

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

HAROLD DENTON MCCURTAIN,

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

S-2020-533

Harold Denton McCurtain, Appellant v.
The State of Oklahoma, Appellee

Date of Final Opinion: August 26, 2021

Oklahoma District Court (LeFlore County)

No. CF-2019-76

The State of Oklahoma, Plaintiff v.
Harold Denton McCurtain, Defendant

Date of Order Dismissing: August 5, 2020

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, dated August 26, 2021, is included in the Appendix at App.1a-10a. The court minute regarding motion to dismiss for lack of jurisdiction by the District Court in and for LeFlore County, State of Oklahoma, dated August 5, 2020, is included below at App.11a-12a. This opinion and order were not designated for publication.



JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on August 26, 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 in *Castro-Huerta* should be granted, and this petition should be held pending a decision there. In the alternative, the petition in this case should be granted.

1. Respondent was charged in LeFlore County District Court Case Number CF-2019-76 with one count of lewd molestation. At a preliminary hearing held on August 8, 2019, S.J. testified that respondent touched her breasts and buttocks in a sexual manner when she was between the ages of six and ten years old. P.H. Tr. 7-22.*

2. After this Court issued its decision in *McGirt*, respondent filed a motion to dismiss the charge against him. The district court held a hearing, after which it determined that respondent is an Indian by blood, and member of the Choctaw Nation, and the crime

* This citation refers to the transcript of respondent's preliminary hearing, which is available below. *See* Sup. Ct. R. 12.7.

occurred “within the reservation of the Choctaw Nation of Oklahoma.” App.11a. The State appealed, arguing, as it had below, the Choctaw Nation’s former reservation was disestablished. Relying on *McGirt*, the Oklahoma Court of Criminal Appeals affirmed the district court’s ruling. App.7a. Judge Lumpkin, who authored the opinion, “accede[d] to *stare decisis* in this case,” while referencing his previously expressed view that *McGirt* was wrongly decided. App.2a, n.2.

Two judges wrote separate opinions. Judge Hudson specially concurred based on *stare decisis*, but stated 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.9a.

Judge Lewis also concurred in the result based on his previous writings in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, *opinion withdrawn by Bosse v. State*, 2021 OK CR 30, ___ P.3d ___, and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___. App.10a.



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.17-29, *Oklahoma v. Castro-Huerta*, No. 21-429. This case presents yet

another opportunity to end the damage caused by *McGirt*. If the petition in *Castro-Huerta* is granted, this petition should be held pending a decision in *Castro-Huerta* and then disposed of as is appropriate. In the alternative, 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.

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.



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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