

**In the Supreme Court of the United States**



STATE OF OKLAHOMA,

*Petitioner,*

v.

SHANNON JAMES KEPLER,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
Oklahoma Court of Criminal Appeals**

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**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

*Shannon James Kepler*, Appellant v.

*The State of Oklahoma*, Appellee

No. PR-2016-981

Date of Final Order: October 28, 2016

No. MA-2017-44

Date of Final Order: January 25, 2017

No. MA-2017-619

Date of Final Order: June 21, 2017

No. MA-2017-668

Date of Final Order: June 28, 2017

No. MA-2017-676

Date of Final Order: July 14, 2017

No. PR-2017-1006

Date of Final Order: October 5, 2017

No. M-2016-1081

Date of Final Order: February 28, 2019

No. F-2017-1186

Date of Final Order: March 18, 2021

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Oklahoma District Court (Tulsa County)

*State of Oklahoma*, Plaintiff v.

*Shannon James Kepler*, Defendant

No. CF-2014-3952

Date of Judgment and Sentence: November 14, 2016

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**OPINIONS BELOW**

The opinion of the Oklahoma Court of Criminal Appeals, dated March 18, 2021 is included in the Appendix at App.1a-9a. 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.23a-27a. The Entry of Facts and Conclusions of Law in Accordance with the remand order, dated November 12, 2020 is included below at App.10a-22a. These opinions and orders were not designated for publication.



## JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on March 18, 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. For the same reasons given in the *Bosse* petition, 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 2014, respondent Shannon James Kepler shot and killed Mr. Jeremy Lake. This shooting occurred after a chain of events involving respondent and one of his adopted daughters. At the time, respondent was an officer with the Tulsa Police Department.

In the early 2000s, respondent and his wife adopted three young sisters, including Ms. Lisa Kepler. (IV Tr. 1510-11, 1666-67.)<sup>1</sup> When Lisa became a teen-

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<sup>1</sup> All fact citations are to the original record from the trial court (O.R.), the transcript of Kepler's fourth jury trial (IV Tr.), held October 9, 2017, through October 18, 2017, and to exhibits from that trial (S. Ex.), all of which are available below. See Sup. Ct. R. 12.7.

ager, respondent and his wife began having difficulty with Lisa. (IV Tr. 1669-71.) After hitting a breaking point, they kicked Lisa out of the family home, drove her to a homeless shelter in downtown Tulsa, and dropped her off there. (IV Tr. 1513-14, 1539-40, 1673-74, 1702, 1704.)

While at the homeless shelter, Lisa met Mr. Lake, who was nineteen-years-old at the time. (IV Tr. 795, 1514.) Mr. Lake did not reside at the homeless shelter, but he was always there helping out and checking on people. (IV Tr. 1514.) After learning of their relationship through Facebook, respondent investigated Mr. Lake's background using his resources as a police officer and became concerned. (IV Tr. 1062-63, 1102, 1677-81, 1749; S. Ex. 80.) He decided to go find Lisa and warn her about Mr. Lake, bringing a revolver with him. (IV Tr. 1067, 1686-89, 1694, 1741.)

When he found Lisa and Mr. Lake under a nearby bridge checking on the local homeless, respondent flashed his car's brights, pulled up next to them, and called out to Lisa. (IV Tr. 1518-23, 1535, 1561.) As Ms. Kepler walked away, Mr. Kepler fatally shot Mr. Lake, once in the neck and once in the chest. (IV Tr. 776-94, 1524; S. Exs. 100-08.)

The State prosecuted four trials on respondent's killing of Mr. Lake. During the first jury trial, he was tried for a count of Murder in the First Degree, in violation of Okla. Stat. tit. 21, § 701.7(A) (Count 1), and two counts of Shooting with Intent to Kill, in violation of Okla. Stat. tit. 21, § 652(A) (Counts 2 and 3) (O.R. 43-47, 188-92, 834-35). At the conclusion of the first trial, the jury found respondent guilty of the lesser offense of Reckless Conduct with a Firearm, in violation of Okla. Stat. tit. 21, § 1289.11, on Counts 2

and 3, and was hung on Count 1. The trial court ultimately declared a mistrial on Count 1. (O.R. 836-40.) The misdemeanor convictions were affirmed separately and are not at issue in this appeal. *See Kepler v. Oklahoma*, No. M-2016-1081 (Okl. Ct. Crim. App. Feb. 28, 2019).

After two more trials involving hung juries, the State finally successfully prosecuted respondent at the fourth trial. At the conclusion of that trial, the jury found respondent guilty of the lesser offense of Manslaughter in the First Degree (Heat of Passion), in violation of Okla. Stat. tit. 21, § 711. (O.R. 1679; IV Tr. 1899-1901.) The court imposed a sentence of fifteen years of imprisonment. (O.R. 1679; IV Tr. 1899-1901.) Respondent then appealed his conviction 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 parties stipulated that respondent has 1/128 Muscogee (Creek) blood, that he is a member of the Muscogee (Creek) Nation, and that his crime occurred within the Muscogee (Creek) reservation recognized by *McGirt*. App.11a-15a. Based on those stipulations and its own findings, the district court concluded that respondent was an Indian who committed a crime in Indian Country within the Major Crimes Act.

The Court of Criminal Appeals vacated the conviction, adopting the trial court's conclusions and holding that the federal government had exclusive authority to prosecute respondent for the crimes at issue. App.3a.

Two judges wrote separate opinions. Judge Lumpkin concurred in the result. App.6a-8a. 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.6a.

Judge Hudson also concurred in the result. App.9a. Like Judge Lumpkin, he concurred "as a matter of *stare decisis*," but he observed that *McGirt* had "far-reaching impact on the criminal justice system in Oklahoma," citing to his previous concurrence in *Bosse*. App.9a.



## 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*. For the same reasons offered in *Bosse*, 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 that 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 victims 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*. For the compelling reasons explained in the petition in *Bosse*, review should be granted in that case. The Court should then 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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AUGUST 16, 2021