

Capital Case

Case No. _____

**In the
Supreme Court of the United States**

SHAUN MICHAEL BOSSE,
Petitioner,
v.
THE STATE OF OKLAHOMA,
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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No. _____

CAPITAL CASE

QUESTION PRESENTED

Whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), applies retroactively to convictions that were final when *McGirt* was announced.

PARTIES TO THE PROCEEDINGS

The parties to this action are named in the caption.

RELATED PROCEEDINGS

Bosse v. State, No. PCD-2019-124, Oklahoma Court of Criminal Appeals, Successive Application for Post-Conviction Relief denied October 7, 2021 (originally granted March 11, 2021, then vacated August 31, 2021).

United States v. Bosse, No. 21-MJ-203-STE, United States District Court for the Western District of Oklahoma. Pending.

Oklahoma v. Bosse, No. 20A161, United States Supreme Court, Application for Stay of Mandate of the Oklahoma Court of Criminal Appeals Pending Review on Certiorari, granted May 26, 2021.

Oklahoma v. Bosse, No. 21-161, United States Supreme Court, Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals, dismissed pursuant to Rule 46.1, September 10, 2021.

Bosse v. Carpenter, No. CIV-18-204-R, United States District Court for the Western District of Oklahoma, Case stayed April 2, 2019.

Bosse v. Oklahoma, No. 17-7232, United States Supreme Court, Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals denied March 5, 2018.

Bosse v. State, No. PCD-2013-360, Oklahoma Court of Criminal Appeals, Application for Post-Conviction Relief denied December 16, 2016.

Bosse v. Oklahoma, No. 15-9173, United States Supreme Court, Petition for a Writ of Certiorari granted, judgment of the Oklahoma Court of Criminal Appeals in D-2012-1128 vacated and case remanded for further proceedings October 11, 2016.

Bosse v. State, Case No. D-2012-1128, Oklahoma Court of Criminal Appeals, Judgment and Sentence affirmed May 27, 2017 (after it was previously affirmed October January 14, 2004, vacated and remanded by this Court).

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THE STATE OF OKLAHOMA,
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On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Shaun Michael Bosse, respectfully petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals (OCCA) in *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Oct. 7, 2021).

OPINIONS BELOW

The opinion of the OCCA denying Mr. Bosse’s subsequent state post-conviction action is available at *Bosse v. State*, ___P.3d ___, No. PCD-2019-124, 2021 WL 4704316 (Okla. Crim. App. Oct. 7, 2021) and included in Petitioner’s Appendix. See Appendix A (Pet. App. at 1-5). That court’s order vacating its previous order and judgment granting post-conviction relief and withdrawing

the opinion from publication is available at *Bosse v. State*, 495 P.3d 669 (Okla. Crim. App. 2021) (mem.). See Appendix B (Pet. App. at 6-7). The OCCA's opinion granting Mr. Bosse state post-conviction relief was (but is no longer) available at *Bosse v. State*, 484 P.3d 286 (Okla. Crim. App. 2021) (withdrawn). See Appendix C (Pet. App. at 8-51) (OCCA's withdrawn published opinion on March 11, 2021).

JURISDICTION

The OCCA denied post-conviction relief on October 7, 2021. This petition is being filed within 90 days of that denial pursuant to Rule 13, Rules of the Supreme Court of the United States. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Indian Commerce Clause of the United States Constitution, Article I, Section 8, provides in relevant part:

The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

The Supremacy Clause to the United States Constitution, Article VI, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Due Process Clause of the Fourteenth Amendment, Section 1, to the U.S. Constitution provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Title 18, United States Code, Section 1151 (Indian country defined) provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Title 18, United States Code, Section 1152 (Laws governing) provides in relevant part:

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.

Section 1080 of Title 22 of the Oklahoma Statutes provides:

Any person who has been convicted of, or sentenced for, a crime and who claims:

(a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;

(b) that the court was without jurisdiction to impose sentence;

(c) that the sentence exceeds the maximum authorized by law;

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Section 1089(D) of Title 22 of the Oklahoma Statutes provides in relevant part:

8. If an original application for post-conviction relief is untimely or if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely original application unless:

a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or

9. For purposes of this act, a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis:

a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or

b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

STATEMENT OF THE CASE

A. Prior History

On August 6, 2010, Bosse was charged in McClain County District Court Case No. CF-2010-213 with three counts of Murder in the First Degree, and one count of Arson in the First Degree. On March 3, 2011, the State filed a Bill of Particulars, alleging four aggravating circumstances: (1) the murders were especially heinous, atrocious, or cruel; (2) the defendant knowingly created a great risk of death to more than one person; (3) the defendant presents a continuing threat to society; and (4) the murders were committed for the purpose of avoiding a lawful arrest or prosecution.

On October 29, 2012, the jury found Bosse guilty of all counts, and assessed punishment at thirty-five years imprisonment and a fine of \$25,000 on the arson count. At the conclusion of the sentencing phase, the jury found three aggravating circumstances on all three counts: (1) the murders were especially heinous, atrocious, or cruel, (2) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person, and (3) the murders were committed for the purpose of avoiding a lawful arrest or prosecution, and imposed a sentence of death for each count. On December 18,

2012, the court formally sentenced Bosse in accordance with the jury's verdict, with all sentences to run consecutively.

Bosse appealed his convictions and sentences to the OCCA, which affirmed the convictions and sentences. *Bosse v. State*, 360 P.3d 1203 (Okla. Crim. App. 2015). This Court vacated and remanded for further proceedings, finding error in the admission of improper opinion testimony by victim-impact witnesses. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016). OCCA again affirmed the convictions and sentences. *Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017), *cert denied* 138 S. Ct. 1264 (2018).

Mr. Bosse petitioned the OCCA for post-conviction relief. The court denied the petition in an unpublished decision. Opinion Denying Application for Post-Conviction Relief, *Bosse v. State*, Case No. PCD-2013-360 (Okla. Crim. App. Dec. 16, 2016).

Mr. Bosse filed a petition for habeas corpus in the United States District Court for the Western District of Oklahoma, which included a ground for relief alleging exclusive jurisdiction over the subject crimes rests with the federal courts because the victims were citizens of the Chickasaw Nation and the crimes occurred within the boundaries of the Chickasaw Nation Reservation. Petition for a Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254, *Bosse v. Carpenter*, No. CIV-18-204-R (W.D. Okla. Feb. 22, 2019). The

parties filed a joint motion for a stay due to the pending *McGirt/Murphy* proceedings in this Court, which the district court granted on April 2, 2019. *See* Order, *Bosse v. Carpenter*, No. CIV-18-204-R (W.D. Okla. April 2, 2019). As of this date, the stay is still in effect.

B. Current Controversy

On February 20, 2019, two days prior to filing his habeas petition, Mr. Bosse filed a subsequent application for post-conviction relief challenging the State's jurisdiction to prosecute him. *See* Appendix D (Pet. App. at 52-118) (Successive Application for Post-Conviction Relief, *Bosse v. State*, PCD-2019-124 (Okla. Crim. App. Feb. 20, 2019)). Mr. Bosse asserted exclusive jurisdiction rests with the federal courts because the victims were citizens of the Chickasaw Nation and the crimes occurred within the boundaries of the Chickasaw Nation Reservation. Because the authority on which Mr. Bosse's claim rested had not yet become final, the OCCA sua sponte held the matter in abeyance pending final decision of this Court in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (July 9, 2020) (mem).

On the same day it decided *Sharp v. Murphy*, this Court also decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In both cases the Court reversed rulings of the OCCA, concluding Congress never disestablished the Creek Reservation. The crimes in *Murphy* and *McGirt* occurred in Indian Country, thus

depriving the Oklahoma courts of jurisdiction. The State thereafter filed a response to Mr. Bosse's post-conviction application in light of *Murphy/McGirt*. See Appendix E (Pet. App. at 119-187) (Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Aug. 4, 2020)).

The OCCA remanded Mr. Bosse's post-conviction case to the District Court for McClain County for an evidentiary hearing. See Appendix F (Pet. App. at 188-193)(Order Remanding for Evidentiary Hearing, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Aug. 12, 2020)). Mr. Bosse submitted a brief prior to the hearing. See Appendix G (Pet. App. at 194-222) (Petitioner's Remanded Hearing Brief Applying *McGirt* Analysis to Chickasaw Nation Reservation, *State v. Bosse*, No. CF-2010-213 (McClain Cnty. Dist. Ct. Sept. 23, 2020)). After the hearing, the district court concluded Mr. Bosse had established the victims were Indian and the crimes for which Mr. Bosse was convicted occurred in Indian Country. See Appendix H (Pet. App. at 223-233)(Findings of Fact and Conclusions of Law, *State v. Bosse*, No. CF-2010-213 (McClain Cnty. Dist. Ct. Oct. 13, 2020)).

Both parties filed supplemental briefing in the OCCA. See Appendix I (Pet. App. at 234-260) (Petitioner's Post-Hearing Brief regarding Proposition I of His Successive Application for Post-Conviction Relief, *Bosse v. State*, No. PCD-

2019-124 (Okla. Crim. App. Nov. 4, 2020)); *See* Appendix J (Pet. App. at 261-286) (State’s Supplemental Brief Following Remand for Evidentiary Hearing from McClain County District Court Case No. CF-2010-213, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Nov. 4, 2020)). The State did not argue that *McGirt* announced a new rule that could not be retroactively applied. Rather, in briefing filed before and after the evidentiary hearing, the State vigorously and repeatedly argued *McGirt* did not announce a new rule. *See* Appendix E (Pet. App. at 156-158 (citing *Teague v. Lane*, 489 U.S. 288, 301, 307 (1989) and *Walker v. State*, 933 P.2d 327, 338-39 (Okla. Crim. App. 1997)) (“*McGirt* was a mere application of, and was dictated by, *Solem [v. Bartlett]*, 465 U.S. 463 (1984)]. Further, the decision did not break new ground or impose a new obligation on the State”); *See* Appendix J (Pet. App. at 283) (“There is simply no way it can be said that the petitioner’s jurisdictional claim could not have been reasonably formulated prior to *McGirt* or that *McGirt* represented an intervening change in constitutional law”); *See* Appendix K (Pet. App. at 291) (Supplemental Brief of Respondent, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Jan. 7, 2021) (“As Petitioner’s *McGirt* claim was based on well-established precedent, it could have been reasonably formulated (and, in fact, was formulated before *McGirt*) and is not based on a new rule of constitutional law.”).

On March 11, 2021, the OCCA held the victims in Mr. Bosse’s case were Indian and the crimes occurred in Indian Country (the Chickasaw Nation Reservation), and concluded the State did not have jurisdiction to prosecute him.¹ See Appendix C (Pet. App. at 30). Consistent with the State’s arguments in Mr. Bosse’s and others’ cases, the OCCA noted the State had argued “that waiver should apply because there is really nothing new about the claim.” Appendix C (Pet. App. at 17 n.8). The OCCA reversed and remanded the case to the District Court of McClain County with instructions to dismiss.² Appendix C (Pet. App. at 31).

¹ Around this time, similar rulings applied *McGirt* to each of Oklahoma’s “Five Civilized Tribes,” and the OCCA issued published opinions granting post-conviction relief to several capital defendants who were convicted in the absence of jurisdiction in Oklahoma state courts, regardless of whether the void state court convictions were final when *McGirt* was announced. See, e.g., *Ryder v. State*, 489 P.3d 528 (Okla. Crim. App. Apr. 29, 2021) (opinion granting relief), *opinion superseded by* __ P.3d __, No. PCD-2020-613, 2021 WL 4929914 (Okla. Crim. App. Oct. 21, 2021) (opinion denying relief); *Cole v. State*, 492 P.3d 11 (Okla. Crim. App. Apr. 29, 2021) (opinion granting relief), *opinion superseded by* __ P.3d __, No. PCD-2020-529, 2021 WL 4704035 (Okla. Crim. App. Oct. 7, 2021) (opinion denying relief); *Bench v. State*, 492 P.3d 19 (Okla. Crim. App. 2021) (opinion granting relief), *opinion vacated by* 495 P.3d 670 (Okla. Crim. App. Aug. 31, 2021).

² Post-conviction relief having been granted on Mr. Bosse’s state convictions, on March 30, 2021 the United States filed a criminal complaint against him for the same conduct in the United States District Court for the Western District of Oklahoma (*United States v. Bosse*, No. 21-MJ-203-STE). As of this date, that action is still pending.

On April 7, 2021, the clerk of the court issued the mandate of the OCCA's March 11, 2021 Opinion Granting Post-Conviction Relief; that same day the State filed a motion to recall it based on the State's intention to seek certiorari review of the Opinion Granting Post-Conviction Relief. Appendix L (Pet. App. at 299-300) (Motion to Recall the Mandate for Good Cause Shown Based on Certiorari Petition, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. April 7, 2021)).³ After two rounds of briefing and oral argument, on April 15, 2021, the OCCA issued an order staying the mandate for 45 days. See Appendix N (Pet. App. at 304-306) (Order Staying Issuance of Mandate, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. April 15, 2021)).

On April 21, 2021, the State filed an application to stay the mandate of the OCCA pending certiorari review in this Court. Application to Stay Mandate of the Oklahoma Court of Criminal Appeals Pending Review on Certiorari, *Oklahoma v. Bosse*, No. 20A161, United States Supreme Court. The Court granted the application. Order in Pending Case, *Oklahoma v. Bosse*, No. 20A161 (U.S. May 26, 2021). On August 10, 2021, the State filed a petition for writ of certiorari in this Court. *Oklahoma v. Bosse*, No. 21-186 (Aug. 10, 2021).

On August 12, 2021, the OCCA reversed course and discarded the settled

³Mr. Bosse's response to this filing is available at Appendix M (Pet. App. at 301-303) (Petitioner's Response to Respondent's Motion to Recall the Mandate, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. April 8, 2021)).

law it had been relying on (and bedrock jurisdictional principles) by issuing *State ex rel. Matloff v. Wallace*, ___ P.3d ___, 2021 WL 3578089, No. PR-2021-366, (Okla. Crim. App. Aug. 12, 2021), *petition for cert. filed, sub. nom. Parish v. Oklahoma, et. al.* (U.S. 9-29-21) (No. 21-467). See Appendix O (Pet. App. at 307-317).⁴ In *Matloff*, the OCCA held *McGirt* “announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction.” 2021 WL 3578089, at *2 (Appendix O at 309). The OCCA explained that in previously granting post-conviction *McGirt* relief to petitioners like Mr. Bosse, its attention had not “been drawn to the potential non-retroactivity of *McGirt*.” 2021 WL 3578089, at *3 (Appendix O at 310),

On August 31, 2021, the OCCA entered its Order Vacating Previous Order and Judgment Granting Post-Conviction Relief and Withdrawing Opinion from Publication. See Appendix B (Pet. App. at 6-7).⁵ The OCCA premised its decision to vacate the previous order and judgment on *Matloff*. On September 2, 2021,

⁴ Counsel for Mr. Bosse submitted an amicus brief in *Matloff*. See Appendix P (Pet. App. at 318-334) (*Amicus Curiae* Brief of the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma in Support of Respondent, *Matloff*, No. PR-2021-366 (Okla. Crim. App. July 2, 2021)).

⁵ Because the OCCA vacated the opinion on which the State’s certiorari petition in this Court was based on, the parties filed a joint stipulation for dismissal pursuant to Rule 46.1 of the Rules of this Court, and the Court dismissed the petition. *Oklahoma v. Bosse*, No. 21-186 (Sept. 10, 2021).

Mr. Bosse filed a Motion to Stay Proceedings, along with a Brief of Petitioner in Support pending certiorari review of *Matloff*. See Appendix Q (Pet. App. at 335-347). Finally, on October 7, 2021, the OCCA issued its order denying *McGirt* post-conviction relief, applying *Matloff's* holding that *McGirt* announced a rule of criminal procedure that does not apply retroactively to cases with final convictions, and denied Mr. Bosse's motion to stay the proceedings pending certiorari review of *Matloff*. See Appendix A (Pet. App. at 1-5).

REASONS THE PETITION SHOULD BE GRANTED

The petition for writ of certiorari in *Parish v. Oklahoma*, No. 21-467 (arising from *Matloff*), presents the same question presented in this case. See *State ex. rel. Matloff v. Wallace*, ___ P.3d ___, 2021 WL 3578089, Case No. PR-2021-366 (Okla. Crim. App. Aug. 12, 2021), *petition for cert. filed, sub nom., Parish v. Oklahoma* (U.S. Sept. 29, 2021) (No. 21-467). As explained in the petition for writ of certiorari in *Parish*, *McGirt* must apply retroactively to convictions that were final when *McGirt* was announced. Mr. Bosse's petition for writ of certiorari is one of several that follows *Parish* and presents the same question.

Under *McGirt*, the federal government has—and always had—exclusive jurisdiction to prosecute the crimes of which Mr. Bosse was convicted that occurred in Indian Country. The State has never had the power to do so. By

holding *McGirt* is a mere procedural rule that is not retroactive to cases on collateral review, the OCCA has sought to preserve legally void convictions that the State never had authority to impose. Such a regime violates the Supremacy Clause by treating an exclusive allocation of power to the federal government as a mere regulation of the State's "manner" of trying a case. The decision also violates bedrock principles of due process and centuries-old understandings of habeas corpus. A conviction cannot stand where a State lacks authority to criminalize the conduct, and habeas courts have long set aside judgments by a court that lacks jurisdiction. If left unreviewed, *Matloff* would condemn many people, including Mr. Bosse, to bear state convictions and serve state sentences for crimes the State had no power to prosecute.

A favorable decision in *Parish* would vindicate Mr. Bosse's argument that *McGirt* applies retroactively to convictions that were final when *McGirt* was announced. Because the question presented in this case is before the Court in *Parish*, Mr. Bosse respectfully requests that the Court hold this petition pending the Court's decision in *Parish*.

CONCLUSION

Oklahoma has no jurisdiction to proscribe and punish Mr. Bosse's conduct, and the State is now holding him without any valid authority to do so. Mr. Bosse respectfully requests the Court hold this petition pending disposition of the

petition for a writ of certiorari in *Parish v. Oklahoma*, No. 21-467, and then dispose of it as appropriate. If *Parish* is resolved in the petitioner's favor, the Court should grant certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully submitted,

s/ Emma V. Rolls

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