

No. 21-868

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

KEVIN TYLER FOSTER,
Respondent.

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

BRIEF IN OPPOSITION

ALEX RICHARD
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. Box 926
Norman, OK 73070
(405) 801-2601

ZACHARY C. SCHAUF
Counsel of Record
LEONARD R. POWELL
ALLISON M. TJEMSLAND
VICTORIA HALL-PALERM
KELSEY L. STIMPLE
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

QUESTIONS PRESENTED

Should this Court consider overruling its statutory decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)?

INTRODUCTION

This is one of several near-identical petitions asking this Court to overrule its statutory decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). This Court recently denied over 30 petitions for certiorari on this question. *See* Order List (U.S. Jan. 24, 2022). This petition should also be denied.

STATEMENT OF THE CASE

Respondent Kevin Tyler Foster, a member of the Cherokee Nation, was charged by information on December 4, 2018 for alleged crimes committed with the Cherokee reservation. Information (Okla. Dist. Ct., Rogers Cnty. Dec. 4, 2018).¹ Over a year earlier, in August 2017, the Tenth Circuit applied *Solem v. Bartlett*, 465 U.S. 463 (1984), to hold that the Muscogee reservation endured. *Murhpy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017). Thereafter, Oklahoma nonetheless prosecuted Respondent, who was found guilty on November 19, 2019. Verdict (Okla. Dist. Ct., Rogers Cnty. Nov. 19, 2019).

Respondent appealed. In Respondent's brief on appeal, Respondent argued that Oklahoma lacked jurisdiction to prosecute in light of this Court's decision in *McGirt v. Oklahoma*. Brief of Appellant (Okla. Ct. Crim. App. Sept. 29, 2020).² The State moved to stay briefing in light of Respondent's application to

¹ References to district-court filings are to Case No. F-2018-784, available at <https://bit.ly/35XijSb>.

² References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2020-149, available at <https://bit.ly/3LctruJ>.

supplement the record. Appellee's Motion to Stay Briefing (Okla. Ct. Crim. App. Dec. 28, 2020). The Oklahoma Court of Criminal Appeals ("OCCA") remanded to the district court for an evidentiary hearing on Respondent's Indian status and whether the alleged crimes occurred within the boundaries of the Cherokee reservation. Pet. App. 26a.

On remand, the parties stipulated that Respondent is an enrolled member of the Cherokee Nation, and that the location of the crimes was within the boundaries of the Cherokee reservation. Pet. App. 13a-14a. The State did not dispute the district court's findings in its supplemental brief after remand, but requested a stay should the OCCA find that Respondent was entitled to relief. Supplemental Brief of Appellee After Remand at 6-7 (Okla. Ct. Crim. App. Apr. 19, 2021).

Therefore, on July 8, 2021, the OCCA dismissed Respondent's case for lack of jurisdiction. Pet. App. 4a.

By the time the OCCA decided Respondent's case, the federal government had long since charged Respondent, Complaint at 1 (N.D. Okla. Mar. 16, 2021), ECF No. 1,³ and had taken Respondent into custody, Order (N.D. Okla. Mar. 29, 2021), ECF No. 25. Respondent pled guilty on November 8, 2021. Plea Agreement (N.D. Okla. Nov. 8, 2021), ECF No. 48. Respondent is awaiting sentencing.

³ References to filings in Respondent's federal criminal case are to No. 21-cr-118 (N.D. Okla.).

REASONS FOR DENYING THE PETITION

This petition should be denied for the same reasons this Court recently denied dozens of petitions raising the same question presented. *See also* Brief in Opposition at 18-37, *Oklahoma v. Castro-Huerta*, No. 21-429 (U.S. Nov. 15, 2021) (detailing reasons the same question presented should be denied).⁴

Respectfully submitted,

ALEX RICHARD
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. Box 926
Norman, OK 73070
(405) 801-2601

ZACHARY C. SCHAUF
Counsel of Record
LEONARD R. POWELL
ALLISON M. TJEMSLAND
VICTORIA HALL-PALERM
KELSEY L. STIMPLE
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

⁴ Respondent also maintains that the petition should be denied as moot. *See* Cherokee Nation Amicus Brief at 12-14, *Oklahoma v. Castro-Huerta*, No. 21-429 (U.S. Oct. 29, 2021).