

In the Supreme Court of the United States



STATE OF OKLAHOMA,

Petitioner,

v.

FLOYD JOSEPH BALL, JR.,

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-2019-263

Floyd Joseph Ball, Jr., Petitioner v.

State of Oklahoma, Respondent

Date of Final Opinion: April 1, 2021



Oklahoma District Court (McIntosh County)

No. CF-2018-89

State of Oklahoma, Plaintiff v.

Floyd Joseph Ball, Jr., Defendant

Date of Judgment and Sentence: April 16, 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 21, 2020, remanding the case for an evidentiary hearing is included below at App.18a-22a. The Order of the District Court in and for McIntosh County, State of Oklahoma, dated September 24, 2020, is included below at App.12a-17a. 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. § 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. Respondent was in a relationship with a woman whose initials are J.H., but as of May of 2018 the two had been separated for two-and-a-half months. P.H. 8.* On May 4, J.H. was alone, closing the Subway store at which she worked. P.H. 9. Respondent entered the restaurant through a side door with a knife and demanded that J.H. go with him. P.H. 10-14. J.H. attempted to press the restaurant's panic button, but respondent threw her to the ground and placed the knife against her throat. P.H. 14-15.

* All fact citations are to respondent's preliminary hearing transcript (P.H.), which is available below. See Sup. Ct. R. 12.7.

Respondent eventually forced J.H. into a car and drove away. P.H. 16-17. When J.H. resisted his commands to remove her clothing, respondent punched her in the face. P.H. 17-19. The blow broke J.H.'s nose, cheekbone, and jaw. P.H. 19. Respondent drove to his grandmother's house where he threatened to make a "bloody mess" if J.H. screamed or tried to run. P.H. 20-23. Once they were in the house, respondent raped J.H. several times, vaginally and anally. P.H. 24-25, 28. Respondent kept J.H. captive, without treatment for her injuries, until she was rescued by police the following day. P.H. 28-40.

Respondent pled guilty to first degree rape and kidnapping, and was sentenced to twenty-four years imprisonment and twenty years imprisonment, respectively.

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 court found that respondent is an Indian based on the parties' stipulation that he has 1/8 Indian blood and is enrolled in the Choctaw Nation. App.13a-14a. The court further concluded that the crimes occurred on the Creek reservation recognized by *McGirt*. App.14a.

The Court of Criminal Appeals reversed the convictions, adopting the trial court's conclusions and holding that the federal government had exclusive authority to prosecute respondent for the crimes at issue. App.4a-5a.

Two judges wrote separate opinions. Judge Lumpkin concurred in the result. App.8a-10a. 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.8a.

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.11a; 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, who authored the majority opinion, reiterated in a footnote 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.5a.



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 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 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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