

No. 21-960

In the
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

JESSY SHAY BAILEY,
Respondent.

**On Petition for a Writ of Certiorari to the
Oklahoma Court of Criminal Appeals**

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

INTRODUCTION. 1

REASONS FOR DENYING THE WRIT. 2

 1. FINALITY 2

 2. WAIVER BY THE STATE 4

CONCLUSION. 4

TABLE OF AUTHORITIES

CASES

A.J.B. v. State,
1999 OK CR 50 4

McGirt v. Oklahoma,
140 S.Ct. 2452 (2020) 1, 4

State of Oklahoma v. Victor Manuel Castro-Huerta,
No. 21-429 (U.S.) 2

STATUTES

18 U.S.C. § 1152 1

18 U.S.C. § 1153 1

INTRODUCTION

In the wake of this Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), the State of Oklahoma has continually beseeched this Court to overrule it, modify it or, as in this case, rule on a question of law that would allow the State to prosecute persons such as Bailey regardless of *McGirt*.

The issue is a live one in this case because, as the lower courts found, the criminal acts occurred in Indian country (the Choctaw Nation), Congress had not disestablished the Choctaw Nation or its reservation boundaries, and the complaining witness was a member of the Choctaw Nation which is a federally recognized tribe. Petitioner's Appendix 3a.

Respondent Bailey is not a member of a tribe.

This fact, says the State, creates a legal question of whether the Major Crimes Act (18 U.S.C. § 1153) and the General Crimes Act (18 U.S.C. § 1152) make room for concurrent jurisdiction by the State to prosecute non-Indians who commit crimes against Indians within the boundaries of Indian country.

The State has posed the question presented as:

Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country.

Bailey believes that a myriad of good reasons exist for this Court to deny certiorari on this legal question.

However, he must acknowledge that in another Oklahoma case, similar to Bailey's involving a non-Indian who committed a crime against an Indian in Indian country, this Court on January 21, 2022, granted certiorari on this question. *See State of Oklahoma v. Victor Manuel Castro-Huerta*, No. 21-429 (U.S.) This Court has set the *Castro-Huerta* case for oral argument on Wednesday, April 27, 2022.

Thus, Bailey is in the position of objecting to certiorari in his case on a legal question where review has been granted by this Court in another case. Still, he does object for the following reasons:

REASONS FOR DENYING THE WRIT

1. FINALITY.

Bailey was convicted of lewd acts and sentenced to three years. State Petition at 3. Although this case involved accusations by a 14-year-old then-family-friend, and Bailey consistently asserted his innocence and even passed a polygraph exam, the jury convicted him on January 15, 2020, at the conclusion of which he was ordered into custody and eventually processed to an Oklahoma prison while his appeal was pending.

Bailey served time in prison during the time that his direct appeal was pending in the Oklahoma Court of Criminal Appeals, which granted relief on September 23, 2021. He was discharged shortly thereafter, having completed the bulk of his sentence.

The State never requested a stay of the decision of the OCCA reversing the case, nor requested this Court for a stay. Thus, in the subsequent months, the

decision of the OCCA took effect. Bailey has been released from prison having served most of his sentence, gained employment, had his record expunged in the Oklahoma trial court, and has moved on with his life, as has, presumably, the minor complaining witness.

In contrast, the defendant in Castro-Huerta was convicted of Child Neglect and sentenced to 35 years in prison.

The certiorari docket of this Court is, of course, discretionary, and it is Bailey's position that under the facts and circumstances of his case, that discretion counsels that review should be denied because the parties have moved on in light of the decision by the OCCA and litigation must end at some point where the major objectives of that litigation have been substantially met.

Bailey cannot argue that the legal question presented is not worthy of certiorari review. This Court has granted review and deemed that it is. But the question is whether resolution of that question by this Court necessitates that Bailey's case also be considered. Bailey asserts that it does not.

Here, Bailey contested the case, had a trial, lost, was convicted, and has been punished in substantial conformity with the verdict of the jury. Keeping Bailey, and the other interested parties, in further legal limbo, would serve little purpose at this point.

2. WAIVER BY THE STATE.

In addition to concerns of finality, there is the issue of the piece-meal manner in which the State has raised the legal question it now asks this Court to address. Recall that Bailey raised his *McGirt* claim in the OCCA in the form of a motion for a new trial. Petitioner's Appendix 2a. The State did not respond to the motion or assert at that time its current legal theory of concurrent jurisdiction; rather, the OCCA remanded to the district court for fact-finding on the *McGirt* question.

It was only after the fact-finding at been completed that the State raised the concurrent jurisdiction issue in a supplemental brief after remand. Thus, it is Bailey's position that Oklahoma has waived its concurrent-jurisdiction argument by not raising it until after the OCCA's post-*McGirt* remand. See *A.J.B. v. State*, 1999 OK CR 50, ¶ 9 ("the State, like defendants, must...preserve errors...otherwise they are waived.")

Thus, even though this Court has decided to hear the issue presented, albeit in another case, there is no jurisprudential reason to review Bailey's case because the decision was correct.

CONCLUSION

For the reasons stated above, the Respondent prays respectfully that this Court deny the Petition for Certiorari filed by the Petitioner.

DATED this 25th day of March, 2022.

Respectfully submitted,

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