

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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

2. Whether *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), should be overruled.

LIST OF PROCEEDINGS

Oklahoma Court of Criminal Appeals

F-2017-702

Richard Ray Roth, Appellant v.

State of Oklahoma, Appellee

Date of Final Opinion: September 16, 2021

Oklahoma District Court (Wagoner County)

No. CF-2013-592

State of Oklahoma, Plaintiff v.

Richard Ray Roth, Defendant

Date of Judgment and Sentence: December 5, 2014

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, dated September 16, 2021, is included in the Appendix at App.1a-28a, and published as *Roth v. State*, 2021 OK CR 27, ___ P.3d ___. The September 29, 2021 order of the Oklahoma Court of Criminal Appeals staying the mandate is included below at App.29a-30a. The order of the Oklahoma Court of Criminal Appeals, dated August 21, 2020, remanding the case for an evidentiary hearing is included below at App.34a-38a. The Findings of Fact and Conclusions of Law of the District Court in and for Wagoner County, State of Oklahoma, dated October 20, 2020, is included below at

App.31a-33a. The remand order and findings of fact and conclusions of law were not designated for publication.



JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on September 16, 2021. App.1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1151 (in relevant part) Indian country defined

[T]he term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

18 U.S.C. § 1152 (in relevant part) Law governing (Indian country)

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.



STATEMENT OF THE CASE

The decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), has devastated the criminal-justice system in Oklahoma, and the outcome in this case exemplifies its unconscionable consequences. Respondent is a non-Indian man who struck and killed a 12-year-old Native American boy while driving with a blood-alcohol content nearly four times the legal limit. Respondent was convicted and sentenced to 20 years of imprisonment, but the conviction and sentence were vacated on the ground that the State lacked jurisdiction to prosecute him because the young victim was Indian and the crime occurred on the Creek Reservation.

When vacating respondent's sentence, the court below recognized that respondent would likely escape re-prosecution because the limitations period under federal law had elapsed. The court lamented the "exceptionally hard impact [its] decision will have on the victim's surviving family and friends, not to mention the community where these crimes occurred." App.11a. But the court concluded that "[t]he matter [was] simply out of [its] hands after *McGirt*." *Id.* Respondent now walks free and has not been re-prosecuted by the federal government. *See also* Editorial, *How to Get Away With Manslaughter*, WALL. ST. J., at A12 (discussing this case).

Thousands of other state criminal prosecutions have been called into question by this Court's decision in *McGirt*. Like in other pending petitions before this Court, this case presents the question whether *McGirt* should be overruled and, even if not, whether the State

has authority to prosecute non-Indians who commit crimes against Indians in Indian country. For the same reasons given in the petition in *Oklahoma v. Castro-Huerta*, No. 21-429, review is warranted to examine those questions. The petition for a writ of certiorari in this case should be held pending consideration of the *Castro-Huerta* petition or, in the alternative, granted.

1. On November 8, 2013, twelve-year-old B.L. and his older brother, J.L., rode their bicycles to Eternity Fraternity, a Christian facility for children, which was located in Wagoner, Oklahoma. Tr. I, 260-61; Tr. II, 301; Tr. IV, 915-16.* At approximately 9:00 p.m. on the same day, respondent left his residence and went to his brother-in-law's house on Highway 16 in Wagoner, Oklahoma. Tr. II, 352-53.

At approximately 10:15 p.m., J.L. called his mother, Pamela Sequichie, and told her that he and B.L. were on the way home. Tr. I, 261; Tr. II, 302. While riding home on their bicycles, the chain on J.L.'s bicycle "kept locking" up so J.L. alternated between riding the bike and pushing it. Tr. IV, 917. J.L. and B.L. traveled north on Story Street. B.L. rode a little ways ahead of J.L. and was on his left side. Tr. IV, 906, 918. As J.L. and B.L. approached the intersection of 9th and Story, J.L. heard a vehicle driving behind them. Tr. IV, 906, 918-19. J.L. pushed his bicycle to the east side of the street and into the grass. J.L. then saw a white 2002 Chevrolet Tahoe strike B.L. Tr. IV, 787, 906, 919.

* Citations to the transcript of respondent's trial will be abbreviated as (Tr.), and citations to the transcript of the evidentiary hearing on respondent's prosecutorial authority claim will be abbreviated as (10/19/2020 Tr.). Both transcripts are available below. *See* Sup. Ct. R. 12.7.

After the vehicle struck B.L., the driver, later identified as respondent, shouted at J.L. stating, “Why did he do that? Why did he go out in front of me?” Respondent told J.L. he was going to get his wife and he left the scene. Tr. IV, 920. J.L. called Ms. Sequichie and said, “Brother just got hit. Mom, you need to get down here. Brother just got hit.” Tr. II, 303; Tr. IV, 919. Ms. Sequichie got into her vehicle and drove to the intersection of 9th and Story. Tr. II, 303.

B.L. died from his injuries. Tr. III, 573-78. Respondent’s blood alcohol content was 0.291 grams, and he tested positive for Tramadol. Tr. III, 736-77. Respondent was convicted of first-degree manslaughter and leaving the scene of a fatality accident, and sentenced to consecutive sentences totaling twenty years’ imprisonment.

2. After this Court issued its decision in *McGirt*, the Court of Criminal Appeals remanded the case to the trial court for an evidentiary hearing. On remand, the State preserved an argument that it has concurrent prosecutorial authority over respondent’s crimes because he is not Indian. 10/19/2020 Tr., 13. The court accepted the parties’ stipulations that, although respondent is not an Indian, respondent’s victim was a member of the Cherokee Nation with 3/8 Cherokee blood, and the crimes occurred within the boundaries of the Creek Nation’s reservation found to exist by *McGirt*. App.31a-32a.

Ms. Sequichie-Chuculate was permitted to speak at the evidentiary hearing. She expressed her dismay that her son’s killer “benefits off of my son dying” and asked, “why can’t he serve his sentence? I mean, my son was tribal, but he was also a citizen of the United States. He was a citizen of Oklahoma.” 10/19/2020 Tr., 4.

After the state district court issued its findings of fact and conclusions of law, the case returned to the Oklahoma Court of Criminal Appeals. There, the State argued *McGirt* was wrongly decided, preserving that issue for this Court's review, but recognized that the state courts were bound by it. 6/14/2021 Supp. Br. of Appellee and Request for Stay and Abatement of Appeal, 3 n.3. The State also argued that it has prosecutorial authority over non-Indian-on-Indian crime. 11/12/2020 Supp. Br. of Appellee after Remand, 3-14.

In a full and published opinion, the Court of Criminal Appeals "reject[ed] the State's concurrent jurisdiction argument" and reversed the convictions "[p]ursuant to *McGirt*." App.3a. The court acknowledged the "understandable" "outrage" of B.L.'s mother, and the possibility that no other entity may be able to prosecute respondent App.10a. Indeed, the federal statute of limitations of five years has expired. 18 U.S.C. § 3282. And the tribe has no jurisdiction over the non-Indian respondent. Yet, "[t]he matter was simply out of [the Court of Criminal Appeals'] hands after *McGirt*." App.11a.

Vice Presiding Judge Hudson, who authored the opinion, included a footnote in which he "maintain[ed] his previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress." App.11a. Three judges wrote separate opinions.

Presiding Judge Rowland dissented, expressing his view that the State's prosecutorial authority is not preempted when the applicable federal statute of limitations has expired. App.15a-24a.

Judge Lumpkin concurred in the result. App.25a-27a. He expressed his view that the Court's opinion in *McGirt* "contravened * * * the history leading to the disestablishment of the Indian reservations in Oklahoma," but concluded that he was bound to follow it. App.25a.

Judge Lewis specially concurred based on his view that this Court held in *Donnelly v. United States*, 228 U.S. 243, 269-72 (1913), that the United States has "sole and exclusive" prosecutorial authority under 18 U.S.C. § 1152. App.28a. *But see Castro-Huerta*, Pet. at 13-14. The federal government has not indicted respondent.



REASONS FOR GRANTING THE PETITION

In the decision below, the Oklahoma Court of Criminal Appeals applied *McGirt* to free yet another criminal—this time a non-Indian who cannot be re-prosecuted by either the federal or tribal governments—from state custody, exacerbating the crisis in the criminal-justice system in Oklahoma. As the State of Oklahoma explains in its petition in *Castro-Huerta*, reconsideration of *McGirt* is the only realistic avenue for ending the ongoing chaos affecting every corner of daily life in Oklahoma. At a minimum, the impact of *McGirt* can be partially mitigated by affirming the State's jurisdiction over non-Indians who commit crimes against Indians on a reservation. This case thus presents still one more opportunity to end or limit the damage caused by *McGirt*. This petition should be held pending the disposition of the petition

in *Castro-Huerta* and then disposed of as is appropriate, or this petition should be granted.

As explained more fully in *Castro-Huerta*, *McGirt* was wrongly decided, and the Court's review is urgently needed because no recent decision has had a more immediate and disruptive effect on life in an American State. *McGirt* contravened longstanding precedent on the disestablishment of Indian reservations. 140 S.Ct. at 2485 (Roberts, C.J., dissenting). It did so by wrongly reasoning that historical materials showing the original public meaning of statutes may be considered in the disestablishment inquiry "only" to "clear up" statutory ambiguity. *See id.* at 2467-2468, 2469-2470 (majority opinion). But consideration of history is necessary precisely because it is unclear whether Congress's alienation of Indian lands at the turn of the century changed the Indian country status of the land. *See id.* at 2488 (Roberts, C.J., dissenting). Under the correct framework prescribed by this Court's precedent, it is clear that Congress disestablished the Creek territory in Oklahoma, as well as the territories of the four other Oklahoma tribes. And with that conclusion, it is clear the decision below is incorrect and warrants reversal.

Overruling *McGirt* and restoring the state jurisdiction it stripped is important not only for this case and the victims of the terrible crimes at issue. As the Chief Justice correctly predicted, the "burdens" of the *McGirt* decision on the State of Oklahoma have been "extraordinary." 140 S.Ct. at 2500. The challenges from that seismic shift in jurisdiction have rippled through every aspect of life in Oklahoma. Most immediately, *McGirt* has jeopardized the State's jurisdiction over

thousands of criminal cases—this case being just one of them.

Even assuming nearly half of Oklahoma properly constitutes Indian country for purposes of federal criminal jurisdiction, review is also warranted on the question whether a State has authority to prosecute a non-Indian, like respondent, for crimes committed against Indians in Indian country. The petition in *Castro-Huerta* sets forth why review of this question is urgent and demonstrates Oklahoma’s continued jurisdiction over these crimes is consistent with statute and precedent. As this Court has repeatedly held, “absent a congressional prohibition,” a State has the right to “exercise criminal (and implicitly, civil) jurisdiction over non-Indians located on reservation lands.” *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992); see also *United States v. McBratney*, 104 U.S. (14 Otto.) 621, 624 (1881). Meanwhile, nothing in the text of the General Crimes Act, nor any other Act of Congress, prohibits States from exercising jurisdiction over crimes committed by non-Indians against Indians. See 18 U.S.C. § 1152.

Thus, this Court in the past has upheld state laws protecting Indians from crimes committed by non-Indians on a reservation. *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 370-71 (1858). And this Court in *Oklahoma v. Bosse*, No. 20A161, granted a stay presenting this and another question, indicating that these issues involve “extraordinary circumstances” where there is “a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari” and “five Justices are likely to conclude that the case was erroneously decided

below.” *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers).

The questions presented in this case are materially identical to those presented in other petitions already pending before this Court, including *Castro-Huerta*. This Court should hold this petition pending the resolution of those questions in *Castro-Huerta*. Alternatively, in the event certiorari is more appropriate in this case than in another case, the Court should grant review in this case to answer the questions common to all of them.



CONCLUSION

The petition for a writ of certiorari in *Castro-Huerta* should be granted, and the petition in this case should be held pending a decision there and then disposed of as is appropriate. In the alternative, this petition should be granted.

Respectfully submitted,

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