

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERIAH SCOTT BUDDER, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
TENTH CIRCUIT COURT OF APPEALS

**UNOPPOSED APPLICATION FOR EXTENSION OF TIME IN WHICH TO
FILE PETITION FOR WRIT OF CERTIORARI**

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To the Honorable Justice Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Petitioner Jeriah Scott Budder, though undersigned counsel and pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13(5), 21, 22, and 39, respectfully seeks a 60-day extension of time, to and including January 5, 2024, in which to file a petition for a writ of certiorari. In support of this request, counsel states as follows:

1. This case arises from a direct appeal from the judgment and 96-month sentence imposed on Mr. Budder, following his conviction by a jury for one count of Voluntary Manslaughter. Mr. Budder is now in the custody of the Bureau of Prisons. The Tenth Circuit Court of Appeals issued its Opinion affirming the District Court's judgment and entering its own judgment on August 7, 2023. See United States v. Budder, 76 F.4th 1007 (10th Cir. 2023) (attached as Appendix 1). Without an extension of time, the time to petition for a writ of certiorari in this Honorable Court would expire on November 6, 2023, which is the next day after the ninetieth day from the date of the of the Circuit Court of Appeals' opinion and judgment (the ninetieth day being a Sunday). See Sup. Ct. R. 13(1). This application is being filed more than ten days before that date. See Sup. Ct. R. 13(5).

BACKGROUND

2. Mr. Budder was originally charged with manslaughter by the Cherokee County District Attorney, in Tahlequah, Oklahoma, for an alleged offense that occurred on April 24, 2019. Before the matter proceeded to trial in Oklahoma state court, this Honorable Court decided McGirt v. Oklahoma, 591 U.S. ----, 140 S.Ct. 2452, 207 L.Ed.2d 985 (July 9, 2020). Mr. Budder, as a Cherokee, is an enrolled member of a federally recognized tribe and the offenses with which he was charged are alleged to have occurred on the Cherokee Nation reservation. Accordingly, this Court's decision in McGirt effectively divested Oklahoma of jurisdiction and extended jurisdiction over the offense conduct to the United States Attorney under the Major Crimes Act. 18 U.S.C. § 1153. The state criminal charges were therefore dismissed for lack of subject matter jurisdiction.

3. The United States thereafter prosecuted Mr. Budder for first-degree murder in Indian Country of 18 U.S.C. §§ 1111(a), 1151, and 1153 and later filed a Superseding Indictment charging additional counts of Using, Carrying, Brandishing, and Discharging a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A), and Causing the Death of a Person in the Course of a Violation of Title 18 U.S.C. § 924(c), in violation of 18 U.S.C. § 924(j)(1), as well as a forfeiture allegation. Prior to trial, Mr. Budder filed a motion requesting that the District Court apply the Oklahoma state law of self-defense, arguing that the change from the Oklahoma law to the narrower federal law of self-defense violated the Constitution's Ex-Post Facto Clause and otherwise violated his

right to due process under the law. The District Court denied that motion, but finding Mr. Budder’s “arguments and authority compelling,” indicated at the pre-trial conference that, if there was evidence of self-defense presented at trial, the Court “was inclined to provide the jury with instruction and an interrogatory that explained the Oklahoma law of self-defense using the Oklahoma pattern jury instruction.” See United States v. Budder, 601 F. Supp. 3d 1105, 1109-10 (E.D. Okla. 2022), aff’d, 76 F.4th 1007 (10th Cir. 2023).

4. The matter proceeded to a three-day jury trial. At the conclusion of the evidence, the District Court asked the jury to fill out a special interrogatory, thus allowing a determination of whether the jury believed that the Oklahoma law of self-defense would have applied differently to the facts of this case than federal law. The jury ultimately found Mr. Budder guilty on only Count One of the Superseding Indictment to the lesser-included offense of Voluntary Manslaughter. In rendering this verdict, the jury considered the District Court’s instruction on the federal law of self-defense and determined that it did not apply to the lesser offense of Voluntary Manslaughter. “In response to the ‘Special Interrogatory,’ however, the jury answered ‘No,’ determining that the government had not proved beyond a reasonable doubt that [Mr.] Budder had not acted in self-defense under Oklahoma law. As such, the jury found that application of Oklahoma’s law of self-defense to the facts of this case would have operated to acquit” Mr. Budder. See Budder, 601 F. Supp. 3d at 1111 (emphasis in the original).

5. After the trial, Mr. Budder “renewed his Motion to Dismiss arguing that the change wrought in McGirt, which precluded him from asserting the self-defense law of Oklahoma, raises *ex post facto* and due process issues.” *Id.* at 1111. Although the District Court ultimately denied Mr. Budder’s motion and declined “to vacate the jury’s lawful verdict,” it expressed serious “concerns with the due process affording to this Defendant under the facts of this case,” determined “the McGirt decision “operate[d] precisely like an *ex post facto* law” with respect to a large group of Americans, including the Defendant in this case,” and stated that it “firmly believes that appellate review of this issue of law is warranted.” *Id.* at 1116 (citing and quoting Bouie v. City of Columbia, 378 U.S. 347, 353 (1964). But, finding “no analogous Tenth Circuit or Supreme Court precedent,” the District Court declined “to extend the scope of the Supreme Court precedent in Bouie and its progeny beyond the contours within which the Supreme Court and Tenth Circuit have thus far indicated it should apply.” *Id.* at 1116-17.

6. In a published decision, the Court of Appeals later affirmed the judgment of conviction and terminated the case, rejecting Mr. Budder’s due process and Eighth Amendment claims and any suggestion that this Court’s decision in McGirt was “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” United States v. Budder, 76 F.4th 1007, 1015 (10th Cir. 2023) (quoting Rogers v. Tennessee, 532 U.S. 451, 457, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001).

7. This Court’s five-Justice majority in McGirt acknowledged the four-Justice dissent’s “concern for reliance interests,” and endorsed the view that lower courts should take into consideration legitimate reliance interests through “other legal doctrines ... designed to *protect those who have reasonably labored under a mistaken understanding of the law.*” McGirt, at 2481 (emphasis added). This Court expressly left “questions about ... reliance interest[s] for later proceedings crafted to account for them.” Id., quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020).

8. This case presents strong arguments that the 10th Circuit decided an important federal constitutional question that has not been, but should be, settled by this Court, and in ways that conflict with and contravene this Court’s relevant decisions, making this case a worthy candidate for this Court’s certiorari review. See Sup. Ct. R. 10(c). Indeed, this is an important case for the Court to review because it can allow the Court to appropriately articulate the contours of the law in this area following in the wake of McGirt.

9. This Court has jurisdiction to grant certiorari pursuant to 28 U.S.C. § 1254.

REASONS FOR GRANTING AN EXTENSION OF TIME

10. I believe an extension of time is necessary to prepare Mr. Budder’s petition for writ of certiorari adequately. This is a legally complex case, and there is a significant amount of information that needs to be conveyed within the petition so that this Court will be able to meaningfully exercise its discretion as to whether or

not to grant a writ of certiorari. Presenting these issues directly, clearly, concisely and with brevity, as required by Sup. Ct. R. 14, is difficult and time-consuming.

11. Additionally, this is a serious criminal case involving a young offender. Mr. Budder was only eighteen-years-old when the offense for which he stands convicted occurred. Barring relief, he will spend the better part of the next six years in the Bureau of Prisons.

12. I am a sole practitioner and have been working diligently on this petition, but have been prevented from completing it by other significant professional responsibilities in other serious criminal cases and pressing professional matters, that I have been and will continue to be busily engaged in and that have required and will continue to require substantial time and effort, including:

- I was vigorously defending a first degree murder case and preparing for a jury trial on People v. C'Vontae Smith, Arapahoe County, Colorado, Case No. 22CR2315 that was set to begin on October 24, 2023. That case recently resolved on October 3, 2023.
- I am also learned counsel on two ongoing capital cases United v. Jesse Montanez, Western District of Louisiana, 23-cr-00244 (indictment filed on October 11, 2023) and United States v. Diaz-Pineda (Eastern District of California, 22-cr-00232 (client indicted for capital murder). Counsel has a new, significant deadline of November 27, 2023, to

submit materials to the United States Attorney seeking the deauthorization of the death penalty.

- I am also counsel in the former capital case of United v. Ayala-Flores (Central District of California, 19-cr-00117, which although no longer a death penalty case, is now a RICO and VICAR murder conspiracy case involving multiple co-defendants and multiple murders.
- I am also counsel for Gabriel Sanchez in a United States District Court of Colorado prosecution, 22-cr-00345-RM, alleging a widespread narcotics trafficking conspiracy in which the defendant guidelines out to a life sentence, if convicted. This matter was scheduled to begin trial in February 2024, but that trial date was recently continued.
- I am counsel in other complex and serious cases, including a Colorado state RICO narcotics prosecution, and a Colorado state Abusive Head Trauma Child Abuse case.

13. Given the amount of work that remains to be done on Mr. Budder's petition and in the other matters referenced above, I do not believe it will be possible to file his petition by November 6, 2022, and especially not in the comprehensive form and manner deserving of this Honorable Court and the important constitutional questions sought to be reviewed.

14. The requested extension of time is for sixty days. See Sup. Ct. R. 13(5) (authorizing extension of up to sixty days for the filing of a petition for writ of

certiorari). Undersigned counsel has conferred with opposing counsel, Ms. Linda Epperley, who has indicated that the United States does not object to the extension of time requested herein.

WHEREFORE, Petitioner Jeriah Budder respectfully requests that an order be entered extending his time in which to petition for writ of certiorari to and including January 5, 2024.

Respectfully submitted this 27th day of October 2023,

/s/James Castle
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AFFIDAVIT OF SERVICE

JAMES CASTLE, a member of the bar of this Court, hereby attests that pursuant to Supreme Court Rule 29, the preceding Unopposed Application for Extension of Time in Which to File Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals was served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

Linda A. Epperley, Okla. Bar No. 12057
Assistant United States Attorneys
520 Denison Avenue
Muskogee, Oklahoma 74401
Telephone: (918) 684-5100
Facsimile: (918) 684-5150
linda.epperley@usdoj.gov

and that the envelope was deposited with the United Parcel Service, Denver,

Colorado 80220, on October 27th, 2023, and further attests that all parties required to be served have been served.

/s/James Castle
JAMES CASTLE