta* opinion addresses arguments by the dissent that are consistent with Appellee's argument, and the majority disagreed that the Oklahoma Enabling Act destroys Oklahoma jurisdiction over Indian Country. The misquoted section states:

> The dissent responds that the language of the 1906 statute enabling Oklahoma's statehood itself established a jurisdictional division between the State and Indian country. ... That argument is mistaken. This Court long ago explained that interpreting a statehood act to divest a State of jurisdiction over Indian country "wholly situated within [its] geographical boundaries" would undermine "the very nature of the equality conferred on the State by virtue of its admission into the Union." ... So the Court requires clear statutory language "to create an exception" to that "rule." ... To reiterate, the Oklahoma Enabling Act contains no such clear language. Indeed, the Court has interpreted similar statutory language in other state enabling acts not to displace state jurisdiction. ... In *Organized Village of Kake*, the Court specifically addressed several state enabling acts, including the Oklahoma Enabling Act, and stated that statutory language reserving jurisdiction and control to the United States was meant to preserve federal jurisdiction to the extent that it existed before statehood, not to make federal jurisdiction exclusive.[9]

597 U.S. at 654–55, 142 S. Ct. at 2503–04 (emphasis added to terms omitted by Appellee).

F. NO EVIDENTIARY HEARING ON *BRACKER* BALANCING IS NECESSARY.

Appellee argues *Bracker* balancing is inapplicable, would not change the outcome of the case, and that an evidentiary hearing on the interests must occur. Appellee at 14, 16-17. Appellee also inexplicably argues the City did not raise *Bracker* balancing in the trial court. *Id.* However, the City raised the issue in briefing and filed an affidavit regarding some of the City's interests. (O.R. 65-82, 98-109.) The Supreme Court applied *Bracker* balancing without an evidentiary hearing in *Castro-Huerta* thus invalidating the argument that a hearing is required. 597 U.S. at

650. Although the *Castro-Huerta* Court balanced the interests in relation to prosecution of an Indian victim rather than Indian offender, balancing the interests here shows an exercise of concurrent jurisdiction by the City over an Indian offender similarly "would not deprive the tribe of any of its prosecutorial authority," *Id.*, nor would it involve the exercise of City/State power over the Tribe itself. *Id.* Under the separate sovereign doctrine, nothing prevents MCN from prosecuting Appellee for a crime for which the City prosecutes him. If one considers *Castro-Huerta*'s language and logic regarding concurrent State/federal jurisdiction, the same logic applies to show concurrent City/Tribe jurisdiction over Indians would not be harmful to the tribal interests. Concurrent jurisdiction would supplement, not supplant tribal authority, "facilitate effective law enforcement" and thus "further the federal and tribal interests in protecting Indians and their property against" criminal conduct and would not preclude a separate tribal prosecution or harm the interests of the tribes in protecting Indian victims nor prohibit the City/State from dismissing cases filed concurrently by the tribes. 597 U.S. at 650–51 (internal citations omitted). Further, without an evidentiary hearing, *Castro-Huerta* recognized the State interests in criminal prosecutions, "ensuring public safety and criminal justice within its territory[,]" and having an interest in "protecting crime victims both Indian and non-Indian victims." *Id.* at 652. These interests are no different with an Indian offender than a non-Indian offender. As noted in Judge Hudson's special concurrence in *Fuller*, *Bracker* balancing is "consistent with the Supreme Court's directive in" *Castro-Huerta*. 2024 OK CR 4, ---P.3d--- at *7 (Hudson, J. specially concurring at ¶ 1). Judge Hudson went on to agree with the majority opinion's:

> observation that the General Crimes Act cannot be logically read to preempt state jurisdiction over Indian defendants, while not preempting state jurisdiction over Indian victims, when the statute mentions neither class in its text. We must apply the *Bracker* balancing test to resolve the ultimate issue of the State's criminal jurisdiction.

Id. at ¶ 3. Here, the interests weigh in favor of the City. The offense occurred on a fee land on a City street, and Supreme Court precedent in the civil context shows that:

> [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." ... Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." ...

Strate v. A-1 Contractors, 520 U.S. 438, 459, 117 S. Ct. 1404, 1416 (1997) (internal citations omitted).

In viewing the relevant statistics, parameters, and interests reviewed in the *Bracker* case, "[I]t is legally hard to see how the enforcement of a state criminal law, not specifically preempted by the federal government, could ever interfere with internal tribal relations." *Fuller*, ---P.3d--- at *5 (Lumpkin J., dissenting at ¶ 7, n.9). The only fact patterns where Appellee and Tribes can reasonably argue that the Tribes have an interest that outweighs State and local interests might include: 1) where the offense occurs on trust or restricted land, or 2) where an Indian offender victimizes the Tribe or its entities such as embezzlement from the Tribal coffers or destruction of a Tribally owned vehicle, or 3) an Indian offender commits a crime solely against the public of the Tribe and which does not also offend the public of the State or City, such as election fraud in a Tribal election. Such facts contrast dramatically with the shared interest in preventing drunk driving. The City would not seek jurisdiction over such cases, and such a fact pattern does not exist here where a nonmember Indian was driving on a City street within fee lands and alleged to be doing so while intoxicated equally against the peace and dignity of the People of Tulsa and the MCN. Concurrent jurisdiction over such an offense is not preempted by interests in tribal self-government.

WHEREFORE, the City prays for this Honorable Court to issue an Order ruling the City has criminal jurisdiction over Indians who violate municipal ordinances when the offense occurs on fee land within a reservation boundary and reversing the dismissal in the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on the 26 day of March, 2024, the above and foregoing, was served with a hard copy by placing said copy in the mail, postage prepaid, to the following:

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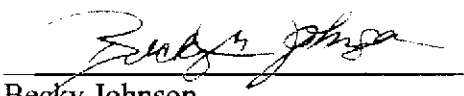

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