

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

KEVIN TYLER FOSTER,

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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QUESTION PRESENTED

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

LIST OF PROCEEDINGS

Oklahoma Court of Criminal Appeals

F-2020-149

Kevin Tyler Foster, Appellant v.
The State of Oklahoma, Appellee

Date of Final Opinion: July 8, 2021

Oklahoma District Court (Rogers County)

No. CF-2018-784

The State of Oklahoma, Plaintiff v.
Kevin Tyler Foster, Defendant

Date of Judgment and Sentence: February 13, 2020

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, dated July 8, 2021, is included in the Appendix at App.1a-9a. The order of the Oklahoma Court of Criminal Appeals, dated February 2, 2021, remanding the case for an evidentiary hearing is included below at App.24a-29a. The Order Relating to Evidentiary Hearing of the District Court in and for Rogers County, State of Oklahoma, dated March 25, 2021, is included below at App.10a-11a. The Agreed Stipulation on Indian Country Remand and Joint Motion to Strike Evidentiary Hearing, dated March 25, 2021, is included below at App.12a-23a. These opinions and orders were not designated for publication.



JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on July 8, 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.

18 U.S.C. § 1153(a)**Offenses committed within Indian country**

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.



STATEMENT OF THE CASE

Thousands of state criminal prosecutions have been called into question by this Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). Like the pending petition in *Oklahoma v. Castro-Huerta*, No. 21-429, this case presents the question whether *McGirt* should be overruled. For the same reasons given in the *Castro-Huerta* petition, review is warranted to examine that question. The petition in *Castro-Huerta* should be granted, and this petition should be held pending a decision there. In the alternative, the petition in this case should be granted.

1. On November 15, 2018, respondent shot and killed his stepfather, Rick Swan. Tr. 1024, 1026, 1277, 1851, 1856, 1901.* The shooting was the culmination of a long-running dispute over money and the gravesite of respondent's late mother. Tr. 430, 461, 502, 598, 639-40, 649, 1811-17, 1882. After he killed Mr. Swan, respondent poured paint thinner on and around Ms. Swan's body and set the RV in which he lay on fire. Tr. 1858-59. On his way out, respondent stopped to take a picture of his handiwork. Tr. 1859.

Respondent was convicted of first-degree murder, first-degree arson, desecration of a corpse, possession of a firearm during the commission of a felony, trespassing, and injury to a gravestone. He was sentenced to life without the possibility of parole, thirty-five years' imprisonment, seven years' imprisonment, ten

* All fact citations are to the transcripts of respondent's trial (Tr.), which are available below. See Sup. Ct. R. 12.7.

years' imprisonment, six months in the county jail, and ninety days in the county jail, all to run consecutively. Respondent then appealed to the Court of Criminal Appeals, claiming the State lacked authority to prosecute him because he was an Indian and he killed Mr. Swan in Indian country.

2. The Court of Criminal Appeals remanded the case to the state district court for an evidentiary hearing on February 2, 2021. App.24a-29a. On remand, the parties stipulated that respondent was an enrolled member of the Cherokee Nation at the time of the crimes and possessed a 1/32 degree of Cherokee blood. App.13a. Furthermore, the parties stipulated that respondent's crimes occurred within the historical boundaries of the Cherokee Nation. App.13a-14a. The state district court entered an order adopting the parties' stipulations. App.10a-11a.

The case then returned to the Oklahoma Court of Criminal Appeals. There, the State explained that it "strongly believes that *McGirt* was wrongly decided" but recognized the state courts were bound by that decision. Supplemental Br. of Appellee After Remand at 7 n.3 (Apr. 19, 2021). The Court of Criminal Appeals noted that the State did not "formally conced[e]" that it lacked jurisdiction, but held that "[t]he ruling in *McGirt* applies" and reversed respondent's convictions. App.4a. Two judges wrote separate opinions.

Judge Lumpkin "reluctantly" concurred in the result while expressing strong disagreement with *McGirt*. App.6a-9a.

Judge Hudson specially concurred but maintained 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.9a.

Respondent has since pled guilty in federal court to second-degree murder, with a sentence of forty-five years’ imprisonment.



REASONS FOR GRANTING THE PETITION

In the decision below, the Oklahoma Court of Criminal Appeals applied *McGirt* to free yet another criminal 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. *See* Pet. at 17-29, *Oklahoma v. Castro-Huerta*, No. 21-429. This case presents yet another opportunity to end the damage caused by *McGirt*. If the petition in *Castro-Huerta* is granted, this petition should be held pending a decision in *Castro-Huerta* and then disposed of as is appropriate. In the alternative, 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 victim 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.

The question presented in this case is materially identical to the second question presented in *Castro-Huerta*. For the compelling reasons explained in the petition in *Castro-Huerta*, review on this question is warranted.



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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