

In the Supreme Court of the United States



STATE OF OKLAHOMA,

Petitioner,

v.

NACOLE RYAN BAIN,

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

No. C-2019-853

Nacole Ryan Bain, Petitioner v.

The State of Oklahoma, Respondent

Date of Final Opinion: April 1, 2021

Oklahoma District Court (Okmulgee County)

Nos. CF-2018-196, CM-2018-492

State of Oklahoma, Plaintiff v.

Nacole Ryan Bain, Defendant

Date of Judgment and Sentence: October 23, 2019

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, dated April 1, 2021, is included in the Appendix at App.1a-11a. The order of the Oklahoma Court of Criminal Appeals, dated August 19, 2020, remanding the case for an evidentiary hearing is included below at App.15a-17a. The Findings of Fact and Conclusions of Law of the District Court in and for Okmulgee County, State of Oklahoma, dated December 15, 2020, is included below at App.12a-14a. These opinions and orders were not designated for publication.



JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on April 1, 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. Bosse*, No. 21-186, this case presents the question whether *McGirt* should be overruled. As the petition in *Bosse* explains, review is warranted here to examine that question. The petition for a writ of certiorari in this case should either be granted or, if the petition in *Bosse* is granted, held pending a decision in *Bosse* and then disposed of as is appropriate.

1. In late June 2018, respondent, already a five-time convicted felon, shot and killed Addison Waddell in the trailer home where they lived together. O.R. 37;

P.H. 15-16, 31-32, 35-36.* Respondent loaded Addison's body into a large tote, which she concealed in a brush pile on a rural property. P.H. 7-8, 33, 38. She set about selling Addison's personal property and pocketing the proceeds. P.H. 24. After the discovery of Addison's decomposing body days later, respondent ultimately confessed to authorities that she intentionally shot him in the head with a revolver, claiming she did so because he had shown interest in her eighteen-year-old daughter. P.H. 6-8, 52-53.

Respondent pleaded guilty to first degree murder. At that same time, she also pleaded guilty to misdemeanor larceny of merchandise based on having stolen various items from a Dollar General store about a month prior to the murder. O.R. 7, 40. Respondent was sentenced to life imprisonment and thirty days imprisonment for the felony and misdemeanor convictions, respectively. She appealed both convictions to the Court of Criminal Appeals in a consolidated appeal.

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, court found that respondent is an Indian based on the parties' stipulation that she has 7/64 Indian blood and is enrolled in the Creek Nation. App.13a. The court further concluded that the crimes occurred on the Creek reservation recognized by *McGirt*. App.13a-14a.

* All fact citations are to the trial court's original record (O.R.) and the preliminary hearing transcript (P.H.), which are available below. *See* Sup. Ct. R. 12.7.

The Court of Criminal Appeals reversed the convictions, adopting the trial court's conclusions and holding that the State of Oklahoma did not have authority to prosecute respondent for the crimes at issue. App.3a-4a.

Three judges wrote separate opinions. Judge Lumpkin concurred in the result. App.7a-9a. 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.7a.

Judge Lewis concurred in the result based on his previous concurrences in *Bosse* and *Hogner* in which he—in relevant part—explained that *McGirt* required reversal. App.10a; see *Hogner v. State*, 2021 OK CR 4, ¶¶ 1-5, ___ P.3d ___ (Lewis, J., concurring in results); *Bosse v. State*, 484 P.3d 286, 299 (Okla. Crim. App. 2021) (Lewis, J., specially concurring).

Judge Hudson specially concurred. App.11a. Like Judge Lumpkin, he concurred "as a matter of *stare decisis*," but reaffirmed his "previously expressed views on the significance of *McGirt*" and "its far-reaching impact on the criminal justice system in Oklahoma." App.11a.



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 *Bosse*, reconsideration of *McGirt* is the only realistic avenue for ending the ongoing chaos affecting every corner of daily life in Oklahoma. This case presents yet another opportunity to end the damage caused by *McGirt*. This petition should either be granted or, if the petition in *Bosse* is granted, held pending a decision in *Bosse* and then disposed of as is appropriate.

As explained more fully in *Bosse*, *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 terri-

stories 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.

The question presented in this case is materially identical to the third question presented in *Bosse*. The Court should either grant review in this case or hold the petition pending the resolution of the third question presented in *Bosse*.



CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, if the petition in *Oklahoma v. Bosse*, No. 21-186, is granted, the petition in this case should be held pending a decision there and then disposed of as is appropriate.

Respectfully submitted,

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