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MEMORANDUM

July 5, 2022

TO: TRIBAL CLIENTS
FROM: HOBBS, STRAUS, DEAN & WALKER, LLP
RE: Supreme Court Decision in *Oklahoma v. Castro-Huerta*

On June 29, 2022, the Supreme Court issued its decision in *Oklahoma v. Castro-Huerta*, 597 U.S. __ (2022), ruling that the seminal Indian law case of *Worcester v. Georgia*, 31 U.S. 515 (1832) was no longer controlling and holding states have concurrent criminal jurisdiction over non-Indian crimes against Indians in Indian country. In a 5-4 vote, the Court reversed Oklahoma Court of Criminal Appeal's (OCCA) decision, which held the State of Oklahoma (State) did not have jurisdiction over crimes committed by a non-Indian against an Indian within Indian country.

BACKGROUND

The dispute underlying this case arose in 2015 when the State prosecuted and convicted Victor Manuel Castro-Huerta, a non-Indian, for committing child abuse—namely, neglect—against his then-5-year-old stepdaughter, a citizen of the Eastern Band of Cherokee Indians, in the mother and Castro-Huerta's residence within the reservation boundaries of the Cherokee Nation of Oklahoma. Following his conviction, the Court recognized the continued existence of the Muscogee (Creek) Nation reservation in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Based on the *McGirt* ruling, the OCCA later recognized the continued existence of the Cherokee Nation, Choctaw Nation, and Chickasaw Nation reservations. See, e.g., *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶15, 497 P. 3d 686, 689.

After the Court announced the *McGirt* decision, Castro-Huerta filed an appeal with the OCCA, arguing the State lacked criminal jurisdiction over a non-Indian's commission of a crime against an Indian within Indian country. The OCCA decided in favor of Castro-Huerta and vacated his conviction. While appellate procedures at the state level were ongoing, the federal government prosecuted Castro-Huerta for the same set of offenses. Castro-Huerta later pleaded guilty in federal court.

Oklahoma petitioned the Supreme Court to: (1) revisit the *McGirt* decision, and (2) determine states have "'inherent' authority to try crimes within reservation boundaries by non-Indians against tribal members." Castro-Huerta contended the federal government

has exclusive jurisdiction over crimes committed by non-Indians against Indians within Indian country under the General Crimes Act, 18 U.S.C. § 1152. Castro-Huerta further contended Public Law 280 (P.L. 280)—authorizing states to assert criminal jurisdiction over crimes committed within Indian country under certain circumstances—barred the State from asserting this authority to prosecute him because the State lacked this authorization.

MAJORITY OPINION

Justice Kavanaugh delivered the majority opinion, and was joined by Chief Justice Roberts and Justices Thomas, Alito, and Barrett. Although the underlying case arose in Oklahoma, the Court did not limit application of the opinion to Oklahoma. The Court began by acknowledging federal law may preempt state jurisdiction under certain circumstances. The Court, however, ruled that absent these circumstances, "a State has jurisdiction over all of its territory, including Indian country." As support for this proposition, the Court cited to the 10th Amendment.

In a stark departure from established precedent, the Court went on to call into question the continued import of the seminal case on the issue, *Worcester v. Georgia*, 31 U.S. Pet. 515, 561 (1832). The Court's decision in *Worcester* established that state law had no force in Indian country without congressional authorization. The Court reasoned that *Worcester* was no longer controlling because the Court has since decided "[b]y 1880 [it] no longer viewed reservations as distinct nations" but, rather, as "part of the Surrounding State." (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962).

Rather, the Court asserted that since the latter half of the 1800s, "the Court has consistently and explicitly held that Indian reservations are 'part of the surrounding State'" and subject to the State's jurisdiction 'except as forbidden by federal law.'" (quoting *Egan*, 369 U.S. at 72). The Court then cited its decision in *United States v. McBratney*, 104 U.S. 621, 623–24 (1882) (holding states have jurisdiction to prosecute non-Indian against non-Indian crimes in Indian country), to depart from long-established precedent, finding states hold "inherent" authority to prosecute crimes in Indian country unless preempted by federal law.

Having asserted that states possess jurisdiction to prosecute crimes in Indian country unless preempted by federal law, the Court determined that no existing law preempts the State's authority to assert criminal jurisdiction over crimes committed by non-Indians against Indians within Indian country. The Court began by stating that the General Crimes Act did not bar the states' authority to prosecute these crimes. The General Crimes Act provides "the general laws of the United States as to the punishment of offenses committed ... within the sole and exclusive jurisdiction of the United States ... shall extend to the Indian country." 18 U.S.C. § 1152. The Court took the silence of the General Crimes Act as to preempting the State's authority to mean that under the General Crimes Act, "both the Federal Government and the State have concurrent jurisdiction to prosecute [these] crimes." The Court also rejected Castro-Huerta's counter

argument that Indian country should be treated as federal enclaves for jurisdictional purposes in light of the Court's past rulings that states may prosecute certain crimes within Indian country.

The Court also distinguished the General Crimes Act from the Major Crimes Act, 18 U.S.C. § 1153, noting that the Major Crimes Act contains language explicitly providing defendants shall be subject to the same laws as those subject to the United States' exclusive jurisdiction whereas the General Crimes Act does not. The Court also rejected Castro-Huerta's reenactment argument—namely, that Congress' recodification of the General Crimes Act two years after the Court decided in dicta that states lack jurisdiction over crimes committed by non-Indians against Indians within Indian country in *Williams v. United States*, 327 U.S. 711, 714 (1946) was a way of codifying the Court's statements in that decision. The Court reasoned his argument fails because "the reenactment canon does not override clear statutory language" and the canon does not apply to dicta. The Court, however, maintained the *McGirt* decision was still good law.

The Court also decided P.L. 280 did not preempt the State's authority to prosecute non-Indian crimes against Indians in Indian country, in part, because the legislation "contains no language that preempts States' civil or criminal jurisdiction." P.L. 280, originally enacted in 1953, authorized certain states to assert criminal jurisdiction over Indian country. The Court rejected Castro-Huerta's argument that Congress enacted P.L. 280 because federal law did not permit states' assertion of authority over those crimes until it passed the act. The Court reasoned P.L. 280 had no preemptive effect because "any overlap (or even complete overlap)" between Public Law 280's jurisdictional grant with States' preexisting jurisdiction with respect to these crimes does not show the absence of such jurisdiction prior to its passage. Instead, the Court held the need to clarify state jurisdiction warranted passage of the act, especially given what the Court considered to be a cloud on states' jurisdiction over these non-Indians defendants.

Finally, applying the test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43, the Court further determined federal law did not preempt states' jurisdiction over crimes committed by non-Indians against Indians within Indian country. Under the *Bracker* test, the Court determined: (1) the exercise of state jurisdiction here would not infringe on tribal self-government because "Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians" and state prosecutions of non-Indians are only between the State and the non-Indian, not tribes; (2) the State's prosecution of a non-Indian does not harm any federal interest in protecting Indian victims because states' jurisdiction runs concurrent with federal jurisdiction and does not oust or otherwise bar an earlier or later federal prosecution; and (3) "the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory and in protecting all crime victims" and it refuses to "treat Indian victims as second-class citizens"—the Court pointed to the fact that it would be undisputed that the State would have jurisdiction if the victim here had been non-Indian. The Court, thus, reversed the decision of the OCCA and remanded for more proceedings consistent with the Court's opinion

DISSENTING OPINION

Justice Gorsuch issued a dissenting opinion, which was joined by Justices Breyer, Sotomayor, and Kagan. The dissent first discusses the Court's *Worcester* decision as providing 200 years of precedent for the proposition that States are prohibited from asserting criminal jurisdiction over a separate sovereign—namely, tribal sovereigns and their territories. The dissent then notes that the majority utilized an ahistorical reading of the facts underlying the history of tribal criminal jurisdiction in this country and that, unlike the *Worcester* Court's unwillingness to give into the State of Georgia's attempted power grab in *Worcester* in the 1830's, the majority in *Castro-Huerta* "wilts" where it once stood firm.

The dissent asserts that the framers of the original U.S. Constitution intended the federal government to have broad powers over tribal relations while leaving tribes wide latitude to govern their internal affairs. The dissent noted that at that time in history, the states acknowledged their utter lack of jurisdiction over Indian affairs.

The dissent explains that Congress enacted the General Crimes Act a mere two years after the Court decided *Worcester* as a promise to tribes to protect their members from harms posed by the United States' citizenry, and that this same law remains in effect in nearly its original form. Drawing upon the Court's rulings in *McBratney* and *Draper* (governing crimes involving only non-Indian perpetrators and victims), the dissent argues, the history of these laws reveal, "States could play no role in the prosecution of crimes by *or against* Native Americans on tribal lands." (emphasis added).

Further, the dissent discusses the Oklahoma Enabling Act of 1906, which required the State to "forever disclaim[] all right and title in or to all lands lying within the State's limits owned or held by any Indian, tribe, or nation." (quoting 37 Stat. 270). Rather, Congress stated its intention that tribal territories "would 'remain subject to the jurisdiction, disposal, and control of the United States.'" (quoting 37 Stat. 270). This language, which was adopted into the Oklahoma Constitution, was intended to limit Oklahoma's jurisdictional authority over the tribes.

With respect to P.L. 280, the dissent observed that the law evolved over time to provide tribal governments more of a say over jurisdictional matters, such as requiring tribal consent before a state could assume P.L. 280 jurisdiction. The dissent pointedly notes that Oklahoma has never sought consent from any Oklahoma tribes to assert P.L. 280 jurisdiction. The dissent argues the proper approach for the state would have been to seek consent from tribes to administer P.L. 280 programs or seek a statutory authority from Congress, rather than the courts.

With regard to the majority's position that the State may exercise jurisdiction over non-Indians in Indian country unless Congress provides otherwise, the dissent argues that the majority's understanding of the law is completely mistaken. The dissent argues that

currentl law provides the opposite is true - state powers to assert criminal jurisdiction over non-Indians in Indian country are barred unless Congress specifically grants that authority to the state. "Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom," the dissent wrote of the majority's analysis.

Finally, the dissent closes by inviting Congress to take action, such as by amending P.L. 280 to reverse the Court's acquiescence to the State's successful power grab.

CONCLUSION

Apart from the grant of state authority to prosecute non-Indians for crimes committed against Indians in Indian country, the long-term impact of the decision in *Castro-Huerta* is unclear at this time. As noted in the dissent, Congress could act to restore exclusive federal and tribal jurisdiction in Indian country.

The decision's departure from well-established Indian law principles, however, is extremely concerning and raises concerns about the Court's willingness to reexamine foundational principals of Indian law in ways that significantly and detrimentally impact the legal landscape that has been in place for many decades. The decision will undoubtedly lead to additional litigation surrounding the nature and scope of federal Indian law principles in the criminal as well as civil jurisdiction context.

If you have any questions or would like additional information on any of the issues raised in this report, please do not hesitate to contact Elliott Milhollin (emilhollin@hobbsstraus.com or 202-822-8282) or Geoff Strommer (gstrommer@hobbsstraus.com or 503-242-1745).