

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

JESSY SHAY BAILEY,

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-2020-226

Jessy Shay Bailey, Appellant v.
The State of Oklahoma, Appellee

Date of Final Opinion: September 23, 2021

Oklahoma District Court (Atoka County)

No. CF-2018-81

The State of Oklahoma, Plaintiff v.
Jessy Shay Bailey, Defendant

Date of Judgment and Sentence: March 9, 2020

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, dated September 23, 2021, is included in the Appendix at App.1a-11a. The order of the Oklahoma Court of Criminal Appeals, dated January 22, 2021, remanding the case for an evidentiary hearing is included below at App.16a-20a. The Findings of Fact and Conclusions of Law of the District Court in and for Atoka County, State of Oklahoma, dated March 24, 2021, is included below at App.12a-15a. These opinions and orders were not designated for publication.



JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on September 23, 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

Relying on this Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), the court below threw out respondent's conviction for committing a sex offense against a minor. The federal government will not re prosecute him and the tribal government lacks authority to do so. As a result, if the decision below stands, respondent will walk free, which includes being free from the requirements of sex offender registration designed to protect the public.

Thousands of other 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. Respondent was convicted of one count of lewd acts with a child under sixteen, for molesting 14-year-old J.P. Tr. II 212-16.* He was sentenced to three

* Citations to the transcript of respondent's trial will be abbreviated as (Tr.), and citations to the transcript of respondent's sentencing hearing will be abbreviated at (S. Tr.). These transcripts are available below. See Sup. Ct. R. 12.7.

years' imprisonment and was ordered to register as a sex offender. S. Tr. 29-30.

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 crime because he is not Indian. 3/19/2021 Pre-Hearing Brief Asserting Concurrent Jurisdiction. The court accepted the parties' stipulations and found J.P. was a member of the Choctaw Nation with some Indian blood. App.13a-14a. The court further held, based on *McGirt*, that the crime occurred within the boundaries of the Choctaw Nation's reservation. App.14a-15a.

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, but recognized that the state courts were bound by it. 4/19/2021 Supp. Br. of Appellee after Remand, 3 n.2. The State also argued that it has prosecutorial authority over non-Indian-on-Indian crime. 4/19/2021 Supp. Br. of Appellee after Remand, 3-14. The Court of Criminal Appeals held that the State lacks prosecutorial authority, even over non-Indians like respondent, "[a]bsent any law, compact, or treaty allowing for jurisdiction". App.5a. Two judges wrote separate opinions.

Vice Presiding Judge Hudson specially concurred to "maintain [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.8a.

Judge Lumpkin concurred in the result. App.9a-11a. 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.9a.

3. It is petitioner’s understanding that respondent will not be charged in federal court for re prosecution of the crime at issue. And respondent, a non-Indian, cannot be tried in tribal court. Thus, respondent will escape consequences for his molestation of a child and will not be on any sex offender registry if the decision below reversing his state-court conviction stands.



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—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 victim of the terrible crime 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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