

**IN THE COURT OF APPEALS OF THE CHOCTAW NATION OF OKLAHOMA
No. ACC-2022-1**

CHOCTAW NATION OF OKLAHOMA,

Appellant,

vs.

TOMMY LEE JONES,

Appellee.

**Appeal from the District Court
of the Choctaw Nation of Oklahoma
Honorable Richard E. Branam, Presiding
District Court Case No. CF-21-537**

ADVERSE RULING AGAINST THE CHOCTAW NATION

BRIEF-IN-CHIEF OF APPELLANT

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INDEX

SUMMARY OF THE RECORD 1

BRIEF HISTORY OF CHOCTAW CRIMINAL JURISDICTION & THE
SPECIAL CRIMINAL DOMESTIC VIOLENCE JURISDICTION IN
THE VIOLENCE AGAINST WOMEN ACT 3

PROPOSITION I

 A. THE SPECIAL CRIMINAL DOMESTIC VIOLENCE JURISDICTION
 IN THE VIOLENCE AGAINST WOMEN ACT PROVIDES THE
 CHOCTAW NATION JURISDICTION OVER BURGLARY IN THE
 FIRST DEGREE 10

 B. IF THERE IS AMBIGUITY IN THE STATUTORY LANGUAGE OF
 THE SPECIAL CRIMINAL DOMESTIC VIOLENCE JURISDICTION, IT
 SHOULD BE RESOLVED IN FAVOR OF THE CHOCTAW NATION 17

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Treaties

Treaty of the Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 3

Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855,
11 Stat. 611 3, 4

Treaty of Washington with the Choctaw and Chickasaw, Apr. 28, 1866,
14 Stat. 769 3, 4

United States Code

18 U.S.C. § 16, Pub. L. 98-473, 98 Stat. 2136

25 U.S.C. § 1301(2) (“Duro Fix”), Pub. L. 90-284, 82 Stat. 77 5

General Crimes Act, 18 U.S.C. § 1152 5

Indian Country Civil Rights Act, 25 U.S.C. § 1501 5

Major Crimes Act, 18 U.S.C. § 1153 5

Public Law 280, 18 U.S.C. § 1162, Pub. L. No. 83-280, 67 Stat. § 588 5

Public Law 280 (1968 amendments), 25 U.S.C. § 1321, Pub. L. 90-284,
82 Stat. 78 5

Tribal Law and Order Act, Pub. L. No. 111-211, Title II, § 201-66,
124 Stat. 2262 (2010) 7

Violence Against Women Act, Pub. L. No. 113-4, § 904,
127 Stat. 54 (2013)(codified as amended at 25 U.S.C. § 1304) 8, 9, 10, 11

Violence Against Women Act Reauthorization Act, Pub. L. No. 117-103,
136 Stat. 49 (2022) 9

United States Supreme Court Cases

Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 89 (1918) 17

Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987) 17

Bryan v. Itasca Cnty., 426 U.S. 373, 392-93 (1976) 17

<i>Duro v. Reina</i> , 495 U.S. 676 (1990)	5
<i>Montana v. Blackfeet Tribe of Indians</i> , 471 U.S. 759, 766 (1985)	17
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	5, 16, 17
<i>U.S. v. Castleman</i> , 572 U.S. 157 (2014)	13, 15
<i>U.S. v. Wheeler</i> , 435 U.S. 313, 98 S.Ct. 1079 (1978)	5
<i>Voisine v. U.S.</i> , 576 U.S. 686 (2016)	14

Choctaw Nation Statutes

<i>An Act Declaring the Punishment for the Crime of Rape</i> , Choctaw Nation Tribal Council, Session XIII, § 11 (Oct. 16, 1846)	4
<i>An Act for disturbing the peace of families</i> , Session XIV, § 6 (Oct. 13, 1847)	4
<i>An Act for Providing for the Punishment of Assault and Battery</i> , Choctaw Nation Tribal Council, Session X, § 2 (Oct. 1843)	4
<i>An Act to provide for protection of rights of the Choctaw Nation and her citizens against increased encroachments by U.S. Courts</i> , Choctaw Nation Tribal Council Bill No. 51 (Nov. 14, 1889)	4
Choctaw Nation Code of Criminal Procedure §§ 1089.1 <i>et seq.</i>	1
Choctaw Nation Criminal Code, § 151(E)	10
Choctaw Nation Criminal Procedure Code, Rule 3.4	1
Choctaw Nation Criminal Procedure Code, Rule 3.5	1
Choctaw Tribal Council Statute, line 59 (3 Districts, Mississippi) (Aug. 5, 1826)	4
Choctaw Tribal Council Statute, line 110 (3 Districts, Mississippi) (June 12, 1828)	4
Choctaw Nation Tribal Council Bill, No. 24 (Oct. 26, 1877)	4

Tribal Court Cases

<i>Pascua Yaqui v. Frank Jaimez, Order Denying Dismissal Due to Lack of Subject Matter Jurisdiction</i> , Case No. CR-16-236 (Feb. 20, 2017)	14
<i>Davisson et al. v. Colville Confederated Tribes</i> , 10 Am. Tribal Law 403, 407, 11 CCAR 13, 6 CTCR 04 (2012)	15

State Court Cases

State v. Sizemore, 2021 OK CR 6, 485 P.3d 867 4

State ex rel. Matloff v. Wallace, 2021 OK CR 21, 497 P.3d 686 4

Secondary and Other Authorities

A. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 *Geo. Wash L. Rev.* 552 (2007) 13

Amicus Curiae Brief of National Congress of American Indians, Oklahoma v. Castro-Huerta, S.Ct. (No. 21-429) 10

Amicus Curiae Brief of National Indigenous Women’s Resource Center et. al. Oklahoma v. Castro-Huerta, S.Ct. (No. 21-429) 8, 16

Amici Curiae of the National Network to End Domestic Violence et. al., U.S. v. Castleman, 572 U.S. 157 (2014) 13, 15

Amnesty International, *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA* (2007) 5

E. Stark, *Re-Presenting Woman Battering: From Battered Woman’s Syndrome to Coercive Control*, 58 *Alb. L. Rev.* 973, 986 (1995) 13

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Statement of Senator Dianne Feinstein, 165 *Cong. Rec. S2*, 679-02 (daily ed. May 7, 2019) 9

Statement of Senator Tom Cole, United States House Floor, H.R. 1585 (April 4, 2019) 11

Training Institute on Strangulation Prevention, *All Abusers Are Not Equal: New IPV Research Reveals Indicator of Deadly Abuse* (Jan. 8, 2020) 16

U.S. Census Bureau, *2012-2016 American Community Survey 5-Year 7*
Estimates—DP05 Demographic and Housing Estimates (2016).

Court Minutes & Transcripts

Court Minute, Formal Arraignment, February 9, 2022 2

Formal Arraignment Transcript, February 9, 2022 2

Preliminary Hearing Transcript, December 10, 2021 2, 15

IN THE COURT OF APPEALS OF THE CHOCTAW NATION OF OKLAHOMA

CHOCTAW NATION OF OKLAHOMA,)	No. ACC-22-1
Appellant,)	
)	
vs.)	
)	District Court: CF-21-573
TOMMY LEE JONES,)	
Appellee.)	

BRIEF-IN-CHIEF OF APPELLANT

COMES NOW, the Choctaw Nation of Oklahoma, Plaintiff in the trial court and Appellant in this Court, presents the following as its Brief-in-Chief, in compliance with §§ 1089.1 *et seq.* of the Choctaw Nation Criminal Procedure Code and Rules 3.4 and 3.5 of the Choctaw Nation Rules of the Court of Appeals in Criminal Cases.

SUMMARY OF THE RECORD

Pursuant to the sworn probable cause affidavit submitted into the case file, on November 6, 2021, Officer Joey Zappala of the Idabel Police Department responded to a report of a domestic disturbance at 615 Southeast Ave G. in Idabel, Oklahoma. Upon arrival, Officer Zappala observed two (2) minor children outside of the house, and the children immediately pointed inside of the house. As Officer Zappala approached the front door of the house, he heard noises towards the rear of the house. Inside of the home, Officer Zappala observed two (2) additional small children, and these children were pointing to the bedroom towards the rear of the house. Officer Zappala made his way to the back bedroom, where he observed the Appellee on top of the victim R.D. and observed the Appellee to be holding R.D. down on the bed while pulling R.D.’s hair.

Officer Zappala observed R.D. to be crying and trying to get free from the Appellee, but the Appellee was not allowing her to move away from him. Officer Zappala drew his firearm and

ordered the Appellee to let R.D. go and to get off of her. Officer Zappala then placed the Defendant under arrest and then placed him into his patrol vehicle. When Officer Zappala returned to the residence, R.D. stated that while she was working in her bedroom, the Defendant had entered the house uninvited and made his way into her bedroom. R.D. told Officer Zappala that the Appellee had grabbed her computer, thrown it to the bottom of the bed, and then threw her on top of the bed. R.D. stated that Appellee put his hands around her neck and squeezed.

Officer Zappala observed redness on both sides of R.D.'s neck, as well as under the chin. There were a total of five (5) children present in the residence at the time of this incident. Officer Zappala then transported Appellee to the Idabel City Jail. On November 9, 2021, the Choctaw Nation filed an *Information* against the Appellee and charged him with Count 1- Domestic Assault and Battery by Strangulation, in violation of § 644(J) of the Choctaw Nation Criminal Code; and Count 2- Burglary in the 1st Degree, in violation of § 1431 of the Choctaw Nation Criminal Code.

On December 10, 2021, the Preliminary Hearing was held, in which the parties stipulated to the CDIB/Tribal Membership status of the Victim R.D. and that the charged crimes occurred in the territorial jurisdiction of the Choctaw Nation. P.H. Tr., lines 15-17, p. 3 (Dec. 10, 2021). R.D. testified that the Defendant did not have authorization to enter the home and that he had strangled her. *Id.* at lines 5-22, p.7. After the Choctaw Nation rested, Appellee demurred to Count 2 alleging that the trial court lacked jurisdiction over him for Count 2- Burglary in the 1st Degree as not being a crime of domestic violence. The demurrer was taken under advisement. *Id.* at lines 13-16, p. 22. *Court Minute*, Preliminary Hearing (Dec. 10, 2021). The trial court then granted the demurrer as to Count 2 regarding jurisdiction on February 9, 2022. *See* F.A. Tr., lines 21-23, p. 4; *Court Minute*, Formal Arraignment (Feb. 2, 2022). The Choctaw Nation appeals from this order. For the reasons set forth herein, the trial court erred in granting the demurrer and that order should be reversed.

**BRIEF HISTORY OF THE CHOCTAW NATION’S CRIMINAL JURISDICTION
& SPECIAL CRIMINAL DOMESTIC VIOLENCE JURISDICTION IN THE
VIOLENCE AGAINST WOMEN ACT**

A. Choctaw Nation Criminal Jurisdiction

Since time immemorial, the Choctaw government has exercised authority and jurisdiction over those who committed crimes in Choctaw communities. As recorded by the 1826 Choctaw Tribal Council, “In the past, we have always had laws” *See* Choctaw Tribal Council Statute, line 59 (3 Districts, Mississippi) (Aug. 5, 1826). Choctaw laws were inclusive to protect women, children, and to honor cultural customs and beliefs. Some of the first series of written Choctaw laws demonstrate that Choctaw people valued the safety and protection of Choctaw women: “If a woman is unwilling and a man violates her by raping her, the law specifies that he shall be charged with thirty-five lashes with a switch.” *Id.* at line 110 (June 12, 1828) (translation included to define “*ilbvshalechit okpahani* (violate)” meaning to cause harm, oppression, shame, or any form of distress, especially emotional). As any government, Choctaw laws changed over time, but the Choctaw government has consistently maintained its jurisdiction over those within its lands.

In 1830, the United States Congress ratified the Treaty of the Dancing Rabbit Creek, which secured the Choctaw Nation’s reservation in Indian Territory and promised that that the Choctaw Nation would have “jurisdiction and government of all the persons and property that may be within their limits west” Treaty of the Dancing Rabbit Creek, arts. 2, Sept. 27, 1830, 7 Stat. 333. In subsequent treaties, Congress reaffirmed the existence of the Choctaw Nation Reservation, with modified boundaries. *See* 1855 Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611; 1866 Treaty of Washington with the Choctaw and Chickasaw, Apr. 28, 1866, 14 Stat. 769. Since its creation, the Choctaw Nation’s Reservation has never been disestablished

by Congress. *See State v. Sizemore*, 2021 OK CR 6, 485 P.3d 867; *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686.

Following removal to Indian Territory, the Choctaw Nation Tribal Legislature enacted laws that prohibited crimes of violence. In the mid-1800s, the Choctaw Nation Tribal Council enacted numerous criminal laws, which prohibit “any” or “every person” from specific criminal conduct. *See e.g. An Act for Providing for the Punishment of Assault and Battery*, Choctaw Nation Tribal Council, Session X, § 2 (Oct. 1843); *An Act Declaring the Punishment for the Crime of Rape*, Choctaw Nation Tribal Council, Session XIII, § 11 (Oct. 16, 1846). Crimes similar to the Choctaw Nation’s current-day Burglary or Breaking and Entering charges were also prohibited in the reservation, as it prohibited “any person” from entering the residence of another and using abusive language to disturb the peace of any family. *See An Act disturbing the peace of families*, Session XIV, § 6 (Oct. 13, 1847).

Past treaty language has provided the Choctaw Nation criminal jurisdiction over non-Indians. In 1866, the Treaty of the Choctaw and Chickasaw between the United States provided that every white person married to a Choctaw woman, who was then adopted by the Choctaw Legislature, is deemed a member of the community and subject to Choctaw Nation laws, including civil penalties and criminal punishments. *See Treaty of Washington*, *supra*, art. 38. Throughout the late 1800s, the Choctaw Nation continued to assert its jurisdiction over intermarried whites pursuant to the 1866 treaty jurisdiction over intermarried white men, as seen in a Tribal Bills passed in 1877 and 1899. *See Council Bill, No. 24*, Choctaw Nation Tribal Council (Oct. 26, 1877); *An Act to provide for protection of rights of the Choctaw Nation and her citizens against increased encroachments by U.S. Courts*, Council Bill No. 51, Choctaw Nation Tribal Council (Nov. 14, 1889).

A series of federal legislation and policies then began to interfere with tribal justice systems, beginning in 1885. *See e.g.* Major Crimes Act, 18 U.S.C. § 1153; General Crimes Act, 18 U.S.C. § 1152; “Public Law 280,” Pub. L. No. 83-280, 67 Stat. § 588 (1953)(codified as 18 U.S.C. § 1162, 25 U.S.C. § 1321; “Duro Fix” 18 U.S.C. 1301(4)(responding to *Duro v. Reina*, 495495 U.S. 676 (1990)); Indian Country Civil Rights Act, 25 U.S.C.§ 1501. The Choctaw Nation retained its criminal jurisdiction over both Indians and non-Indians during this time period, as “tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *U.S. v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079 (1978). Then, in 1978, the United States Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe* that tribal governments were divested of their criminal jurisdiction over non-Indians and that such an exercise of criminal jurisdiction must be provided for by Congress. 435 U.S. 191, 208 and 212 (1978), 98 S.Ct. 1011, 55 L.Ed.2d 209.

The consequences from the *Oliphant* ruling were catastrophic for Indian Country. The combination of case law and federal legislation directed at Indian Country, including the Choctaw Nation, created an extremely complicated jurisdictional framework, which became known as the “jurisdictional maze.” *See* Amnesty International, *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA* (2007), <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf> (accessed last May 19, 2022). Holding non-Indian domestic abusers accountable became extremely difficult because non-tribal governmental prosecution agencies either lacked understanding of the complex jurisdiction or chose to not enforce their authority over non-Indians committing abuse against Indian women. *See id.*

Three main factors determine which government has jurisdiction: (1) if the victim is a member of a federally recognized Indian tribe or considered Indian by the federal government; (2)

if the accused is a member of a federally recognized Indian tribe or considered Indian by the federal government; and (3) if the alleged offense occurred on tribal land. Due to *Oliphant*, non-Indian abusers often faced little to no punishment for their domestic violence crimes against Indian women by either the state or the federal government if the offense occurred on tribal lands, thus creating a gap. Reportedly, this gap in jurisdiction and enforcement encouraged non-Indian individuals to pursue criminal activities of various kinds in Indian Country. *Id.* at 59. *See also* Indian Law and Order Commission, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States*, 3 (2015), available at <https://www.aisc.ucla.edu/iloc/report/index.html> (accessed last May 19, 2022) (discussing how the jurisdictional gaps contribute to an institutionalized public safety crisis). *Oliphant* essentially provided immunity to non-Indian offenders and compromised the safety of Indian women and men. National Institute of Justice, *Violence Against American Indian and Alaska Native Women and Men*, at 4 (2016), available at <https://www.ojp.gov/pdffiles1/nij/249822.pdf> (last accessed May 19, 2022).

Following *Oliphant*, tribal reservations began experiencing high rates of violence, particularly violence committed by non-Indians against Indian women. Recent studies have shown that Indian women experience shockingly high rates of violence at the hands of non-Indians. *See id.* Data shows that four (4) out of five (5) American Indian and Alaska Native women experience violence in their lifetime. *Id.* at 2. The same study shows that for American Indian and Alaska Native women: 56.1% experience sexual violence; 55.5% experience physical violence committed by an intimate partner; 48.8% experience stalking; and 66.4% experience psychological aggression from an intimate partner. *Id.* Out of those offenses, 97% of American Indian and Alaska Native

women experience violence by at least one (1) interracial (non-Indian) partner in their lifetime. *Id.* at 4.

For tribal communities such as the Choctaw Nation, there is a significant non-Indian population that lives within the reservation. Specifically, the Choctaw Nation has a recorded population of approximately twenty (21) percent Indian and seventy-nine (79) percent non-Indian, thus increasing the likelihood that Indian women who are abused will be abused by non-Indians. *See 2012-2016 American Community Survey 5-Year Estimates—DP05 Demographic and Housing Estimates*, U.S. Census Bureau (2016).

In 2010, Congress made a significant step towards closing some of the jurisdictional gaps created by *Oliphant* and other prior case law by enacting the Tribal Law and Order Act (TLOA). Pub. L. No. 111-211, Title II, § 202, July 29, 2010, 124 Stat. 2262. Congress articulated that tribal governments are “the first responders” and “most appropriate institutions for maintaining law and order in Indian Country. *Id.* TLOA expanded tribal sentencing authority, mandated greater federal cooperation with tribal governments, and authorized tribal attorneys to act as Special United States Attorneys to prosecute crimes committed Indian people. 25 U.S.C. § 1302(a)(7)(c). TLOA also extended numerous rights to defendants in tribal prosecutions, including: the right to effective assistance of counsel and court appointed defense counsel. TLOA also requires the presiding judge to be law trained and licensed to practice law, requires the tribe’s laws be made publicly available (including rules of evidence and procedure), and requires the court to maintain a record of the proceeding. 25 U.S.C. § 1302 (c). Although TLOA was a huge milestone aimed at making reservations safer and expanding tribal authority, it did not reverse *Oliphant* or provide jurisdiction to tribes over non-Indians.

B. Special Criminal Domestic Violence Jurisdiction

In 2013, Congress restored tribal criminal jurisdiction over non-Indians who committed crimes of domestic violence, dating violence, and violation of protective orders against Indians by enacting the Special Criminal Domestic Violence Jurisdiction (SCDVJ) in the Violence Against Women Act (“VAWA”). *See* 25 U.S.C. § 1304(c). The SCDVJ of the VAWA is known as a partial reversal of *Oliphant*. The purpose behind restoring this tribal criminal jurisdiction for crimes of domestic violence, dating violence and violations of protective orders was to both address the jurisdictional maze in Indian Country and to address the disproportionate rate of violence that Indians experience at the hands of non-Indians. Congress understood the need to affirm tribal criminal jurisdiction against non-Indian abusers, and it acknowledged this need by enacting the SCDVJ in the VAWA. Only certain non-Indians with specific ties to the participating tribal nation can be subject to the SCDVJ of the VAWA:

- (i) Resides in the Indian country of the participating tribe;
- (ii) Is employed in the Indian country of the participating tribe;
- (iii) Is a spouse, intimate partner, or dating partner of –
 - (I) A member of the participating tribe; or
 - (II) An Indian who resides in the Indian country of the participating tribe.

Id.

By restoring this specific tribal criminal jurisdiction, one of Congress’s rationales for this jurisdictional restoration was that the government closest to the victim—i.e., the tribal government—has the most responsibility and accountability to the victim herself. *See Amicus Curiae Brief of NIWRC et. al.*, at 20, *Oklahoma v. Castro-Huerta*, No. 21-429 (citing 159 Cong. Rec. S487 (daily ed. Feb. 7, 2013)) (“When it comes to protecting those most at risk, Congress must recognize the need for local control, local responsibility, and local accountability.”). In 2018, the National Congress of American Indians published a report detailing the success of the SCDVJ in

tribal communities and that the restoration of tribal criminal jurisdiction over crimes related to domestic violence has “allowed tribes to respond to long-time abusers who previously had evaded justice and has given a ray of hope to victims and community that safety can be restored.” Nat’l Congress of American Indians, *VAWA 2013’s Special Domestic Violence Criminal Jurisdiction (SDVCJ) Five-Year Report*, 1 (2018), available at https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf (last accessed May 19, 2022).

The implementation of the SCDVJ in Tribal communities has also been recognized by Congress as a success, as seen in a statement by Senator Dianne Feinstein, “Tribes were finally able to prosecute anyone who committed domestic violence against an Indian on Indian land. These measures were not only necessary; *they worked* . . . In fact, not a single conviction was overturned because of a lack of due process. We must now build on that success.” 165 Cong. Rec. S2, 679-02 (daily ed. May 7, 2019) (statement by Sen. Dianne Feinstein)(emphasis added).

Then, in March of 2022, Congress reauthorized VAWA and restored and expanded tribal criminal jurisdiction in the SCDVJ even further over non-Indian crimes of child violence, sexual violence, trafficking, and assaults on tribal justice personnel. *See Violence Against Women Act Reauthorization Act of 2022 (“VAWA 2022”)*, Pub. L. No. 117-103, 136 Stat. 49 (2022)(signed into law March 15, 2022).¹ The Reauthorization Act declares that “restoring and enhancing Tribal capacity to address violence against women provides for greater local control, safety, accountability, and transparency.” *Id.* at § 801(a)(13).

By reauthorizing tribal criminal jurisdiction and expanding such jurisdiction in VAWA, Congress demonstrated a resounding affirmation of the importance of tribal governments

¹ The offenses committed by Appellee predated the VAWA reauthorization of March 15, 2022; therefore, the VAWA enacted in 2013 is the controlling federal act in this matter.

addressing crimes against Indian victims. *Amicus Curiae Brief of National Congress of American Indians*, at 16, *Oklahoma v. Castro-Huerta*, S.Ct. (No. 21-42).

In 2015, the Choctaw Nation of Oklahoma implemented the SCDVJ and enacted this jurisdiction into the Choctaw Nation Criminal Code. C.N.C.C. § 151(E). Since implementing the SCDVJ, the Choctaw Nation has actively prosecuted non-Indian abusers that commit crimes of domestic violence, dating violence, and violations of orders of protection, including the Appellee in this matter.

PROPOSITION I

A. THE SPECIAL CRIMINAL DOMESTIC VIOLENCE JURISDICTION IN THE VIOLENCE AGAINST WOMEN ACT PROVIDES FOR THE CHOCTAW NATION’S JURISDICTION AGAINST APPELLEE FOR BURGLARY IN THE 1ST DEGREE

The Choctaw Nation has criminal jurisdiction over the Defendant for Count 2—Burglary in the 1st Degree, due to this being a crime of domestic violence under the Choctaw Nation Criminal Code and the SCDVJ provision in the VAWA provides for such jurisdiction. *See* C.N.C.P.C. § 60.2; 25 U.S.C. § 1304 *et seq.* The SCDVJ provides that non-Indian defendants with the required ties to the Tribal Nation can be subject to tribal criminal jurisdiction for criminal conduct of domestic violence, dating violence, and violations of protective orders. 25 U.S.C. § 1304(c)(1) and (2). The SCDVJ does not define domestic violence or dating violence; it states:

- (1) The term “dating violence” means ***violence*** committed by a person who is or has been in a social relationship of romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationships, and the frequency of interaction between the persons involved in the relationship.
- (2) The term “domestic violence” means ***violence*** committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim ***under the domestic- or family – violence laws of a Indian tribe that has jurisdiction over the Indian country where the violence occurs.***

Id. (emphasis added).

Congress deferred to participating tribal nations to define criminal conduct in statutes regarding domestic violence and dating violence, as seen in subdivision (2) regarding domestic violence. The lack of a definition for domestic violence and dating violence has been previously discussed by members of Congress, as Senator Tom Cole stated on the United States House Floor, “I support the right of tribes to enact their own definition of domestic and sexual violence, rather than replacing it with the federal government’s definition. States already have this flexibility—tribes should as well.” *Statement of Tom Cole on United States House Floor*, H.R. 1585 (April 4, 2019). Ultimately, there is no definition in the SCDVJ of what constitutes a crime of domestic violence other than: a crime of ***violence*** committed by a person with the required ties to the tribe ***under the domestic- or family – violence laws of that tribe*** that has jurisdiction over the Indian country where the violence occurs. *See* 25 U.S.C. § 1304 (c)(2). There is no language in the SCDVJ that domestic violence or dating violence is limited to certain specific acts; rather, it is broad and provides that the domestic violence laws of the tribe will define domestic violence.

In the Choctaw Nation Code of Criminal Procedure, it broadly defines domestic abuse as the infliction of any of the following acts upon a victim² by an abuser³:

1. “Assault”—an attempt to cause bodily harm to another through the use of force, or the creation in another of a reasonable fear of imminent bodily harm;

² (C) “Victim” means . . . : 1. Any member or former member of the abuser’s household or immediate residence areas; 2. Any person involved in, or formerly involved in, a dating relationship with the abuser; 3. Any person who interacts with the abuser in an employment, academic, recreational, religious, social or other setting; 4. Any child of the abuser; 5. Any relative of the abuser; 6. Any elderly person; or 7. Any vulnerable person. Examples of vulnerability which give rise to the protection of this Act include, but are not limited to, emotional and physical disabilities and impairments.

³ (D) “Abuser” means any person who engages in conduct defined as domestic abuse under paragraph A of this Section against any of the persons defined as victims under paragraph C of this Section. 1. “Any person” includes any non-Indian who: a. resides in the Indian country of the Choctaw Nation of Oklahoma; b. is employed in the Indian country of the Choctaw Nation of Oklahoma; or c. is a spouse, intimate partner, or dating partner of—
i. a member of the Choctaw Nation of Oklahoma; or ii. an Indian who resides in the Indian country of the Choctaw Nation of Oklahoma.

2. “Battery”—application of force to the person of another resulting in bodily harm or an offensive touching;
3. “Threatening”—words or conduct which place another in fear of bodily harm or property damage;
4. “Coercion”—compelling an unwilling person, through force or threat of force, to:
 - a. Engage in conduct which the person has a right to abstain from; or
 - b. Abstain from conduct which the person has a right to engage in;
5. “Confinement”—compelling a person to go where the person does not wish to go or to remain where the person does not wish to remain;
6. “Damage to property”—damaging the property of another;
7. “Emotional abuse”—using threats, intimidation, or extreme ridicule to inflict humiliation and emotional suffering upon another;
8. “Harassment”—conduct which causes emotional alarm and distress to another by shaming, degrading, humiliating, placing in fear, or otherwise abusing personal dignity. Examples of harassing conduct include, but are not limited to the following:
 - a. Unwelcome visiting or following of a person;
 - b. Unwelcome sexual propositioning, reference to body functions or attributes, or other comments of a sexual nature;
 - c. Unwelcome communications, made by phone or by other methods, containing intimidating, taunting, insulting, berating, humiliating, offensive, threatening, or violent language; or
 - d. Unwelcome lingering around the home, school, or work place of a person.
9. “Sexual abuse”—any physical contact of a sexual nature, or attempted physical contact of a sexual nature, with a person, made without that person’s consent. Consent cannot be obtained through means such as force, intimidation, duress, fraud, or from a minor under any circumstance;
10. “Stalking” means the willful, malicious, and repeated following or harassment of a person by an adult, emancipated minor, or minor thirteen (13) years of age or older, in a manner that would cause a reasonable person to feel frightened, intimidated, threatened, harassed, or molested and actually causes the person being followed or harassed to feel terrorized, frightened, intimidated, threatened, harassed or molested. Stalking also means a course of conduct composed of a series of two or more separate acts over a period of time, however short, evidencing a continuity of purpose or unconsented contact with a person that is initiated or continued without the consent of the individual or in disregard of the expressed desire of the individual that the contact be avoided or discontinued. Unconsented contact or course of conduct includes, but is not limited to:
 - a. following or appearing within the sight of that individual,
 - b. approaching or confronting that individual in a public place or on private property,
 - c. appearing at the workplace or residence of that individual,
 - d. entering onto or remaining on property owned, leased, or occupied by that individual,
 - e. contacting that individual by telephone,
 - f. sending mail or electronic communications to that individual, or
 - g. placing an object on, or delivering an object to, property owned, leased or occupied by that individual;

11. “Other conduct”—any other conduct that constitutes an offense or a tort under the law of the Choctaw Nation.

C.N.C.P.C. § 60.2(A). This broad definition includes a wide variety of conduct which are crimes of violence that the SCDVJ was intended to cover.

The United States Supreme Court has even held that domestic violence is not merely a “type” of violence; it is a *term of art encompassing acts* that one might not characterize as “violent” in a non-domestic context. *U.S. v. Castleman*, 572 U.S. 157, 165, 134 S.Ct. 1405, 188 L.Ed. 2d 426 (2014) (emphasis added). In *Castleman*, the Court further held, “Minor uses of force may not constitute ‘violence’ in the generic sense . . . But an act of this nature is easy to describe as ‘domestic violence’ when the accumulation of such acts over time can subject one intimate partner to the other’s control.” *Id.* at 166. Domestic violence is ultimately a spectrum of behaviors; it is distinguished from generic “violence” not by the nature of the abusive conduct, but the *purpose* of the conduct, which is to gain control over another person. See *Amici Curiae of the National Network to End Domestic Violence et. al.*, at 7, *U.S. v. Castleman*, 572 U.S. 157 (2014); A. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash L. Rev. 552, 569 (2007).

The definition of domestic abuse provided for in the Choctaw Nation Code of Criminal Procedure reinforces the United States Supreme Court’s precedent that domestic violence is a term of art that encompasses a range of acts that are intended to control one’s victim. Domestic violence is not simply punching another or “fist on cheek”; it encompasses a range of conduct that is intended to assert control and domination over another person. Domestic violence is an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman’s life. *Id.* (citing E. Stark, *Re-Presenting Woman Battering: From Battered Woman’s Syndrome to Coercive Control*, 58 Alb. L. Rev 973, 986 (1995)). This range of violence can include non-physical

behaviors such as sexual, emotional economic, or psychological. *Id.* Abusers use this broad range of conduct to control, intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, and wound someone. *Id.* Thus, the meaning of domestic violence is necessarily broad because the reality of the words describe a broad reality for victims. *Id.*

The eleven provisions for the definition of domestic abuse in the Choctaw Nation Criminal Procedure Code provide for a wide range of conduct because the reality is that domestic violence includes a wide range of conduct. The last provision even includes a catch-all provision that includes any other conduct that constitutes an offense or tort under the law of the Choctaw Nation. C.N.C.P.C. § 60.2(A)(11). The eleven provisions in the Criminal Procedure Code are consistent with to both the *Castleman* holding and the widely researched and understood dynamics of domestic violence: narrowly defining domestic violence to simply physical force against a victim would be blatantly ignoring the reality of domestic violence.

Additionally, the Choctaw Nation is not the only Tribal Nation who domestic violence laws include property related crimes. For instance, the Pascua Yaqui Trial Court ruled that the property damage of an item belonging to an intimate partner is domestic violence when committed in a manner to control the victim:

Context is everything. The mere breaking of a piece of furniture, in and of itself, may constitute only malicious mischief or vandalism, but when the “use” of force on someone’s personal property nearby an alleged victim is used with intent to create an atmosphere of intimidation of an intimate partner, such an act may constitute an act of domestic violence.

Pascua Yaqui Tribe v. Frank Jaimez, Order Denying Dismissal Due to Lack of Subject Matter Jurisdiction, Case No. CR-16-236 (Feb. 20, 2017). The Pascua Yaqui court examined the federal definition of violence and found that property damage is a crime of violence that included domestic violence. *Id.* (analyzing 18 U.S.C. § 16(a) and *Voisine v. U.S.*, 576 U.S. 686, 136 S.Ct. 2272, 195 L.Ed. 2d (2016)). Further, the Colville Confederated Tribes Court of Appeals heard a case

involving a defendant's conviction that was specifically charged as Domestic Violence Burglary under the Tribe's domestic violence laws. *See Davisson et al. v. Colville Confederated Tribes*, 10 Am. Tribal Law 403, 407, 11 CCAR 13, 6 CTCR 04 (2012).

In this matter, Burglary in the 1st Degree is a crime of domestic violence against the victim R.D., which is provided for in the definition of domestic abuse in the Choctaw Nation Criminal Code, as it is an offense under the Choctaw Nation's laws and has a nexus of Appellee's ties to his victim R.D. By unlawfully breaking and entering his victim's home—which should be the safest place for any individual—the Appellee was demonstrating to her that he could control her and dominate her at any time and any place. Appellee entered R.D.'s home without her authorization, entered her bedroom and then proceeded to strangle her with both of his hands while holding her down on a bed. *See P.H. Tr.*, pgs. 6-8. The burglary quickly turned into a strangulation, which demonstrates not only that the Appellee engaged in multiple acts of violence, but the violence escalated from the burglary to strangulation.

Moreover, this incident between the Victim R.D. and the Appellee was not an isolated incident. R.D. testified that the Appellee had strangled her before several times in the past and that she did not want the children she shares with the Appellee to see the strangulation. *See P.H. Tr.*, lines 5-7, pg. 9. As experts in this field have found, the underlying dynamic of domestic violence often drives the abusive partner into a series or pattern of escalating behaviors and the abusive acts increase over time. *See Amici Curiae of the National Network to End Domestic Violence et. al.*, at 10, *U.S. v. Castleman*, 572 U.S. 157 (2014). This understanding of domestic violence is necessary to prevent extreme and lethal outcomes for victims.

Strangulation is an extremely dangerous and lethal form of domestic violence. Death can result from strangulation within a time period of less than two (2) minutes. K. Jordan et. al, *A Case of Nonfatal Strangulation Associated with Intimate Partner Violence*, *Advanced Emergency Nursing Journal*, Vol. 52, No. 3 (2020). Strangulation also exposes victims to further violence at the hands of their intimate partners. The Training Institute on Strangulation Prevention has found that strangulation victims are 750% more likely to be killed by their intimate partners later with a gun. See Training Institute on Strangulation Prevention, *All Abusers Are Not Equal: New IPV Research Reveals Indicator of Deadly Abuse* (Jan. 8, 2020), available at <https://www.strangulationtraininginstitute.com/all-abusers-are-not-equal-new-ipv-research-reveals-an-indicator-of-deadly-abuse/> (access last May 19, 2022). In this matter, the Appellee has strangled R.D. multiple times in the past, including the occurrence in the pending matter, which has put her at risk of death with each occurrence.

By breaking and entering R.D.'s home and then proceeding to strangle her, the Appellee was demonstrating that he can have complete control over R.D.'s home and life. The purpose behind the SCDVJ is for tribes to have criminal authority over abusers like Appellee in all aspects of their acts of domestic violence; not a piece meal selection as the Appellee desires. While it is true that the decision in *Oliphant* eliminated tribal criminal jurisdiction over non-Indians, it is equally true that the very same Court concluded that Congress may provide tribes with criminal jurisdiction over non-Indians "in a manner acceptable to Congress." See *Oliphant*, 435 U.S. at 210; *Amicus Curiae Brief of NIWRC et al.*, at 6, *Oklahoma v. Castro-Huerta*, S.Ct. (No. 21-429). By enacting the SCDVJ in the VAWA, Congress specifically provided a manner to tribes to prosecute non-Indian abusers for crimes of violence, which includes burglary. The Choctaw Nation's

domestic violence laws include violent crimes such as Burglary that are committed against Indian domestic violence victims.

Thus, under the language of the SCDVJ provisions of VAWA, it is plain that the trial court had jurisdiction to adjudicate a violence crime against a domestic partner as an act of “domestic violence”, and thus the demurrer should have been denied. The trial court’s order sustained the demurrer as to Count 2 should be reversed.

B. IF THERE IS AMBIGUITY IN THE SPECIAL CRIMINAL DOMESTIC VIOLENCE JURISDICTION, IT SHOULD BE RESOLVED IN FAVOR OF THE CHOCTAW NATION.

The statutory language of the SCDVJ should be liberally construed in favor of the Choctaw Nation in this case under the canon of sympathetic construction. The United States Supreme Court precedent requires that treaties, agreements with tribes, and statutes that pertain to the benefit of tribes “are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392-93 (1976); *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918). This principle canon was even followed in *Oliphant*, as the Court provided that ambiguities in statutes relating to Indians are to be resolved in favor of the Indians. *Oliphant*, 435 U.S. at 208, n. 17. Ultimately, the canon of sympathetic construction applies to tribes such as the Choctaw Nation, and it has more strength than the ordinary canons of statutory interpretation. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)(“[T]he standard principles of statutory construction do not have their usual force involving Indian law.”)

Therefore, if there is any ambiguity as to whether the SCDVJ provision statutorily provides for the Choctaw Nation’s jurisdiction over the Appellee in Count 2- Burglary in the 1st Degree as a crime of domestic violence, this Court should apply the canon of of sympathetic construction

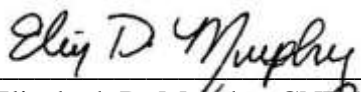
and find that such ambiguity should be ruled in favor of the Choctaw Nation. Therefore, the trial court's order sustained the demurrer as to Count 2 should be reversed and the ruling should be held in favor of the Choctaw Nation.

CONCLUSION

Therefore, this Court should reverse the trial court's ruling granting the Appellee's demurrer and rule that the Choctaw Nation has jurisdiction over Appellee for Count 2- Burglary in the 1st Degree, as it is a crime of domestic violence provided for in the SCDVJ of the VAWA and section 60.2 of the Choctaw Nation Code of Criminal Procedure. In the SCDVJ of the VAWA, Congress specifically decided that tribes should have criminal jurisdiction over specific non-Indians for crimes of domestic violence and dating violence. The Appellee is such a non-Indian that the SCDVJ was intended to cover, as well as his crime of Burglary in the 1st degree against R.D. Lastly, should there be any ambiguity to this Court regarding the statutory language of the SCDVJ, this Court should rule that such ambiguity should be resolved in the favor of the Choctaw Nation, pursuant to United States Supreme Court precedent.

Respectfully Submitted.

Date: 20th day of May, 2022

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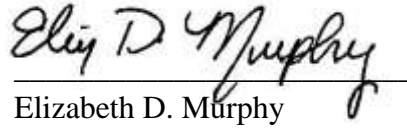
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellant's Brief-in-Chief was served on the 20th day of May, 2022, a true and correct copy of the above and foregoing was delivered via electronic mail to the following:

Clerk of Appellate Court, via email

Blayne Allsup, via email

Attorney for Defendant/Appellee


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