

In the Supreme Court of the United States



STATE OF OKLAHOMA,

Petitioner,

v.

TERRANCE LUCAS COTTINGHAM,

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. F-2017-1294

Terrance Lucas Cottingham, Appellant v.
The State of Oklahoma, Appellee

Date of Final Opinion: May 6, 2021

Oklahoma District Court (Washington County)

No. CF-2015-350

The State of Oklahoma, Plaintiff v.
Terrance Cottingham, Defendant

Date of Judgment and Sentence: December 13, 2017

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, dated May 6, 2021, is included in the Appendix at App.1a-15a. 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 Findings of Fact of the District Court in and for Washington County, State of Oklahoma, dated October 29, 2020, is included below at App.16a-17a. These opinions and orders were not designated for publication.



JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on May 6, 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. 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 for a writ of certiorari in this case should either be granted or, in the alternative, held if the petition in *Castro-Huerta* is granted.

1. On October 6, 2015, seventy-eight-year-old Helen Jo Lewis visited the Kmart store in Bartlesville, Oklahoma to do some shopping around lunch time. Tr. I 196-98.* While Helen was shopping, respondent approached her in an aisle, acting strangely. Tr. I 198. Helen felt uncomfortable, so she hurried away from respondent. Tr. I 198. After the first sighting, Helen saw respondent walk past her a few times, and she saw him again when she was at the cash register checking out. Tr. I 198-99.

After she completed her purchase, Helen walked outside to her car, placed her bags in the backseat, and then opened her driver's door. Tr. I 199. Before

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

she could get in her car, Helen heard a strange noise, and she turned and saw respondent jump out of a white car and run toward her. Tr. I 199. Respondent twice demanded Helen's purse, but she refused to relinquish it. Tr. I 199. Respondent then pointed a knife at her stomach. Tr. I 199-200. Helen screamed, and respondent grabbed her purse and ran. Tr. I 200.

Respondent was convicted of robbery with a dangerous weapon after two or more prior felony convictions and sentenced to twenty-five years imprisonment. He then appealed to the Court of Criminal Appeals.

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 accepted the parties' stipulations and found that respondent is a member of the Cherokee Nation and the crime occurred within the reservation of the Cherokee Nation. App.16a-17a.

The Court of Criminal Appeals reversed the conviction “[p]ursuant to *McGirt*”. App.8a. The opinion's author, Judge Hudson, wrote in a footnote that he maintains 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.

Three judges wrote separate opinions. Presiding Judge Kuehn concurred in the result to express disagreement with some aspects of the majority's opinion, but agreed that the “case must be dismissed.” App.11a.

Judge Lumpkin concurred in the result. App.12a-14a. He expressed his view that the Court's opinion in

McGirt “contravened * * * the history leading to the dis-establishment of the Indian reservations in Oklahoma,” but concluded that he was bound to follow it. App.12a.

Judge Lewis also concurred in the result based on previous concurrences in which he—in relevant part—explained that *McGirt* required reversal. App.15a; 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), *withdrawn by Bosse v. State*, 2021 OK CR 23, ___ P.3d ___.



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*. This petition should either be granted or, if the petition in *Castro-Huerta* is granted, held pending a decision in *Castro-Huerta* and then disposed of as is appropriate.

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.

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. Accordingly, the Court should either grant review in this case or hold the petition pending the resolution of the second question presented in *Castro-Huerta*.



CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, if the petition in *Castro-Huerta* 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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