No. 21-265

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,
v.
ERIK SHERNEY WILLIAMS,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Oklahoma Court of Criminal Appeals correctly hold that States lack jurisdiction to prosecute crimes 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)?

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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). Its two questions presented are identical to the questions presented in *Oklahoma v. Mize*, No. 21-274 (as well as the questions presented in *Oklahoma v. Castro-Huerta*, No. 21-429). This petition should be denied for the same reasons explained in the Brief in Opposition in *Mize* ("*Mize* Opp. __").

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." *Murphy* Pet. 18, No. 17-1107. 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." *McGirt* Arg. Tr. 54, 18-9526.

Respondent Erik Sherney Williams invoked that law below. Respondent had been convicted in the trial court of first-degree murder and sentenced to life without parole. Pet. App. 1a-2a. While his appeal was pending, the Tenth Circuit decided *Murphy*, and Respondent argued that, as a result, Oklahoma did not have jurisdiction to prosecute him because the alleged crime occurred on the Muscogee reservation and the victim was an Indian. Pet. App. 2a-3a. After *McGirt*, the

OCCA remanded for a hearing on "(a) the victim's status as an Indian; and (b) whether the crime occurred in Indian Country." Pet. App. 3a. The parties stipulated that the victim was indeed Indian and that the alleged crime occurred on the Muscogee reservation. Pet. App. 3a-4a. During the remand, Oklahoma for the first time argued—contrary to its representations in *Murphy* and *McGirt*—that it has "concurrent jurisdiction over all crimes committed by non-Indians in Indian country." Pet. App. 4a.[1]

When the case returned to the OCCA, the OCCA held that *McGirt* compelled the conclusion that the alleged crime had occurred in Indian country, and that its decision in *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, rejected Oklahoma's concurrent-jurisdiction argument. The OCCA therefore held that Oklahoma "did not have jurisdiction to try" Respondent and vacated his conviction. Pet. App. 4a-5a. Oklahoma moved to stay the mandate pending the filing of a petition for writ of certiorari. Mot. to Stay Mandate at 1 (Okla. Ct. Crim. App. Apr. 22, 2021).[2] But the OCCA issued the mandate without acting on the motion and, subsequently, denied it. Mandate at 1 (Okla. Ct. Crim. App. 23, 2021); Order at 2 (Okla. Ct. Crim. App. May 18, 2021). The trial court

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[1] Respondent maintains that he is Indian. The OCCA, however, resolved his case on the assumption that Respondent is a non-Indian. Pet. App. 4a. Respondent reserves all rights to argue that he is an Indian. This disputed issue renders this case a poor vehicle to consider Oklahoma's first question presented.

[2] References to filings in the Oklahoma Court of Criminal Appeals are to Case No. F-2016-937, available at https://bit.ly/3EDdCc2.

duly vacated Respondent's judgment and sentence. Judgment and Sentence at 1 (Okla. Dist. Ct., Tulsa Cnty. May 14, 2021).[3]

Although the OCCA subsequently vacated *Bosse* on other grounds, the OCCA again "reject[ed] the State's concurrent jurisdiction argument" in *Roth v. State*, 2021 OK CR 27, ¶12. *Roth* observed that the rule of "exclusive" federal jurisdiction "is well-established." *Id.* ¶13. And it explained that "Congress has authorized States to assume criminal jurisdiction over Indian Country in limited circumstances" but that Oklahoma never received such jurisdiction. *Id.* ¶14.

By the time the OCCA vacated Respondent's conviction, the federal government had already indicted Respondent, Indictment at 1 (Mar. 24, 2021), ECF No. 2,[4] and it duly took Respondent into custody. Arrest Warrant at 1 (Apr. 12, 2021), ECF No. 18. Trial is scheduled for January 18, 2022. Order at 3 (Oct. 12, 2021), ECF No. 32.

REASONS FOR DENYING THE PETITION

The OCCA's application of settled law in the decision below does not warrant review, for the reasons explained in the *Mize* Brief in Opposition. *Mize* Opp. 10-38. Oklahoma first told this Court that it must limit or overrule *McGirt* because "[t]housands" of prisoners were poised to successfully "challeng[e] decades' worth

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[3] References to district-court filings are to Case No. CF-2014-4936, available at https://bit.ly/3jU7dS8.

[4] References to filings in Respondent's federal criminal case are to 4:21-cr-00104-JFH-1 (N.D. Okla).

of convictions." Pet. 2, *Oklahoma v. Bosse*, No. 21-186. Events, however, removed that premise. After Oklahoma filed for certiorari in *Bosse*, the OCCA issued *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, *petition for cert. filed*, No. 21-467 (U.S. Sept. 29, 2021). *Matloff* stated that the OCCA was "interpret[ing] … state post-conviction statutes [to] hold that *McGirt* … shall not apply retroactively to void a conviction that was final when *McGirt* was decided." *Id.* ¶15. So Oklahoma shifted course. Seeking to salvage review, Oklahoma filed a new petition, focusing on *McGirt*'s consequences for present and future criminal prosecutions and for civil jurisdiction. *Oklahoma v. Castro-Huerta*, No. 21-429. But try as Oklahoma might, the simple facts remain: *McGirt*'s backwards-looking effects are now limited—and its going-forward effects are for Congress to weigh. Today, neither of Oklahoma's questions presented warrants review.

Oklahoma's first question presented asks "[w]hether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country." Pet. i. The OCCA correctly answered no, in a decision implicating no conflict or disagreement. *Mize* Opp. 10-19. This Court has long affirmed that "the United States, rather than … [the State], ha[s] jurisdiction over offenses committed" in Indian country "by one who is not an Indian against one who is." *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946); *see Mize* Opp. 10-11. Lower courts uniformly concur. *Mize* Opp. 10 & n.6. Meanwhile, Congress has repeatedly embedded this understanding in statute. *Mize* Opp. 13, 15-16. Oklahoma previously asked this Court to upend that

consensus based on *McGirt*'s effects on existing Oklahoma convictions. But again, those effects are now limited—and *Matloff* has reshaped the backdrop against which this Court stayed *Bosse*. *Mize* Opp. 11-12.[5]

Oklahoma's request to overrule *McGirt* is no more certworthy. *Mize* Opp. 2-4, 19-38. Like many of this Court's statutory decisions, *McGirt* was divided. Like many such decisions, *McGirt* had real effects (though Oklahoma vastly overstates them). And like all of this Court's statutory decisions, the ball is now where the Constitution has placed it: With Congress.

Certiorari is not warranted to address Oklahoma's invitation for this Court to elbow Congress aside. It scarcely needs saying that this Court does not overrule statutory decisions based solely on changes in personnel. *Stare decisis* exists precisely to protect the "actual and perceived integrity of the judicial process" against such threats. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (quotation marks omitted). And *stare decisis* applies with "special force" in statutory cases, where "Congress remains free to alter what [this Court has] done." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (quotation marks omitted); *see Mize* Opp. 20-21.

Here, those principles are no mere abstractions.

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[5] Oklahoma also waived its concurrent-jurisdiction argument by not raising until after the OCCA's post-*McGirt* remand. Under Oklahoma law, "the State, like defendants, must … preserve errors …, otherwise they are waived." *A.J.B. v. State*, 1999 OK CR 50, ¶9. So whatever the answer to Oklahoma's question presented *in general*, the decision below reached the correct result.

Oklahoma seeks certiorari *in order to* preempt active negotiations. In May 2021, its governor opposed H.R. 3091, which would have allowed the State to compact with two of the Five Tribes to obtain its pre-*McGirt* criminal jurisdiction. *Mize* Opp. 3, 12. In July 2021, the State opposed federal-law-enforcement funding because it did not desire "a permanent federal fix."[6] And weeks later, it became clear why: It preferred to swing for the fences in this Court. This Court's place, however, is not in the middle of legislative negotiations. And Oklahoma's siren song that "[o]nly the Court can remedy [its] problems," *Castro-Huerta* Pet. 4, badly misunderstands this Court's role.[7] *Mize* Opp. 20-24; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 25-28; Chickasaw Nation Amicus Br. 6-7, 13-15, *Oklahoma v. Beck*, No. 21-373.

Rarely, moreover, will this Court receive so inappropriate a request justified by so little. Despite claiming "unprecedented disruption," *Castro-Huerta* Pet. 10, Oklahoma points to few real effects—and none

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[6] Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), https://yhoo.it/3lYMjD8.

[7] Because *Castro-Huerta* is Oklahoma's most recent version of its certiorari arguments—which it originally made in *Oklahoma v. Bosse*, No. 21-186—Respondent addresses that petition. *See Mize* Opp. 1-2, 3 n.2; Letter to the Court of Okla. at 1, *Williams* (Sept. 22, 2021). True, it is bizarre for Oklahoma to ask the Court to weigh overruling *McGirt* in a case (like *Castro-Huerta*) concerning the *Cherokee* reservation, a different reservation subject to different treaties and statutes. But that oddity should be of no moment. Oklahoma's question presented does not warrant review in any case.

that could justify this Court substituting itself for Congress. Again, *McGirt*'s impact on existing convictions is now limited and affects only the modest set of criminal cases still on direct review. Many of those cases proceeded when Oklahoma knew its prosecutions might be invalid—and in such cases, retrial is easiest and least likely to face obstacles from time bars or stale evidence. Indeed, Oklahoma's many petitions fail to mention the federal and tribal prosecutions that are *comprehensively* occurring in those cases, or that the federal government has already obtained convictions in several such cases. *Mize* Opp. 24-27; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 8-11; Chickasaw Nation *Beck* Amicus Br. 4-5, 7-9; Cherokee Nation Amicus Br. 10-12, *Oklahoma v. Spears*, No. 21-323; Choctaw Nation Amicus Br. 15-16, *Oklahoma v. Sizemore*, No. 21-326.

Going forward, the proper allocation of jurisdiction among the federal government, the State, and Tribes is a question for Congress, which can decide whether to modify jurisdictional lines. Meanwhile, Oklahoma's claims of a "criminal-justice crisis" today, *Castro-Huerta* Pet. 4, are largely unburdened by evidence and badly misstate the facts. In reality, the federal government and Five Tribes are working to fulfill the responsibilities *McGirt* gives them and seeking the resources they need to do so (often over Oklahoma's opposition). *Mize* Opp. 27-32; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 12-18; Chickasaw Nation *Beck* Amicus Br. 5-7, 9; Choctaw Nation *Sizemore* Amicus Br. 9-16; Cherokee Nation *Spears* Amicus Br. 4-12.

Oklahoma's claims about civil consequences are even more reality-free. In fact, its position, undisclosed to the

Court in its petitions, is that *McGirt* applies *only* to criminal jurisdiction and has *no* civil effects. In all events, moreover, those effects will be vastly less than Oklahoma suggests. And the place to address such concerns is in civil cases—which will make concrete *McGirt*'s (limited) actual consequences. Oklahoma's overwrought claims have no place in this criminal case. *Mize* Opp. 32-37; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 19-24; Chickasaw Nation *Beck* Amicus Br. 9-12; Choctaw Nation *Sizemore* Amicus Br. 10; Cherokee Nation *Spears* Amicus Br. 12-14.

Indeed, Oklahoma's petitions are a source of, not a solution to, uncertainty. Overruling *McGirt* would invalidate thousands of federal and tribal prosecutions and squander tens of millions of dollars spent in reliance on *McGirt*. Meanwhile, granting review would freeze negotiations indefinitely. Oklahoma apparently is happy to impose those costs. But that only underscores why its arguments should be directed to Congress, which the Constitution charges with making such decisions. *Mize* Opp. 31-32; *see* Muscogee (Creek) Nation *Mize* Amicus Br. 25-28; Chickasaw Nation *Beck* Amicus Br. 21-22; Choctaw Nation *Sizemore* Amicus Br. 10-12; Cherokee Nation *Spears* Amicus Br. 22-23.

The Court should also deny review because Oklahoma did not preserve its request to overrule *McGirt*. In cases from state courts, this Court reviews only questions "pressed or passed on below." *Illinois v. Gates*, 462 U.S. 213, 219-20, 222 (1983). And that remains true even when litigants argue that a "well-settled federal" rule "should be modified." *Id.* at 222. "[C]hief among" the considerations supporting that practice "is

[the Court's] own need for a properly developed record." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Likewise, this Court treats as waived arguments "not raise[d] … below." *United States v. Jones*, 565 U.S. 400, 413 (2012).

This case illustrates why this Court does so. Oklahoma says *McGirt* should have placed more weight on "contemporaneous understanding" and "histor[y]." *Castro-Huerta* Pet. 17-18. And it seeks *McGirt*'s overruling based on claims of "disruption." *Castro-Huerta* Pet. 3-4. But below, even though the OCCA remanded *expressly* to hold a hearing on whether the alleged crime occurred in Indian country, Oklahoma did not raise its present arguments. As a result, the record contains no evidence to support these claims.[8] Only after the arrival of a new Attorney General, in June 2021, did Oklahoma reverse course and begin to seek *McGirt*'s overruling in this Court. That is why Oklahoma's petition is so light on evidence and so heavy on citation-free assertions.

This is no way to undertake the grave task of weighing whether to abandon *stare decisis*. If Oklahoma wants this Court to entertain that request, it should develop a record in the lower courts. Even better, it should take its claims to Congress, which has the institutional capacity to gather evidence and the institutional responsibility to make legislative

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[8] To Respondent's knowledge, the same is true of all Oklahoma's pending petitions. *See* Cherokee Nation *Spears* Amicus Br. 15-19 & n.46 (identifying additional procedural obstacles, including mootness).

judgments based on that evidence.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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