CASE NO. 22-5034

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUSTIN HOOPER,
Plaintiff/Appellant,

VS.

THE CITY OF TULSA,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
District Court Case No. 21-CV-165-WPJ-JFJ
The Honorable William P. Johnson, District Judge

PLAINTIFF/APPELLANT'S BRIEF IN CHIEF
ORAL ARGUMENTS ARE REQUESTED
THERE ARE ATTACHMENTS TO THIS BRIEF

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STATEMENT OF PRIOR RELATED APPEALS

This matter was originally an appeal from an order denying post conviction relief entered in the Municipal Court of the City of Tulsa (*City of Tulsa v. Justin Hooper*, Case No. 7470397 (App. 3 and 21)[1]) and an application for declaratory judgment. Additionally, there are two appeals involving this exact issue at the Oklahoma Court of Criminal Appeals styled *Brent Taylor v. City of Tulsa*, Case No. C-2021-1429 and *Brent Taylor v. City of Tulsa*, Case No C-2021-1430.

STATEMENT OF JURISDICTION

Appellant Justin Hooper filed an action in the district court for declaratory judgment pursuant to 28 U.S.C. § 2201. Additionally, the district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. Finally, the district court would have jurisdiction under 30 Stat. 495 § 14 if that is still valid law. The district court dismissed his complaint pursuant to Fed R. Civ. Pro. 12(b)(6) on April 13, 2022, disposing of all issues between the parties. The Appellant timely filed his Notice of Intent to Appeal on May 2, 2022. This appeal is proper before this Court pursuant to 28 U.S.C. § 1291.

[1] The Appellant will reference attached documents as "EX ___" and references to the Appendix as "App. ___ at ___".

STATEMENT OF THE CASE[2]

The City of Tulsa was originally incorporated as "the Town of Tulsa" on January 18, 1898, pursuant to Arkansas law by order of the Northern District Court for Indian Territory. (App. 5) At that time, it occupied approximately one square mile. On December 27, 1907, Governor C. N. Haskell declared that the City of Tulsa was a City of the first class under the Laws of the State of Oklahoma. (App. 8) Tulsa continued to grow and in 1966 it annexed an area that now contains the area of US 169 and 51st Street. (App. 13 at 89-91)

Hooper received a traffic ticket in the City of Tulsa on November 25, 2020, for speeding in excess of the posted speed limit. Hooper entered a plea of guilty and was convicted of the charge. He paid a fine of $150.00. (App. 17 at 102) Hooper is a member of the Choctaw Nation. (*Id.*) The offense occurred at approximately US 169 and 51st Street in the City of Tulsa and in the Muscogee (Creek) Nation. (*Id.*) This location was not annexed into the City of Tulsa until 1966. (App. 13 at 89-91)

Hooper filed an application for post-conviction relief in the Municipal Court of the City of Tulsa seeking to have this conviction vacated pursuant to the United States Supreme Court decision in *McGirt v. Oklahoma*, 591 U.S. _____, 140 S. Ct. 2452; 207 L.Ed.2d 985 (2020) . The municipal court denied his application based

[2] These facts are generally a restatement of the complaint found at App. 17 and the argument contained in the transcript at App. 21.

upon its interpretation of the "Curtis Act" codified at 30 Stat. 495 § 14. (App. 2) Because Hooper is an Indian, his only appeal was to federal court pursuant to the *McGirt* decision and Section 14 of the Curtis Act. The federal district court does not currently have a procedure for filing an appeal from a municipal court as contemplated by the Curtis Act. Therefore, the appeal was recast as Count I: declaratory judgment with Count II containing the appeal of the denial of post conviction relief. (App. 17) The defendant filed a motion to dismiss pursuant to Fed.R.Civ.Pro 12(b)(6) for failure to state a claim. (App. 18) The district court granted the defendant's motion. (App. 25) The district court entered an order finding that the Curtis Act is still valid law and the City of Tulsa has subject matter jurisdiction over crimes committed by Indians in Indian country within its boundaries. (EX A, App. 2) Therefore, the court found Hooper was not entitled to relief under Count I, which would render Count II moot. Based upon that order, the court entered its judgment dismissing Hooper's case. (EX B, App. 26) Hooper is appealing that order.

STANDARD OF REVIEW

As framed, this is a mixed question of law and fact; therefore, the Court must examine federal law and interpret federal treaties to determine whether, on the facts of this case, [the defendant] may be convicted of a crime. *See Hallowell v. U.S.*, 209 U.S. 101, 28 S. Ct. 498, 52 L. Ed. 702 (1908).

> A mixed question is present when the facts are admitted or established and the law is undisputed; the sole issue is whether the law applied to the facts satisfies the statutory standard. Where the mixed question involves primarily a factual inquiry, the clearly erroneous standard is appropriate. If, however, the mixed question primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate.

United States v. Roberts, 898 F.2d 1465, 1468 (10th Cir. 1990), citing *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986).

In the case of *Wyoming v. United States EPA*, 875 F.3d 505, 513 (10th Cir. 2017) the Court noted that the precedents tell us, "'the Supreme Court has applied, without comment, a *de novo* standard of review in determining congressional intent [regarding reservation boundary diminishment].'" *Osage Nation*, 597 F.3d at 1122 (alteration in original) (*quoting Yazzie*, 909 F.2d at 1393). Although examination of the historical record "involves a mixed question of law and fact," *de novo* review is appropriate "[w]here a mixed question 'primarily involves the consideration of legal principles.'" *Id*. at 1393-94 (quoting *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986)).

SUMMARY OF ARGUMENT

This appeal is a challenge to the subject matter jurisdiction of the Municipal Court of the City of Tulsa over crimes committed by Indians in Indian country and within its city limits. The parties have stipulated to the fact that the offense occurred within the boundaries of the Muscogee (Creek) Nation and that Hooper is

and was that the time of the offense a member of the Choctaw Nation, a federally recognized Indian tribe possessing some quantum of Indian Blood. (App. 21 at 181-185)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Does the City of Tulsa have subject matter jurisdiction to prosecute Indians for crimes that are committed in Indian country and within its city limits?

ARGUMENT

I. The City of Tulsa Does Not Have Jurisdiction Over Criminal Offenses Committed by Indians Within City Limits on the Muscogee (Creek) and Cherokee Nations Reservations.

A. Tulsa Is Located on Indian Reservations Subject to Federal Law Governing Jurisdiction over Crimes Committed by Indians in Indian Country.

In 2020 the United States Supreme Court ruled that the Muscogee (Creek) Reservation was never disestablished and still exists as an Indian reservation. *McGirt v. Oklahoma*, 581 U.S. ___, 140 S. Ct. 2452 (2020); *Murphy v. Sharp*, 581 U.S. __, 140 S. Ct. 2412 (2020), (*affirming Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017)). While the court did not use *Murphy*[3] as the vehicle for its analysis and ultimate conclusion regarding reservation status, the *McGirt* analysis is consistent with the court's analysis in *Murphy*. Both *McGirt* and *Murphy* establish that the

[3] It should be noted that the United States Supreme Court decided *McGirt* instead of *Murphy* because Justice Gorsuch had recused from *Murphy*.

entire Muscogee (Creek) Reservation, including all fee lands within it, is Indian country as defined by 18 U.S.C. § 1151(a).

The district court's decision here expressly recognized the "tremendous impact" of *McGirt* and resulting exclusive federal jurisdiction over major crimes committed by Indians on the reservation under the Major Crimes Act, 18 U.S.C. § 1153 ("MCA"). *See* App. 2 at 17.

However, the district court failed to recognize that reservation status has a broader impact. Crimes not described in the MCA committed by Indians in Indian country are subject to either federal or tribal jurisdiction[4] under federal law. Like the state, Tulsa's municipal judicial authority on the Muscogee (Creek) and Cherokee Reservations is limited to authority to prosecute crimes by non-Indians against non-Indians. *United States v. McBratney*, 104 U.S. 621, 624 (1882). The district court misunderstood these basic legal principles in finding that *McGirt* is not controlling as to municipal jurisdiction because it "does not deal with municipal law at all." App. 2 at 19.

[4] The district court recognized that tribal courts ("not federal courts") have jurisdiction over "misdemeanors" committed by Indians on reservations. App. 2 at 16.

1. The Temporary Nature of Municipalities Organized in Indian Territory Before Statehood is Demonstrated in Federal Laws Enacted Between 1890 and Statehood.

In order to gain a full understanding regarding the limited scope of Tulsa's jurisdiction over on-reservation crimes, it is necessary to take a walk through the pertinent federal laws involving Indian Territory, Oklahoma Territory, and Oklahoma statehood. These laws include the Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890 Act), the Act of June 28, 1898 (Curtis Act), ch. 517, 30 Stat. 495, and the Act of June 16, 1906, ch. 3335, 34 Stat. 267, as amended by the Act of March 4, 1907, ch. 2911, 34 Stat. 1286 (Oklahoma Enabling Act). These laws "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269, 112 S. Ct. 683, 693 (1992).

a. 1890 Act

The 1890 Act established Oklahoma Territory, to be governed by a territorial government based on Nebraska laws. *Id.*, § 1-28. The 1890 Act left the eastern portion of Indian Territory intact, subject to federal and tribal jurisdiction, *id*., §§ 29-44, but authorized certain identified Arkansas laws to be applied there, because Indian Territory "was without a local legislature to legislate to meet local needs." *Inc. Town of Hartshorne v. Inc. Town of Haileyville*, 1909 OK 240, 104 P. 49, 50 (Okla. 1909).

b. 1898 Curtis Act

By 1898, non-Indian speculators had begun settling Tulsa along newly established railroad lines. These inhabitants had no title to the lots and blocks upon which they built improvements, and no local self-government. Section 14 of the Curtis Act was "enacted to afford immediate local municipal governments" for towns in Indian Territory on a provisional basis. *Inc. Town of Hartshorne*, 104 P. at 50.

The district court relied on Section 14 of the Curtis Act to find that Tulsa has jurisdiction over "violations of municipal ordinances by any inhabitant of those municipalities, including Indians." App. 2 at 19. Section 14 reserved towns with populations of 200 or more from the inevitable allotment process. § 14, 30 Stat. 495. Section 14 further authorized Indian Territory towns with populations of 200 or more to petition the federal court in the district where the town was located "to have the same incorporated as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas,"[5] and 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 . . ." *Id*. (emphasis added). Such towns were

[5] The Curtis Act provided a provisional process for Indian Territory towns to form governments prior to allotment and statehood. The *McGirt* dissenters recognized that non-Indian settlers who founded "flourishing towns" along railway lines needed government. The Curtis Act permitted such governments to have the same powers and rights as Arkansas municipalities on a temporary basis. *McGirt*, 140 S. Ct. at 2484, 2490, J. Roberts, dissenting.

clearly established under *federal* authority. *Inc. Town of Hartshorne*, 104 P. at 50 (confirming that municipalities can only be created through the exercise of the power of the sovereignty). These towns, as authorized by Section 14, were organized under Arkansas state law and possessed only the "powers" of similar Arkansas municipalities.[6] This would have granted no authority over Indians, and therefore the City of Tulsa must rely only on the words of the Curtis Act for such authority.

The district court's ruling that Section 14 grants Tulsa jurisdiction over on-reservation crimes committed by Indians ignores both the history of Tulsa and the complexities of Section 14. Section 14 provided that for its purposes "all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory." Section 14, 30 Stat. 495. It authorized the United States courts serving Indian Territory to exercise "jurisdiction to enforce the same, and to punish any violation thereof," and required the city or town councils to "pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect." *Id*. It provided that the "mayors of such cities and towns, in addition to their other powers," would

[6] The status of a city or town incorporated under Arkansas law before statehood should not be confused with plats showing approximately 150 townsites, including Tulsa and Red Fork, that contained lots that were sold as required by the Curtis Act. *McGirt*, 140 S. Ct. at 2490. *See* App. 4. The Curtis Act's requirements for sale of town lots were based on a town's population, not incorporation.

have "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*. The statute made no provision for police courts.

The United States commissioners' jurisdiction had been earlier defined in the 1890 Act, § 39, 26 Stat. at 98-99,[7] and included "all the powers of commissioners of circuit courts of the United States;" authority to serve as *ex officio* notaries public to "solemnize marriages;" and authority to "exercise all the powers conferred by the laws of Arkansas upon justices of the peace," subject to the limitation that they would have no jurisdiction to try any cause where the value of the thing or the amount in controversy exceeded $100 (one of the many limitations that Tulsa chooses to ignore – and did ignore when imposing a sentence with a fine greater than $100 in the instant case). *Id*.

The "'mayors' courts' and United States commissioners' courts were . . . given equally the jurisdiction of justices of the peace courts of Arkansas." *Missouri, K. & T. Ry. Co. v. Phelps*, 76 S.W. 285, 286 (Indian Terr. 1903), citing the 1890 Act and the Curtis Act, § 14, 30 Stat. 495, 499. Strict implementation of Arkansas laws was required for purposes of a mayor's performance of

[7] Sections 29-44 of the 1890 Act included provisions concerning the jurisdiction of the United States courts in what remained of Indian Territory after Oklahoma Territory was established in what is now western and north central Oklahoma as authorized by sections 1-28.

prosecutorial/judicial functions under Section 14. "And as the city council is the creation of the statute, and derives all its powers from it, it can pass no ordinance except such as the [Arkansas] legislature, by statute, has authorized it to do." *In re English*, 61 S.W. 992, 993 (Indian Terr. 1901) (finding that a city ordinance was invalid under Arkansas law).

Today, Tulsa's municipal judges (not mayors) enforce Tulsa municipal codes consistent with Oklahoma statutes and the Oklahoma Constitution - not Arkansas laws as previously required by Section 14. These courts do not handle civil cases or felony matters – rather they appear to be descendants of the "police courts" that were not specifically authorized by the Curtis Act. Congress's actions prior to statehood were intended "to be merely provisional" and to provide a body of local laws "for the time being." *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912).

Provisions in Section 14 concerning municipal jurisdiction were clearly meant to provide stop-gap remedies, and any municipal powers of towns organized under the Curtis Act or by earlier court order ceased after statehood. Even Oklahoma's courts have previously recognized this historical and legal fact early in the state's history:

> The municipal corporations of the Indian Territory prior to the admission of the state into the Union were agencies of the government of the United States, created by Congress under its plenary power to govern the territories in any manner not forbidden by the federal

> Constitution, for the purpose of permitting the people of those cities and town, in a measure to control their local affairs. Except as to those matters to govern which power was delegated to said municipal corporations, the administration of the affairs of the Indian Territory was governed exclusively by congressional legislation, and, while no form of organized territorial government existed in the Indian Territory in the sense that the term "organized territory" is generally used, a form of territorial government administered by Congress by means of direct legislation for said territory did exist, and said municipal corporations formed a part of said government. *Upon the admission of the state into the Union, the form of government theretofore existing in the Indian Territory ceased to exist, and the laws in force in that territory under which Muskogee* [a town chartered before statehood] *held its charter and exercised its municipal powers became inoperative.*

State ex rel. W. v. Ledbetter, 1908 OK 196, ¶ 4, 22 Okla. 251, 255-56, 97 P. 834, 835 (emphasis added).

Ledbetter expressly stated the history of the Curtis Act as an expression of how Congress directly governed Indian Territory before there was a state government to fulfil that task. However, it was also recognized that after Oklahoma became a state and assumed all of the authority given to states by Congress, the authority that had previously been given municipalities and other creations of Congress through territorial management had "become inoperative".

The district court relied on *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) as an example of Congressional plenary power over Indian affairs to support the City of Tulsa's argument that Congress can grant a political subdivision of a state authority greater than the state. Its reliance is misplaced

because Congressional authority is not at issue; rather, Congressional intent is controlling. At the time Congress enacted the Curtis Act, Congress used legislation to address governance of non-Indians in Indian Territory because there was no organized territorial or state government to do so. That situation changed with the creation of the State of Oklahoma. That would include the authority a municipality may have had over "all inhabitants", thus effectively repealing the Curtis Act after it had done its job and was no longer needed. Tulsa cannot claim criminal jurisdiction over Indians in Indian country on the basis of provisional congressional relics.

c. 1901 Creek Allotment Agreement and 1902 Cherokee Allotment Agreement

The Creek and Cherokee allotment agreements that were approved only a few years after the Curtis Act provide additional context related to protection of townspeople in Indian Territory. The 1901 Creek Allotment Act provided that "[n]o Act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation, except section fourteen of [the Curtis Act], which shall continue in force as if this agreement had not been made." Creek Allotment Agreement, 31 Stat. 861, 872. The Cherokee Allotment Agreement contains a similar provision continuing Section 14. *See* Act of July 1, 1902, ch. 1375, § 73, 32 Stat. 719, 727. The Cherokee Allotment Agreement, like the Creek Allotment Agreement, reserved townsites from allotment if set apart under the 1898 Curtis

Act; contained detailed provisions concerning surveys, appraisals, establishment and disposition of townsites; and required compensation to occupants who had made improvements on the lands. §§ 24(a), 38-44, 32 Stat. 719, 722-23; *see Murphy v. Royal*, 875 F.3d at 896 (Creek Agreement, §§ 2, 10-14, 17, 24(a)). The district court overlooked this context and the need to keep Section 14 in force while the dispositions of Cherokee and Creek townsite allotments were finalized.[8]

Section 14, together with Section 15, was aimed at rewarding and protecting non-Indian residents of cities and towns who had built improvements without authorization. §§ 14-15, 30 Stat. 495, 499-501. Section 15 protected townsites from allotment, and afforded town residents, both Indian and non-Indian, the opportunity to purchase town lots on which they had made improvements.

[8] Both the presiding judge of the Tulsa Municipal Criminal Court and the district court considered whether the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 5201-5210, repealed Section 14 of the Curtis Act. *See* App. 2 at 12; App. 3 at 29-30. The municipal judge recognized that it "is clear" that it has been "determined that the OIWA repealed the portion of the Curtis Act [in section 28] dealing with tribal courts" (thus enabling the Muscogee (Creek) Nation to establish tribal courts), in *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1447 (D.C. Cir. 1988). *Id*. Notwithstanding the OIWA's general repealer ("[a]ll Acts or parts of Acts inconsistent herewith are hereby repealed"), both the municipal judge and the district court chose to interpret the *Hodel* ruling to be limited to repeal of Section 28, and found that the OIWA did not repeal Section 14. *Id*. They failed to note that in *Hodel*, the Court expressly gave broad effect to the repealer, and rejected an interpretation of the OIWA that "would result in a perpetuation of the piecemeal legislation rather than its elimination." *Hodel*, 851 F.2d at 1445-46. In any event, it is not necessary to find that the OIWA repealed Section 14 for purposes of municipal jurisdiction, because any grant of authority to prestatehood (and pre-allotment) municipalities by Section 14 was meant to be, and was, temporary.

Section 14 fit into that general framework by giving town residents an opportunity to begin organizing towns and recognizing municipal authority governed by federal and Arkansas law until a state was formed. The Creek and Cherokee Allotment Agreements addressed requirements for townsites, likely superseding many of the Curtis Act provisions related to towns. *See Murphy*, 875 F.3d at 943 (describing the townsite requirements in the Creek Allotment Agreement, §§ 11-22, 31 Stat. 861, 864-867). The Creek Allotment Agreement's references to the continuation of Section 14 in force does not state or establish any intent that Congress intended municipalities to possess jurisdiction in Indian country greater than state jurisdiction.[9]

B. Tulsa was Established Under Oklahoma Law Almost Immediately After Statehood.

Tulsa's claim that its present jurisdiction is untethered to that of Oklahoma is simply wrong. Soon after Oklahoma became a state, Tulsa changed its status

[9] The district court did not address two cases cited by the municipal judge as supporting Tulsa's claim that municipal courts in incorporated Indian Territory towns have present-day jurisdiction to prosecute on-reservation crime by Indians. *See* App. 3 (Mun. Ct. Ord.) at 8-9, *citing Choctaw and Chickasaw Nations v. City of Atoka*, 207 F. 2d. 42 (10th Cir. 1953) and *United States v. City of McAlester*, 604 F.2d 42 (10th Cir. 1979). Both involved pre-statehood condemnation judgments obtained in United States Courts for Indian Territory. In 1903 and 1907, judgments the Central District United States Court approved, under Section 11 of the Curtis Act, the taking of unallotted tribal lands for specific municipal purposes. Central to the challenges decades later was the claim that the United States had been an indispensable party and had not consented to the pre-statehood taking. The decisions in favor of the municipalities were specific to the language in Section 11 and offer no support for Tulsa's current argument under Section 14.

from an Indian Territory town to an Oklahoma municipality. As recognized by Oklahoma in briefing in *McGirt*, such "*municipalities are creatures of state law*." Brief of Appellee, *McGirt v. Oklahoma*, Case No. 18-952, at 28-29 (March 13, 2020).

The Oklahoma Constitution, approved on September 17, 1907, art. 18, § 1, prohibited the creation of municipal corporations "by special laws," and authorized the state legislature, "by general laws," to provide for the incorporation and organization of cities and towns. It authorized a municipal corporation "now existing" in Oklahoma to continue "with all of its present rights and powers until otherwise provided by law." *Id*., art. 18, § 2. The Constitution further provided that upon final approval of a municipal charter, "it shall become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it." *Id.*, art. 18, § 3(a). This effectively ended any powers granted by Congress to municipalities organized under the Curtis Act because their state charter superseded the territorial charter.

On December 27, 1907, Oklahoma's first Governor declared Tulsa to have "all the powers, duties, and privileges of a city of the first class *under the laws of the state of Oklahoma." See* App. 7. Seven weeks later, the Oklahoma Legislature enacted a statute declaring cities and towns in the former Indian Territory to be "cities of the first class *under the laws of this State*." *See* App. 8 at 47-48)

(emphasis added). This statute further provided that the officers of said cities were to continue in office until the next general election for city officers, and made municipal authority uniform throughout Oklahoma by requiring that city officers "shall exercise the duties of the respective offices *under the laws of this State* corresponding to the offices to which they were elected or appointed." *Id*. (emphasis added).

The Oklahoma Legislature enacted a law soon after that, authorizing any city with a population of more than 2,000 inhabitants to adopt a charter for "its own government," and providing that, upon ratification by votes and approval by the Governor, the charter would "become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it." *See* App. 8 at 52-53. Consistent with this law, Tulsa abandoned its provisional government incorporated under Arkansas law and adopted its charter under the Oklahoma Constitution, article 18. *See* App. 9 The charter specifically provided that duties of the municipal judge and city attorney under the new Oklahoma charter would be performed by the present "police judge" and present "city attorney" only until a Board of Commissioners was elected. App. 9 at 60; *see also State ex rel. W. v. Ledbetter*, 1908 OK 196, 97 P. 834 (addressing § 10 of Schedule to Oklahoma Constitution permitting officers of former Indian Territory municipalities to perform duties *until* their successors were elected).

The brief period in which Tulsa was organized as an Indian Territory town was over, and Tulsa has been operating as a political subdivision of the State of Oklahoma ever since. Tulsa has no claim to any authority under its pre-statehood incorporation decree, whether adopted in early 1898 under authority of the 1895 federal court order or Section 14 of the subsequent Curtis Act.

C. The Oklahoma Enabling Act Superseded Authority Given to Municipalities by the Curtis Act.

After the Oklahoma Territory was carved from Indian Territory in 1890, its territorial laws were based on Nebraska laws, while courts in Indian Territory continued to implement certain Arkansas laws specified by Congress. §§ 11, 29-35, 38-39, 41, 26 Stat. 81. The Oklahoma Enabling Act changed this by providing that "the laws in force in the Territory of Oklahoma, as far as applicable shall extend over and apply to said state [Oklahoma] *until changed by the legislature thereof*." Act of June 16, 1906, ch. 3335, § 13, 34 Stat. 267. (emphasis added). This enabled Oklahoma courts, until such time as Oklahoma adopted its own criminal laws, to apply Oklahoma Territory criminal laws to crimes subject to state jurisdiction, such as crimes by non-Indians against non-Indians in Indian country. *See United States v. McBratney*, 104 U.S. 621, 624 (1882). The Enabling Act did not continue the applicability of Nebraska or Arkansas laws; it did not even mention those laws.

The Enabling Act also provided that officers of the state government formed under the new constitution would exercise all the functions of state officers, and provided that "all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or by the constitution of the State." § 21, 34 Stat. 267. It further provided that the laws of the United States would "have the same force and effect within said State as elsewhere within the United States." *Id*. This provision implicitly included the General Crimes Act, 18 U.S.C. § 1152, and 18 U.S.C. § 1153, as recognized in *McGirt*, 140 S. Ct. at 2470, which divests the state government of the ability to enforce criminal laws against Indians and those who commit crimes against them.[10]

The Enabling Act established that the new state would immediately operate under "a body of laws applying with practical uniformity throughout the state." *Jefferson v. Fink*, 247 U.S. 288, 291-93 (1918). Oklahoma's Constitution, in keeping with this policy of uniformity, required that "all laws in force in the territory of Oklahoma" would remain in effect "until they expire by their own

[10] Section 16 of the Enabling Act, as amended in 1907, required the transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." § 1, 34 Stat. 1286. Conversely, Section 20 of the Enabling Act, as amended in 1907, established Oklahoma courts as successors to federal courts in Indian Territory for those civil and criminal cases that were not otherwise transferred to the new federal courts. § 3, 34 Stat. 1286; *see McGirt*, 140 S. Ct. at 2477.

limitation or are altered or repealed by law." *Id*. at 293-294, citing Okla. Const., art. 25, § 2. Only three months after statehood, the Oklahoma legislature established that cities and towns in Oklahoma, including those in the former Indian Territory, would operate under Oklahoma state law.

D. Tulsa is a Political Subdivision of the State of Oklahoma With No Power Independent of State Power.

Tulsa is a political subdivision of Oklahoma. *Fine Airport Parking, Inc. v. City of Tulsa*, 71 P.3d 5, 11 (Okla. 2003) (noting Oklahoma is the "sovereign and [Tulsa] is a political subdivision"). Tulsa's municipal powers are limited by Oklahoma's Constitution and Oklahoma laws that bind it by the charter it adopted pursuant to Okla. Const., art. 18, § 3. Tulsa's powers are also limited by the United States Constitution and federal law. *City of Tulsa Charter*, art. 1, §§ 1- 2. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 177 (1907) (affirming the "well settled" doctrine that municipal corporations are political subdivisions of states and can exercise only such powers as states permit).

Tulsa's jurisdiction in Indian country cannot be greater than Oklahoma's jurisdiction. Thus, when *McGirt* confirmed that Oklahoma has no criminal jurisdiction for offenses committed by or against Indians within the boundaries of the intact Muscogee (Creek) Reservation, Tulsa's jurisdiction was similarly limited. Indeed, Tulsa acknowledged in its *McGirt* amicus brief filed in favor of Oklahoma. *McGirt* Tulsa Amicus at 29. Tulsa conceded that Oklahoma and Tulsa

would have no jurisdiction over on-reservation crimes committed by or against Indians, and warned that if "the entire City is 'Indian country,' state criminal jurisdiction would be stripped in any crime involving an Indian perpetrator or victim." *Id*. at 29. This would mean, according to Tulsa, that Tulsa's courts "could not enforce Oklahoma law in crimes involving Indians." *Id*. at 29. Although Tulsa's tune has now changed, nowhere does it acknowledge that its renegade theory regarding Section 14 of the Curtis Act would upend federal and tribal jurisdiction over crimes by Indians in Indian country as defined in 18 U.S.C. § 1151(c):

> That is not to say that there has never been any 'Indian country' in Tulsa—there are several restricted allotments and trust lands that remain Indian country under Section 1151(c), and even a casino located on land 'still owned by the Creek Nation.'

Id. at 28. Tulsa gives no thought to how its new theory would impact settled tribal and federal prosecutions for crimes that occurred on tribal trust land or on restricted allotments. In *McGirt*, Oklahoma was faulted for ignoring such potential counter disruption; Tulsa should not be permitted to do the same here. *McGirt*, 140 S. Ct. at 2470-71.

Tulsa's new-found argument also ignores established authority concerning criminal jurisdiction in Indian country. It is well-recognized in Oklahoma that "[s]tates have no [criminal] authority over Indians in Indian Country unless it is expressly conferred by Congress." *Cheyenne-Arapaho Tribes of Okla. v.*

Oklahoma, 618 F.2d 665, 668 (10th Cir. 1980) (finding Oklahoma hunting and fishing laws inapplicable in Indian country); *see also Hackford v. Utah*, 845 F.3d 1325 (10th Cir 2020) (quoting *Cheyenne-Arapaho Tribes* in relation to jurisdictional challenge to state authority over a traffic offense); *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990) (involving illegal arrest on Cherokee trust land and stating that "Indian country is subject to exclusive federal or tribal criminal jurisdiction '[e]xcept as otherwise expressly provided by law.' 18 U.S.C. § 1152."); *United States v. Burnett*, 777 F.2d 593, 596 (10th Cir.1985) ("Oklahoma has not acted to assume [criminal] jurisdiction under P.L. 280."). These general principles apply equally to the criminal jurisdiction and law enforcement authority of municipalities. Criminal jurisdiction in Indian country nationwide is uniformly defined by federal statutes that do not differentiate between municipal and state jurisdiction.

E. The Curtis Act Did Not Authorize Municipal Jurisdiction over Areas Within Municipal Limits Resulting from Post-Statehood Expansion.

As discussed above, Tulsa has previously asserted that it would have no jurisdiction over the Indians when arguing to the United States Supreme Court. After losing that argument, it "found" the statutory relic known as "the Curtis Act". Tulsa boldly asserts that not only did its incorporation as an Indian Territory town in 1898 give it criminal jurisdiction over on-reservation crimes "without regard to race" in the small Creek townsite of the time, but that its claimed "jurisdiction

grew as Tulsa grew." Criminal jurisdiction in Indian country is not so fluid as to depend on the vagaries of approvals by the majority of municipal citizens seeking or objecting to annexation under state laws governing annexation. It is important to remember that while the City of Tulsa may have been organized under the Curtis Act, it remained surrounded on all sides by reservations. Nowhere did Congress authorize the city to expand, claiming land that was an Indian reservation by treaty. Moreover, any expansion that occurred after Tulsa re-incorporated under state law in 1908 was done under authority given it by *the State of Oklahoma*, which has never had jurisdiction over Indians on reservations. *McGirt*, 140 S. Ct. at 2478.

The Dawes Commission's official survey and Tulsa townsite plat, completed and approved in 1902 for purposes of reserving the Tulsa townsite from Creek allotment, limited Tulsa to 654.56 acres (only 14 acres more than the 640 acres contained in one square mile).[11] Although Tulsa had attempted earlier to incorporate a larger area of approximately 1,440 acres, only the smaller Creek tribal acreage, identified in the official government survey and townsite plat, was reserved from allotment for Tulsa. *See* App. 11. Congress intended for townsite boundaries approved by the Secretary of the Interior to control the municipal boundaries of incorporated Indian Territory towns. *Inc. Town of Hartshorne,*

[11] *See* App. 11; *See* App. 12; *See* App. 13 at 79, 83, 89, 92.

104 P. at 51.[12] It should be noted that there has been no such approval located for any annexation following statehood, including the annexation for the location where Hooper's offense occurred.

After allotment and the sale of Tulsa townsite lots, the city was firmly in the hands of noncitizens, but remained surrounded by Creek allotments. *See* App. 4. Tulsa has grown beyond its original Indian Territory boundaries since statehood, primarily through the process of state-approved annexation. Tulsa presently encompasses over 200,000 acres (more than 300 times its original 654.56-acre area), and its municipal limits extend well beyond its Creek townsite beginnings. *See* App. 13 at 79, 92. Tulsa's claim that Congress intended that Arkansas laws would continue to apply after statehood to an undefined and ever-expanding municipal area defies logic, and reflects a fundamental misunderstanding of how federal, state, and tribal laws apply in the exercise of jurisdiction over Indian country. Even if Congress gave the original Tulsa the authority to exercise jurisdiction over persons within its pre-statehood boundaries, it did not give the City of Tulsa the authority to expand its jurisdictional area by post-statehood annexations, including the 1966 annexation that added the location where this

[12] Tulsa, when it later chartered under Oklahoma law in1908, apparently included a small area of the Cherokee Nation Reservation within its municipal boundaries. A 1903 map of Tulsa shows Tulsa's boundaries extending slightly into the Cherokee Nation to encompass a strip of land just under 10 acres, called "North Tulsa" addition. *See* App. 15; App. 16; App. 10 at 65.

crime was committed to the area within city limits. When the statutes are construed liberally in favor of the Indians – as required – the outcome is that there was no continuing authority granted over lands within the boundaries of the original town, and certainly not over lands annexed later. The fact that *only* Congress can disestablish or diminish a reservation has been well-settled law for over 100 years – as this Court noted in the case of *Murphy v. Royal*:

> Only Congress can disestablish or diminish a reservation. In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903), the Supreme Court said Congress has the power to unilaterally abrogate treaties made with Indian tribes. Id. at 566. "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998). This includes the power to eliminate or reduce a reservation against a tribe's wishes and without its consent. See *Solem*, 465 U.S. at 470 n.11 (explaining the *Lone Wolf* Court "decided that Congress could diminish reservations unilaterally"). Because "only Congress can alter the terms of an Indian treaty by diminishing a reservation," the Supreme Court has said the "touchstone" of whether a reservation's boundaries have been altered is congressional purpose. *Yankton Sioux Tribe*, 522 U.S. at 343; see also *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977) ("The focus of our inquiry is congressional intent.").

Murphy v. Royal, 875 F.3d 896, 917-18 (10th Cir. 2017).

In the *McGirt* decision, the United States Supreme Court again reminded us that "[O]nly Congress can divest a reservation of its land and diminish its boundaries." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020), citing to *Solem*, 465 U. S., at 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443. In *McGirt*, the court went on

to hold that "while disestablishment has never required any particular form of words … it does require that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) (Internal Citations Omitted).

The City of Tulsa wants this Court to find that the Curtis Act has given it the ability to exercise its authority over all races within its city limits and to expand its limits, and therefore its authority, with impunity in perpetuity. Regardless of how far the City of Tulsa tries to stretch the Curtis Act, it will never stretch it so far that it becomes a "clear intent of Congress" to delegate such authority. The Curtis Act does not reflect any Congressional intent that the City of Tulsa be given the authority to continue to increase the area over which it claims criminal jurisdiction over Indians and to diminish the reservation over which the tribes and the Federal Government exercised authority over crimes committed by Indians. Without clear statutory intent of Congress, the proposition that the Curtis Act so empowers the City of Tulsa must be rejected.

F. The Curtis Act creates an Unworkable and Counterintuitive Framework of Law.

Tulsa advocates a municipal jurisdiction that would create odd and unworkable results. Consider where Tulsa's approach would lead: 1) Tulsa, but not all cities in former Oklahoma Territory, would have jurisdiction over Indian crimes

committed within municipal limits that are also within reservation boundaries; 2) only towns such as Tulsa - not Indian Territory towns that did not incorporate under Arkansas law prior to statehood - would have criminal jurisdiction over Indian crimes committed within intact reservations;[13] 3) because the Curtis Act applied only to the Five Tribes, only pre-statehood incorporated cities within Five Tribes reservations would have jurisdiction to prosecute Indian crimes within their municipal boundaries; and 4) Tulsa would have jurisdiction over Indian crimes occurring on restricted allotments or tribal lands within the city limits within intact reservations, even though Tulsa previously conceded it had no jurisdiction there. *See McGirt* Tulsa Amicus at 28. This piecemeal approach produces absurd results and is not defensible. Further, it is not in line with the policy of "uniformity" previously articulated by the Oklahoma Constitution since this special power touted by Tulsa is not consistent with the jurisdiction of other nearby municipalities that were not incorporated before statehood.

Tulsa is a municipal court of record with limited jurisdiction. It is a "court of record" based upon population. Okla. Stat., tit. 11, § 28-101. This state-law designation is significant. Most important for the determination of this case is that

[13] The anomaly Tulsa's theory would produce is illustrated by the fact that while some Indian Territory towns near Tulsa (Broken Arrow, Sapulpa, Coweta) incorporated under Arkansas law prior to statehood, other nearby towns (Sand Springs, Bristow, Red Fork, Glenpool, Mounds, Inola, and Jenks) did not. *See* The Encyclopedia of Oklahoma History and Culture, https://www.okhistory.org/publications/enc/entry/.php?entry (available articles indexed by town names).

Tulsa's regular appeals and original actions are prosecuted in the Oklahoma Court of Criminal Appeals. *See* Okla. Stat., tit. 11, § 28-128; OCCA, Rule 1.2. Appeals from municipal courts not of record are filed in the district court of the county in which the municipality is located and the Appellant received trial *de novo*. Okla. Stat., tit. 11, § 27-129. Yet, under *McGirt*, Oklahoma courts have no jurisdiction over on-reservation crimes by or against Indians. Further, there is currently no federal "forum" for these Curtis Act appeals. In fact, requiring present-day federal courts to replace the Oklahoma Court of Criminal Appeals or the district courts in such appeals increases lack of uniformity, subverting the underlying purpose Tulsa promotes from the Curtis Act's Section 14 "regardless of race" provision.

Federal courts are not set up to handle municipal appeals. It is true that prior to statehood, appeals from "mayor's courts" of incorporated Indian Territory towns went to the federal courts of Indian Territory. *See Missouri, K & T. Ry. Co. v. Phelps*, 76 S.W. at 286.[14] Those courts, like the municipal Indian Territory governments themselves, no longer exist. At the present time, if there is a way to appeal to federal court, it is through a declaratory judgment action, which has been described by the United States District Court for the Northern District of Oklahoma as arriving in an "uncommon form" and in an "unusual procedural

[14] Mayors' courts had jurisdiction co-extensive with United States Commissioner courts, and appeals of judgments from such provisional courts were taken to the United States Court in Indian Territory. *Barker v. Marcum & Toomer*, 1908 OK 171, 97 P. 572 (Okla. 1908).

posture". *See* App. 2 at 11. If the district court is not the appellate court for appeals arising from traffic citations in towns such as Tulsa, the only remaining alternative would be the United States Supreme Court as the "court of last resort". If the images of our justices climbing through a court record, such as this one, is not amusing enough to think about, consider appeals from courts not of record under which the appellant is entitled to *trial de novo.* One can ponder the likelihood of inquiring what time the United States Supreme Court will have its traffic docket.

II: The Municipal Court erred when it denied Hooper's Application for Post-Conviction Relief.

Hooper has challenged the court's subject matter jurisdiction beginning with the filing of his application for post-conviction relief on December 17, 2020. The prospective application of *McGirt* should have resulted in the court granting relief. Because the Appellant has demonstrated above that the Curtis Act does not provide the City of Tulsa subject matter jurisdiction over him, it is contended that the district court erred in finding his request for post-conviction relief moot. Lack of subject matter jurisdiction may be proven by a challenge to the facts upon which subject matter jurisdiction is based. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction. *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 377, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994) *citing to McNutt v.*

General Motors Acceptance Corp., 298 U.S. 178, 182-183, 80 L. Ed. 1135, 56 S. Ct. 780 (1936).

Subject matter jurisdiction is never presumed, and it can be challenged at every step in a proceeding. *Delgado Oil Co. v. Torres*, 785 F.2d 857, 877 (10th Cir. 1986) *citing to Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 84 L. Ed. 85, 60 S. Ct. 44 (1939). The *McGirt* decision is self-proving that the lack of subject matter jurisdiction can be successfully challenged through post-conviction relief many, many years after a final judgment and a direct appeal have been decided.[15] "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013).

A conviction or judgment without subject matter jurisdiction *is* void. *United States v. Magnan*, 622 Fed. Appx. 719 (10th Cir. 2015). "It is well settled that '[t]he judgment of conviction pronounced by a court without jurisdiction is void.' *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *see also United States v. Bigford*, 365 F.3d 859, 865 (10th Cir. 2004)."

> "Without jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1869). Accordingly, when a court "assume[s] a jurisdiction which in fact it could not take, . . . all the proceedings in that court must go for naught." *Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co.*, 198 U.S. 188,

[15] McGirt's direct appeal was denied and the judgment affirmed in an unpublished decision.

> 195, 25 S. Ct. 629, 49 L. Ed. 1008 (1905); see also *Cunningham v. BHP Petroleum Gr. Brit. PLC*, 427 F.3d 1238, 1244 (10th Cir. 2005) (holding that "[a] court may not exercise authority over a case" for which it lacks jurisdiction (quotation and alteration omitted)). Unlike an order vacating a judgment, a decision holding that a court lacked jurisdiction voids each and every action taken in the case. *Id*., at p. 722-723. See also the following case for the indisputable rule that a judgment is void if the Court lacks subject matter jurisdiction. *Burke v. Smith*, 252 F.3d 1260, 1263 (11th Cir. 2001); *United States v. Buck*, 281 F.3d 1336, 1344 (10th Cir. 2002); *Cothrum v. Hargett*, 178 F. App'x 855, 857 (10th Cir. 2006); *MacArthur v. San Juan Cty*., 405 F. Supp. 2d 1302, 1306 (D. Utah 2005)

The Appellant in this case has asserted that the Municipal Court of the City of Tulsa does not have subject matter jurisdiction over him because he is an Indian and the crime took place in Indian country. The lower courts have repeatedly erred in concluding that the municipal court has subject matter jurisdiction and therefore denied the Appellant's application for post-conviction relief. This is error because, as argued in detail above, the Municipal Court of the City of Tulsa does not have subject matter jurisdiction over crimes committed by Indians within its city limits - and certainly not in areas that were annexed outside of federal authority - that are also committed in Indian country and should have granted the Appellant's application for post-conviction relief and dismissed the case. Even if the municipal court had subject matter jurisdiction, it did not have the authority to hear a case where the amount in controversy was over $100.00 and therefore was without jurisdiction to impose the sentence imposed in this case.

CONCLUSION

Following the entry of the *McGirt* decision, the State and its political entities searched for ways to assert power over Indians within its borders. The Curtis Act is a statutory relic that the City of Tulsa has latched onto in a desperate bid to achieve that objective, asserting jurisdiction over Indian offenses on the Muscogee (Creek) Reservation - a power that even the State of Oklahoma does not have. This position ignores the inherently temporary nature of the Curtis Act. It ignores the offices that would still exist (like the mayors' courts/justice of the peace) that were abandoned long ago. It ignores the fact that such an interpretation would mean that a non-Indian would have the right to appeal to either a district court or the Oklahoma Court of Criminal Appeals, while an Indian would be denied that opportunity. It ignores that there was no express intention of Congress to cede to the municipalities in Oklahoma the ability to continue to diminish Indian reservations by simply expanding their borders.

When the State of Oklahoma was organized, the territorial entities organized under the authority of Congress were reorganized as state entities under the laws of the State of Oklahoma. The authority of municipalities was no different. Further, the municipalities that were organized under the authority of Congress were not and *are not* the same entities, either in form or geographic area. Therefore, the Curtis Act does not operate to give *certain* municipalities jurisdiction over Indians,

while other municipalities have no such authority. This flies in the face of the uniformity that was sought by the Constitution of the State of Oklahoma.

Hooper is an Indian, as defined by federal law. He was issued a citation and prosecuted in the City of Tulsa for a crime that occurred within the city limits of Tulsa and within the borders of the Muscogee (Creek) Reservation. The exact location where the crime occurred was not annexed into the City of Tulsa until 1966. Not only did the municipal court exercise jurisdiction where it had none, it went further and imposed a sentence that was greater than the authority it was granted under the Curtis Act. This Court should enter an order reversing the order of the district court, granting both declaratory judgment and post-conviction relief, and ordering that the municipal citation for speeding be dismissed for want of subject matter jurisdiction.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument for the reasons that this Court's decision will have wide impact on present Oklahoma municipalities, especially those Indian Territory towns that provisionally organized under Arkansas law prior to the allotment of the Five-Tribes Reservations.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 32(a) (7)(c), I certify that this brief is proportionally spaced and contains 7,618 words.

I relied on my word processor to obtain the count and it is Microsoft Word Office 16, Times New Roman 14 point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of June, 2022, he caused a true and correct copy of the above and foregoing to be mailed in a sealed envelope with proper postage affixed thereon to:

Tulsa City Attorney
175 E. 2nd, Suite 685
Tulsa, OK 74103

/s/ John M. Dunn
John M. Dunn

CERTIFICATE OF DIGITAL SUBMISSION

I certify that all required privacy redactions have been made, and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the clerk.

I also certify that the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, PC Matic Supershield. I further certify that according to the commercial virus scanning program, this digital submission is free of viruses.

/s/ John M. Dunn
John M. Dunn

EXHIBIT A

Hooper v. City of Tulsa, Case No. 21-cv-165-WPJ-JFJ, Doc. 24, Memorandum Opinion and Order Granting Defendant's Motion to Dismiss (Apr. 13, 2022)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUSTIN HOOPER,

Plaintiff/Appellant,

v. Case No. 21-cv-165-WPJ[1]-JFJ

THE CITY OF TULSA,

Defendant/Appellee.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [Doc. 6]

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

[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 (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

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

American" do not convey the precise legal meaning that "Indian" does. The Court uses the term "Indian" for clarity.

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.").

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]

[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

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

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.

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.*

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.

[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*, 157 P. 1151, 1152 (Okla. 1916); *In re Poff's Guardianship*, 103 S.W. 765, 766 (Ct. App. Indian Terr. 1907).

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*, 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

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

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.

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, 201 P. 537, 539 (Okla. Ct. Crim. App. 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

[8] This provision has since been amended.

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 (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.

The circumstances here are analogous. Congress has plenary power over Indian affairs, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (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 (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.

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 (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.

WILLIAM P JOHNSON
UNITED STATES DISTRICT JUDGE

EXHIBIT B

Hooper v. City of Tulsa, Case No. 21-cv-165-WPJ-JFJ,

Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUSTIN HOOPER,

Plaintiff/Appellant,

v. Case No. 21-cv-165-WPJ[1]-JFJ

THE CITY OF TULSA,

Defendant/Appellee.

JUDGMENT

THIS MATTER came before the Court on the Complaint (Doc. 1) filed by Plaintiff Justin Hooper ("Plaintiff") appealing the decision of the Tulsa Municipal Criminal Court in Case No. 7470397 and seeking declaratory judgment that municipal courts in Tulsa lacked authority to hear criminal matters involving an Indian defendant. Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order (Doc. 24) previously filed by the Court;

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant City of Tulsa's Motion to Dismiss (Doc. 6) is **GRANTED** as it pertains to declaratory judgment and that Plaintiff's appeal is therefore **MOOT**, thus disposing of this case on the merits.

WILLIAM P JOHNSON
UNITED STATES DISTRICT JUDGE

[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.