

No. 21-914

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

RICHARD RAY ROTH,
Respondent.

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

BRIEF IN OPPOSITION

NICOLE HERRON
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

1. Did the Oklahoma Court of Criminal Appeals correctly hold that States lack jurisdiction to prosecute crimes by non-Indians against Indians in Indian country, as this Court has repeatedly affirmed and as lower courts uniformly agree?

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

INTRODUCTION

This petition’s two questions presented are identical to the questions presented in *Oklahoma v. Castro-Huerta*, No. 21-429. This Court recently granted certiorari on the first question presented in that petition. *See* No. 21-429 (U.S. Jan. 21, 2022). Meanwhile, this Court denied over 30 petitions for certiorari presenting only the second question (*i.e.*, whether to overrule *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)). *See* Order List (U.S. Jan. 24, 2022). This petition should be held pending a decision in *Castro-Huerta*.

STATEMENT OF THE CASE

In *Sharp v. Murphy*, 140 S. Ct. 2412 (2020), and *McGirt*, it was common ground that the Court’s holding would apply to all crimes involving Indians, whether as defendants or victims. That was because, as Oklahoma explained, “States lack criminal ... jurisdiction ... if either the defendant or victim is an Indian.” Petition for a Writ of Certiorari at 18, *Royal v. Murphy*, No. 17-1107 (U.S. Feb. 6, 2018). Hence, Oklahoma emphasized that an adverse ruling would invalidate convictions for “crimes committed against Indians” by Indians or non-Indians, “which the state would not have jurisdiction over.” Transcript of Oral Argument at 54, *McGirt v. Oklahoma*, No. 18-9526 (U.S. May 11, 2020).

Respondent invoked that law below. Respondent Richard Ray Roth was charged by information in November 2013 for alleged crimes committed within the Muscogee reservation. Information (Okla. Dist. Ct.,

Wagoner Cnty. Nov. 15, 2013).¹ On October 25, 2014, Respondent was convicted. Verdict (Okla. Dist. Ct., Wagoner Cnty. Oct. 25, 2014). In December 2016, Respondent filed an application for post-conviction relief in which he explained that he had been led to believe his trial counsel had filed a timely notice of appeal, but that had not in fact occurred. Application for Post-Conviction Relief at 1-2 (Okla. Dist. Ct., Wagoner Cnty. Dec. 29, 2016). On February 28, 2017, the district court sustained Respondent's application, found that Respondent had been denied his right to appeal through no fault of his own, and recommended to the Oklahoma Court of Criminal Appeals ("OCCA") that Respondent be allowed to initiate an appeal out of time. Order Sustaining Application for Post-Conviction Relief at 1 (Okla. Dist. Ct., Wagoner Cnty. Feb. 28, 2017). The district court then mailed to the OCCA documents necessary to allow Respondent to pursue his appeal, but the OCCA advised Respondent that it never received the documents. Order at 1 (Okla. Dist. Ct., Wagoner Cnty. May 9, 2017). When this was brought to the district court's attention, the district court, on May 9, 2017, reiterated its finding that Respondent be allowed to initiate his appeal out of time. *Id.* at 2.

Respondent promptly appealed. Certificate of Appeal (Okla. Dist. Ct., Wagoner Cnty. May 25, 2017). But the OCCA—apparently not realizing that the district court had issued a second order recommending that Respondent be allowed to appeal out of time—declined jurisdiction on the grounds that Respondent's

¹ References to district-court filings are to Case No. CF-2013-00592, available at <https://bit.ly/36qyvvn>.

appeal was not filed within 30 days of the district court's first order. Order Declining Jurisdiction at 3 (Okla. Ct. Crim. App. June 5, 2017).² Respondent then filed another application for post-conviction relief with the district court, and the district court issued a third order finding that Respondent be allowed to initiate his appeal. Second Application for Post-Conviction Relief (Okla. Dist. Ct., Wagoner Cnty. June 15, 2017); Order at 2 (Okla. Dist. Ct., Wagoner Cnty. June 15, 2017). This time, the OCCA permitted Respondent's appeal to go forward. Order Granting Direct Appeal Out of Time at 5 (Okla. Ct. Crim. App. June 30, 2017).³

One month later, in August 2017, the Tenth Circuit applied *Solem v. Bartlett*, 465 U.S. 463 (1984), to hold that the Muscogee reservation endures. *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017). Relying on *Murphy*, Respondent argued to the OCCA that Oklahoma lacked jurisdiction over the alleged crimes. Brief of Appellant at 6-14 (Okla. Ct. Crim. App. Feb. 1, 2018).⁴ After this Court granted certiorari in *Murphy*, the OCCA held Respondent's appeal in abeyance. Order Holding Case in Abeyance at 2-3 (Okla. Ct. Crim. App. Dec. 4, 2018). As far as Respondent is aware, Oklahoma did not, at any point after the Tenth Circuit decided *Murphy*, attempt to work with the federal government

² This reference to a filing in the OCCA is to Case No. PC-2017-522, available at <https://bit.ly/34IklW0>.

³ This reference to a filing in the OCCA is to Case No. PC 2017-641, available at <https://bit.ly/3uTJzC>.

⁴ This and subsequent references to filings in the OCCA are to Case No. F-2017-702, available at <https://bit.ly/3gQ0yqc>.

to address potential statute-of-limitations issues in Respondent's case.

Following *McGirt*, the OCCA remanded to the district court for an evidentiary hearing on the victim's Indian status and whether the alleged crimes occurred within the boundaries of the Muscogee reservation. Pet. App. 35a-36a. On remand, the parties stipulated that the victim was an enrolled member of the Cherokee Nation, and that the location of the alleged crimes was within the boundaries of the Muscogee reservation. Pet. App. 31a-32a. In its supplemental brief after remand, the State continued to accept these facts. Supplemental Brief of Appellee After Remand at 2-3 (Okla. Ct. Crim. App. Nov. 12, 2020). The State did, however, argue that it had concurrent jurisdiction to prosecute Respondent's alleged crimes. *Id.* at 3-14.

The OCCA rejected Oklahoma's concurrent-jurisdiction argument. It explained that it had previously rejected that argument in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286. Pet. App. 6a n.2. And while it had later overruled *Bosse* on other grounds, the OCCA decided to adhere to *Bosse's* analysis of the concurrent-jurisdiction issue. Pet. App. 6a-9a & n.2. The OCCA thus concluded that Oklahoma lacked jurisdiction to prosecute Respondent. Pet. App. 9a. On September 16, 2021, the OCCA dismissed Respondent's case for lack of jurisdiction. Pet. App. 12a. On September 29, 2021, the OCCA stayed its mandate pending the disposition of this petition. Order Staying Issuance of Mandate (Okla. Ct. Crim. App. Sept. 29, 2021).

REASONS FOR DENYING THE PETITION

Respondent maintains that this petition should be denied for the same reasons enumerated in the Brief in Opposition in *Castro-Huerta*. In *Castro-Huerta*, however, this Court granted certiorari on the first question presented here: whether States have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. No. 21-429 (U.S. Jan. 21, 2022). This Court should therefore hold this petition pending *Castro-Huerta* and dispose of it as appropriate after the decision in *Castro-Huerta*.

Respectfully submitted,

NICOLE HERRON
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. Box 926
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ZACHARY C. SCHAUF
Counsel of Record
LEONARD R. POWELL
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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