Oklahoma Municipalities Provisionally Incorporated Under Arkansas Law Prior to Statehood Have No Jurisdiction Over On-Reservation Offenses Committed By or Against Indians.

INTRODUCTION

Last year the Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), that the Muscogee (Creek) Reservation is intact; that it is "Indian country" under 18 U.S.C. §1151(a); and that Oklahoma has no criminal jurisdiction over a crime by an Indian within the boundaries of the reservation. The Oklahoma Court of Criminal Appeals (OCCA) has more recently concluded that the Cherokee Reservation, like the Creek Reservation, is also intact and "Indian country," and that Oklahoma had no jurisdiction over an Indian defendant for on-reservation crimes. *Hogner v. State*, 2021 OK CR 4 ¶18, __ P. 3d. __ (Okla. Crim. App. 2021) (holding "the District Court appropriately applied *McGirt*"); *see* also *Spears v. State*, 2021 OK CR 7, __ P.3d __ (Okla. Crim. App. 2021).[1] The *McGirt*, *Hogner*, *Spears*, and *Cole* rulings are binding on Oklahoma municipalities, including the City of Tulsa (Tulsa), a sub-division of Oklahoma organized and chartered under Oklahoma law and located within the two reservations. [2]

As recognized in *McGirt*, Oklahoma (and its municipalities) may lawfully exercise criminal jurisdiction only over *non-Indian* perpetrators of offenses against non-Indians in Indian country. *McGirt*, 140 S. Ct. at 2479, citing *United States v. McBratney*, 104 U.S. 621, 624 (1882). This authority and power is significant. *McGirt*, 140 S. Ct. at 2460. However, Tulsa has no

[1] OCCA also concluded Oklahoma had no jurisdiction over a non-Indian defendant convicted of a crime against a Cherokee citizen that occurred on the Cherokee Nation's Reservation. *See Cole v. State*, 2021 OK CR 10 ¶16, __ P.3d __(Okla. Crim. App. 2021).

[2] Tulsa's municipal limits also include a portion of the Osage Reservation. At this writing, OCCA has not determined whether a *McGirt* analysis will result in the conclusion that the boundaries of the Osage Reservation remain intact. *See Young v. State*, PCD-2020-954 Order Remanding for Evidentiary Hearing and Ruling on Application for Post-Conviction Relief (Jan. 27, 2021).

jurisdiction over offenses by or against Indians within the Cherokee Reservation, which, according to Tulsa, includes a quarter of Tulsa's land area and sixteen percent of its people.[3] Depending on the Indian or non-Indian status of the offender and/or the victim in each case, criminal jurisdiction for such offenses resides with the federal government under the Major Crimes Act, 18 U.S.C. § 1153, or the General Crimes Act, 18 U.S.C. § 1152, or with the Cherokee Nation under its inherent sovereignty.[4]

Yet despite *McGirt*, or perhaps in defiance of it, Tulsa continues to prosecute on-reservation crimes by or against Indians that occur within city limits within the boundaries of the Creek or Cherokee Reservations. Tulsa's justification for such prosecutions, which has recently been adopted by the Presiding Judge of the Tulsa Municipal Criminal Court,[5] is based on the unprecedented argument that its jurisdiction to prosecute violations of the Tulsa municipal code by or against Indians in Indian country arises from its pre-statehood incorporation as a municipality governed by Arkansas law. In making this argument, Tulsa seeks to elevate section 14 of the Act of June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act), into a congressional grant of uber-sovereignty that supersedes that of Oklahoma, the United States, and the Cherokee and Muscogee Nations. This radical argument illustrates a fundamental misunderstanding of law and turns history on its head.

I. TULSA'S CLAIMED JURISDICTION TO PROSECUTE MUNICIPAL ON-RESERVATION OFFENSES BY OR AGAINST INDIANS IS CONTRARY TO *MCGIRT, HOGNER*, *SPEARS*, AND *COLE*.

[3] *See* Brief of City of Tulsa as Amicus Curiae, *McGirt v. Oklahoma,* Case No. 18-952 (March 3, 2020) at 28 (*McGirt* Tulsa Amicus).

[4] *See Indian Country Criminal Jurisdiction Chart:* https://www.justice.gov/usao-wdok/page/file/1300046/download (last visited 4-7-2021).

[5] *See City of Tulsa v. Shaffer,* Case No. 6108204, Memorandum and Order (Feb. 2, 2021) (*Shaffer*).

Tulsa asserts criminal jurisdiction over offenses on the Cherokee and Muscogee Reservations over all persons "without regard to race," including jurisdiction over offenses by or against Indians, even though the State of Oklahoma (Oklahoma) has no such jurisdiction under the historic ruling in *McGirt* and the OCCA's rulings in *Hogner*, *Spears*, and *Cole*. In an about-face from the view Tulsa urged as amicus in *McGirt*,[6] Tulsa now claims that, despite these precedents, it derives criminal jurisdiction over crime on the Cherokee and Creek Reservations from an isolated and temporary provision in section 14 of the Curtis Act, a pre-statehood congressional act meant to force the Five Tribes to allot their reservations. § 14, 30 Stat. 495. That section provided that "all inhabitants" of cities and towns organized under Arkansas law, "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*.

Not only is Tulsa's reliance on this provision faulty, as discussed in more detail in part II, it merely repeats a failed argument in *McGirt* that the Curtis Act and other pre-statehood federal statutes granted jurisdiction to Oklahoma over crimes committed by Indians on the Muscogee Reservation. These statutes included §28 of the Curtis Act (concerning abolishment of Creek courts), and the Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (granting federal courts in Indian Territory "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense irrespective of race"). *McGirt*, 140 S. Ct. at 2476. Tulsa's reliance on pre-statehood statutes is contrary to *McGirt*, which rejected Oklahoma's similar argument, noting that the statutes were only "statutory artifacts" from Oklahoma's "territorial history." *Id.*

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[6] In *McGirt*, Tulsa accepted that if Oklahoma were determined to have no criminal jurisdiction for on-reservation offenses committed by or against Indians, Tulsa would likewise have no jurisdiction. *See McGirt* Tulsa Amicus at 6, 26-28, 30.

II. THE CURTIS ACT WAS TEMPORARY AND PROVISIONAL AND DOES NOT AUTHORIZE TULSA TO EXERCISE JURISDICTION OVER MUNICIPAL ON-RESERVATION OFFENSES BY OR AGAINST INDIANS.

A. The Criminal Jurisdiction of Municipalities in Indian Territory under Section 14 of the Curtis Act was Limited and Temporary.

In 1890, Congress passed the Act of May 2, 1890, ch. 182, 26 Stat. 81 (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 Arkansas law 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 (1909).

By 1898, non-citizens 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. The Curtis Act was "enacted to afford immediate local municipal governments" in Indian Territory towns on a provisional basis. *Inc. Town of Hartshorne*, 104 P. at 50. Section 14 of the Curtis Act, which included the provision touted by Tulsa as its congressional grant of jurisdiction in Indian country (i.e., that "all inhabitants" would be subject to ordinances of towns organized under Arkansas law "without regard to race"), 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 incorporate through a petition and election process.[7] Such townsites were clearly established under *federal*

[7] 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.

authority. *Id.,*104 P. at 50 (confirming that municipalities can only be created through the exercise of the power of the sovereignty). These townsites, as authorized by section 14, were organized under Arkansas state law and possessed only the "powers" of similar Arkansas municipalities.[8]

Tulsa's theory that section 14 grants Tulsa jurisdiction over on-reservation crimes committed by or against Indians ignores the complexities of that section. For example, 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." § 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 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 United States commissioners' jurisdiction had been earlier defined in the 1890 Act, § 39, 26 Stat. at 98-99,[9] 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

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[8] The status of a city or town as incorporated under Arkansas law before statehood should not be confused with plats showing approximately 150 towns, including Tulsa and Red Fork, that contained lots that were sold as required by the Curtis Act. *McGirt*, 140 S. Ct. at 2490. *See* HASTAIN'S TOWNSHIP PLATS OF CREEK NATION (1910) (Hastain's) The Curtis Act's requirements for sale of town lots were based on a town's population, not incorporation.

[9] 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.

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). *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 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).

Provisions in section 14 concerning municipal jurisdiction were clearly meant to provide stop-gap remedies that did not survive statehood. 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.

B. The Creek and Cherokee Allotment Agreements Do Not Confirm Tulsa's Broad Interpretation of Section 14 of the Curtis Act.

Tulsa relies on the provision in the 1901 Creek Allotment Act 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 Agreement, 31 Stat. 861, 872. The Cherokee Agreement contains a similar provision continuing §14. *See* Act of July 1, 1902, ch. 1375, §73, 32 Stat. 716, 727. The Cherokee Agreement, like the Creek Agreement, reserved town sites from allotment if set apart under the 1898 Curtis Act; contained detailed provisions concerning surveys, appraisals, establishment and

disposition of town sites; 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 896, 943 (10th Cir. 2017*), aff'd Murphy v. Sharp,* 140 S. Ct. 2412 (2020) (Creek Agreement, ¶¶ 2,10, 11-14, 17, 24(a)). Tulsa ignores this context and reason for keeping section 14 of the Curtis Act in force while the dispositions of Cherokee and Creek town site allotments were finalized.[10]

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 town sites from allotment, and afforded town residents, both Indian and non-Indian, the opportunity to purchase town lots on which they had made improvements. 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 Agreements addressed requirements for town sites, likely superseding many of the Curtis Act provisions related to towns. *See Murphy*, 875 F.3d at 943 (describing the town site requirements in the Creek Agreement, §§ 11–22, 31 Stat. 861, 864-867). *See* superseding provisions in the Cherokee Agreement, §§ 38-57, 32 Stat. 719-

[10] The Presiding Judge of the Tulsa Municipal Criminal Court in *Shaffer* 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 Shaffer*. 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). Notwithstanding the OIWA's general repealer ("[a]ll Acts or parts of Acts inconsistent herewith are hereby repealed,"), the judge nevertheless chose to interpret the *Hodel* ruling to be limited to repeal of section 28, and found that "the OIWA does not repeal Section 14 of the Curtis Act." The municipal judge 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." *Id*. 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 for pre-statehood (and pre-allotment) municipalities was meant to be, and was, temporary.

725. The Creek and Cherokee Agreements' 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.[11]

C. The 1906 Oklahoma Enabling Act Confirms That Power Granted to Indian Territory Towns under the Curtis Act Was Temporary.

After 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, 2-35, 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 McBratney*, 104 U.S. at 624. 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

[11] The cases cited by the municipal judge in the *Shaffer* order shed no light on whether municipal courts in incorporated Indian Territory towns have present-day jurisdiction to prosecute on-reservation crime by or against Indians. *See Shaffer* and *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 §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 the municipalities were specific to the language in §11 and offer no support for Tulsa's current argument under §14.

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." *Id*., § 21. 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*. These federal laws included the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153, as recognized in *McGirt*, 140 S. Ct. at 2470.[12]

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 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, as discussed in more detail in part III.B-C of this memo.

III. TULSA DOES NOT HAVE GREATER JURISDICTION OVER INDIAN COUNTRY THAN OKLAHOMA.

A. Tulsa Originated as a Creek Tribal Town.

The citizens of the Muscogee Nation, traditionally a confederacy of tribal towns, were forcibly removed from their ancestral homelands in Alabama to a treaty-created reservation in

[12] 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." Act of Mar. 4, 1907, ch. 2911, § 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.

Indian Territory. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1118 (D.D.C. 1976). The first Creeks to arrive near present-day Tulsa in 1836 were the Locvpoka, who established their tribal town on the east side of the Arkansas River.[13] COBB, RUSSELL, "THE GREAT OKLAHOMA SWINDLE: RACE, RELIGION, AND LIES IN AMERICA'S WEIRDEST STATE," 48 (2020) (COBB).

They placed coals and ash brought from their ancestral sacred fires at the base of a towering tree, the historic Council Oak tree, located on the grounds of Creek Nation Council Oak Park. COBB 48.[14] The tribal town numbered only 247 in 1857.[15] The town's members were nearly annihilated in the Civil War, but some of its survivors rebuilt the town.[16]

B. The City of Tulsa's Incorporation Under Arkansas Law Before Enactment of the 1898 Curtis Act and Its Pre-Statehood Implementation of Arkansas Laws Enabled Non-Indian Residents to Temporarily Perform Municipal Functions Pending Allotment and Statehood.

In the fall of 1895, a federal judge sitting in the Vinita district ruled that Indian Territory towns could organize municipal governments under Arkansas law. DEBO, ANGIE, "THE ROAD TO DISAPPEARANCE" 341, 364 (1941) (DEBO, ROAD). Two years later, Tulsa formed a temporary government through a petition process. On December 16, 1897, at least twenty "qualified voters" filed a petition to incorporate Tulsa under Arkansas law. *See* Petition to Incorporate Tulsa, Indian Territory. The United States Court in Indian Territory approved the petition on January 18, 1898,[17]

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[13] The word "Tulsa" derives from the Creek word, "Tallasi," meaning "old town." *Where It All Began: Muscogee (Creek) Nation Reflects Arrival to Indian Territory, History of Council Oak Tree,* Muscogee (Creek) Nation, News Release, 10-24-2018. The town was later referred to as "Tulsey Town." DEBO, "TULSA: FROM CREEK TOWN TO OIL CAPITOL," 23.

[14] The park is located at 1750 S. Cheyenne Avenue, Tulsa, Oklahoma.

[15] Other Creek tribal towns that resettled near the Locvpoka on the Creek Reservation included Red Fork, Broken Arrow, Glenpool, Sapulpa, and Sand Springs. COBB 47.

[16] One of those returning survivors, Tuckabache, owned, as his allotment, 160 prime acres just south of present-day downtown Tulsa. COBB 49, 51-52. *See* Hastain's (identifying Tuckabache allotment in Section 13, south of land reserved from allotment for town of Tulsa).

[17] Federal districts courts were not exercising legislative authority in incorporating such towns, but rather making adjudicatory determinations as to population, number of petitioners, and other facts

a few months before the Curtis Act was passed. *See* Court Proceedings of Northern District, Indian Territory.[18] At the time of incorporation, the town covered only a few blocks, as shown by the smattering of structures built along the railroad line and Tulsa's Main Street.[19] The population of Tulsa in 1898 was 1,500. *See* Sanford Map.

Tulsa operated its new government only briefly under Arkansas law during the provisional period before Oklahoma became a state by Proclamation of Nov. 16, 1907, 35 Stat. 2160-61. During that time, the "Incorporated City of Tulsa, Indian Territory" approved a modest number of ordinances, many of which addressed the needs of a newly formed town government by providing for elections, official city positions, taxes, bond issues, and trade licenses. Other ordinances concerned necessary infrastructure and essential services, including distribution of electricity and natural gas, construction of streets, sidewalks, streetcars, trash collection, fire protection, waterworks, and sewer services. Tulsa passed a few criminal ordinances regarding vagrancy, morality, gambling, but otherwise generally applied the criminal laws of Arkansas before statehood. *See* Ordinance No. 25.[20] Certainly today, Tulsa does not prosecute any offenses under Arkansas statutes, but under ordinances it passed by authority of Oklahoma.

C. Tulsa Was Established Under Oklahoma Law Almost Immediately After Statehood.

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as required by Arkansas law. *Inc. Town of Hartshorne,* 104 P. at 50 (citing Manfs. Dig. Ark. 1889 c.29 (Ind. T. Ann. St. 1899, c.15)).

[18] The Tulsa City Clerk produced the 1897 petition for incorporation and the 1898 court proceedings. The boundary description and map reported to have been submitted with the petition were not produced. However, we know Tulsa was very small in 1898. An insurance company map of the time shows a few buildings and businesses built along the railway line. The 1898 town did not extend into the Cherokee Reservation. *See* Sanborn-Perris Fire Insurance Map, Tulsa, Creek Nation, Indian Territory, November 1898 (Sanborn Map).

[19] The 1898 structures along S. and N. Rail Road Avenue, Archer, Lindsey, Main, 4th, 5th, and 6th Streets included, among other smaller structures, two hotels, general stores, drug stores, hardware stores, a bank, a lumber company, a flour mill, liveries, and an agricultural supply business. *See* Sanborn Map.

[20] The ordinances from 1900-1905 are available from the Tulsa City Clerk.

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 from an Indian Territory town to an Oklahoma municipality. As recognized by Oklahoma 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).

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* Proclamation by C.N. Haskell, Governor of Oklahoma. Seven weeks later, the Oklahoma Legislature enacted a statute amending former Oklahoma territorial law, and declaring cities and towns in the former Indian Territory to be "cities of the first class *under the laws of this State*." *See* Ok. Sess. Laws, ch. 12, art. I, § 1 [S.B. No. 114] (Feb. 20, 1908) at 183-84 (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* Ok. Sess. Laws, ch. 12, art. IV, § 1 [S.B. No. 149] (May 22, 1908) at 190-91. Consistent with this law, Tulsa abandoned its provisional government incorporated under Arkansas law and adopted its charter under provisions of the Oklahoma Constitution, article 18. *See* Excerpts of Charter of the City of Tulsa, State of Oklahoma, adopted July 3, 1908, approved by Gov. C.N Haskell January 5, 1909 (Charter). 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. *See* Charter at 6; *see also State ex rel. West 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 sub-division of Oklahoma ever since. Tulsa has no claim to any authority under its pre-statehood incorporation decree, whether adopted under authority of the 1895 federal court order or section 14 of the Curtis Act.

D. <u>Tulsa is a Political Subdivision of Oklahoma With No Power Independent of State Power</u>.

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 is only as extensive as 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 Reservation, Tulsa's jurisdiction was similarly limited. Indeed, Tulsa acknowledged this would be the result in its *McGirt* amicus brief filed in favor of Oklahoma. *McGirt* Tulsa Amicus at 29. Tulsa conceded 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 §14 of the Curtis Act would upend the jurisdictional arrangement regarding other forms of Indian country under 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 upend 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. Sec. 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. <u>Tulsa Has Erroneously Claimed that it Can Usurp Federal and Tribal Criminal Jurisdiction Over On-Reservation Crimes By or Against Indians Simply by Expanding Its Jurisdictional Boundaries.</u>

Tulsa makes the bold assertion 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 town site of the time, but that its "jurisdiction" grew as Tulsa grew, eventually encompassing parts of the Cherokee Reservation. Yet, this argument creates an absurdity. 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. Congress has never passed a law conferring jurisdiction on Oklahoma, *McGirt*, 140 S. Ct. at 2478.

The history of Tulsa's establishment and expansion demonstrates the absurdity of Tulsa's argument. When the St. Louis and San Francisco Railway Company extended its railroad line from Vinita to Tulsa in 1882, Tulsa's population was 200, but growing. Tulsa soon became occupied primarily by non-citizens with no claim to Creek land. *Johnson v. Riddle*, 240 U.S 467, 476-77 (1916). The non-Indian "intruders" settled in and around the railroad lines and built improvements on Creek tribal land they did not and could not own. "[S]peculators were purchasing town lots in order to establish a claim that might be validated in case of allotment." DEBO, ROAD 341, 364.

The Dawes Commission's official survey and Tulsa town site plat, completed and approved in 1902 for purposes of reserving the Tulsa town site from Creek allotment, limited Tulsa to 654.56 acres (only 14 acres more than the 640 acres contained in one square mile).[21] Although Tulsa had attempted earlier to incorporate a larger area of approximately 1440 acres, only the smaller Creek tribal acreage, identified in the official government survey and townsite plat, was reserved from allotment for Tulsa. *See* Tulsa Code of Ordinances, Appendix C. 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,* 104 P. at 51. Tulsa, when it later chartered under Oklahoma law in 1908, apparently included a small area of the Cherokee Nation

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[21] *See* Government Survey of Tulsa, Indian Territory by J. Gus Patton, C.E., approved by Department of Interior April 11, 1902; *See* Original Townsite Plat, Tulsa, Creek Nation, Indian Territory, filed June 13, 1902 (Orig.Plat); *See* City of Tulsa, *Annexation History of Tulsa,* Figures at 4, 8, 14,17 (Annexation History).

Reservation within its municipal boundaries. It is unclear how this portion of the Cherokee Nation was acquired and whether the Cherokee Nation consented to its acquisition or inclusion.[22]

After allotment and the sale of Tulsa townsite lots, the city was firmly in the hands of non-citizens, but remained surrounded by Creek allotments. *See* Hastain's. 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 and into a portion of the Cherokee Reservation. *See* Annexation History at 4, 17. Tulsa's claim that Congress intended that Arkansas laws would continue to apply "without regard to race" 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.

IV. TULSA'S ATTEMPT TO EXERCISE JURISDICTION OVER CRIMES BY OR AGAINST INDIANS IN INDIAN COUNTRY IS UNWORKABLE.

A. The Adoption of Tulsa's New-Found Theory Would Produce Unintended and Disconsonant Results.

Tulsa advocates a municipal jurisdiction that would create odd and unworkable results. Consider where Tulsa's approach would lead: 1) Tulsa, but not 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

[22] 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* Survey, North Tulsa, Indian Territory, Cherokee Nation, March 6, 1903; City of Tulsa, Indian Territory Ordinance No. 84; and Charter at art. II §1.

Indian crimes committed within intact reservations;[23] 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 crime within their municipal boundaries; 4) Tulsa's uber-sovereign status, and presumably that of similarly situated Indian Territory towns, would extend beyond the original land area reserved from allotment to include past and future annexations; and 5) Tulsa would have jurisdiction over Indian crime 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 piece-meal approach produces absurd results and is not defensible

B. The Only Available "Appeal" from Tulsa Municipal Convictions is to a State Court.

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. First, Tulsa's misdemeanor convictions can be used as predicates to support felony prosecutions in state district court. 1984 OK AG 142 (finding a municipal court of record conviction for Driving While Under the Influence of Intoxicants (DWI) can serve as a predicate for felony DWI in district court). Second, Tulsa's regular appeals and original actions are prosecuted in the OCCA. *See* Okla. Stat., tit. 11, § 28-128; OCCA, Rule 1.2. Yet, under *McGirt*, Oklahoma courts have no jurisdiction over on-reservation crimes by or against Indians. And, there is no federal "forum" for these Curtis Act appeals. *Shaffer*. In fact, requiring present-day federal courts to replace the OCCA in such appeals

[23] 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 laws 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).

increases lack of uniformity for Tulsa residents – subverting the underlying purpose Tulsa promotes from the Curtis Act's §14 "regardless of race" provision.

Federal courts are not authorized to handle municipal appeals. It is true that prior to statehood, appeals from "mayors 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, discussed more fully in part II(B.)[24] Those courts, like the municipal Indian Territory governments themselves, no longer exist. *See Ledbetter*, 97 P. at 835 ("Upon admission of the state to the union, the form of government [for an incorporated Indian Territory town] . . . ceased to exist [and] . . . the laws in force . . . became inoperable"). The current federal court for the Northern District of Oklahoma is not designated by Congress to provide a forum for appeals of municipal convictions arising from former Indian Territory towns that temporarily incorporated under Arkansas law prior to statehood. Congress's actions prior to statehood were intended "to be merely provisional" and provide a body of local laws "for the time being." *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912). That time has long passed and Tulsa cannot continue to claim Indian country jurisdiction on the basis of provisional congressional relics.

CONCLUSION

As recognized in *McGirt*, pre-statehood federal statutes concerning jurisdiction in Indian Territory such as the Curtis Act were only temporary measures with no impact on jurisdiction involving on-reservation criminal offenses. Oklahoma municipal governments have no right independent of Oklahoma to exercise criminal jurisdiction for on-reservation crimes committed by or against Indians. Since 1908 Tulsa has operated under Oklahoma law and the Oklahoma

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[24] 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).

Constitution. It derives all its power and authority from Oklahoma. It is not a separate sovereign with jurisdiction that extends beyond Oklahoma's.