

No. 21-\_\_\_\_\_

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In the Supreme Court of the United States

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STATE OF OKLAHOMA,

*Petitioner,*

v.

JOHNNY EDWARD MIZE, II,

*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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AUGUST 20, 2021

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## **QUESTIONS PRESENTED**

1. Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country.
2. Whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), should be overruled.

## **LIST OF PROCEEDINGS**

Oklahoma Court of Criminal Appeals

No. F-2019-68

*Johnny Edward Mize, II*, Appellant v.  
*The State of Oklahoma*, Appellee

Date of Final Opinion: March 25, 2021

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Oklahoma District Court (Tulsa County)

No. CF-2017-3891

*The State of Oklahoma*, Plaintiff v.  
*Johnny Edward Mize, II*, Defendant

Date of Judgment and Sentence: January 25, 2019

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#### **OPINIONS BELOW**

The opinion of the Oklahoma Court of Criminal Appeals, dated March 25, 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.19a-23a. The Findings of Fact and Conclusions of Law of the District Court in and for Tulsa County, State of Oklahoma, filed November 6, 2020, is included below at App.12a-18a. These opinions and orders were not designated for publication.



## **JURISDICTION**

The judgment of the Oklahoma Court of Criminal Appeals was entered on March 25, 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.



## 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 questions whether *McGirt* should be overruled and, even if not, whether the State has authority to prosecute non-Indians who commit crimes against Indians in Indian country. For the same reasons given in the *Bosse* petition, review is warranted here to examine those questions. 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 shot and killed an unarmed teenager who was attempting to steal fireworks from him. On July 4, 2017, Jack Ulrich and his fifteen-year-old cousin visited respondent’s fireworks stand in Tulsa. Tr. 331, 334.<sup>1</sup> They were interested in the stand’s centerpiece, a six-foot by three-foot package of fireworks then on sale for \$599.99, but lacked the money for it. Tr. 338-39, 378-81, 571, 839, 927. After watching the stand for a few minutes, they grabbed the large fireworks package and ran. Tr. 339-40, 382. Respondent chased them, carrying his 9mm Glock pistol. Tr. 583, 610, 839. When the cousins

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<sup>1</sup> All fact citations are to the transcript of respondent’s trial (Tr.), which is available below. See Sup. Ct. R. 12.7.

jumped into a truck, respondent approached the passenger's side and shot the fifteen-year-old at a slight angle on the right side of his chest, rupturing his right lung, and then passing through his ribs, his aorta, and his left lung on its way through his body before it exited just below his left shoulder. Tr. 644. The teenager ultimately died from the wound. Tr. 303-05.

The State prosecuted respondent for manslaughter, in violation of Okla. Stat. tit. 21, § 711(2). The jury found him guilty, and the court imposed a sentence of twenty-five years of imprisonment. 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. App.19a-23a. Respondent does not allege he is an Indian. On remand, the parties stipulated that respondent's victim had 3/64 Cherokee blood, that the victim was a member of the Cherokee Nation, and that the crime occurred within the Muscogee (Creek) reservation recognized by *McGirt*. App.17a-18a. Based on those stipulations and its own findings, the district court concluded respondent committed a crime against an Indian in Indian country. App.15a-16a.

The Court of Criminal Appeals vacated the conviction, adopting the trial court's conclusions and holding the federal government had exclusive authority to prosecute respondent for the crimes at issue. App.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 he was bound to follow it. App.7a.

Judge Lewis concurred specially, adhering to his previous concurrence in *Bosse* in which he—in relevant part—agreed with the majority that the State lacks jurisdiction over crimes committed by non-Indians against Indians in Indian country. App.10a; *see Bosse v. State*, 484 P.3d 286, 299 (Okla. Crim. App. 2021) (Lewis, J., specially concurring).

Judge Hudson also concurred in the results. App.11a. 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.11a.



## REASONS FOR GRANTING THE PETITION

In the decision below, the Oklahoma Court of Criminal Appeals applied *McGirt* to free yet another criminal—this time a non-Indian—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. At a minimum, the impact of *McGirt* can be partially mitigated by affirming the State’s jurisdiction over non-Indians who commit crimes against Indians on a reservation. This case thus presents still one more opportunity to end or limit 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 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.

Even assuming nearly half of Oklahoma properly constitutes Indian country for purposes of federal criminal jurisdiction, review is also warranted on whether a State has jurisdiction to prosecute a non-Indian, like respondent, for crimes committed against Indians in Indian country. The petition in *Bosse* sets forth why review of this question is urgent and demonstrates Oklahoma’s continued jurisdiction over these crimes is consistent with statute and precedent. As this Court has repeatedly held, “absent a congressional prohibition,” a State has the right to “exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands.” *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-258 (1992); *see also*

*United States v. McBratney*, 104 U.S. (14 Otto.) 621, 624 (1881). Meanwhile, nothing in the text of the General Crimes Act, nor any other Act of Congress, prohibits States from exercising jurisdiction over crimes committed by non-Indians against Indians. See 18 U.S.C. § 1152.

Thus, this Court in the past has upheld state laws protecting Indians from crimes committed by non-Indians on a reservation. *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 370-71 (1858). And this Court in *Bosse* granted a stay presenting this and another question, necessarily determining these issues involve “extraordinary circumstances” where there is “a reasonable probability that four Members of the Court will consider the issue sufficiently merit- orious to grant certiorari” and “five Justices are likely to conclude that the case was erroneously decided below.” *Graves v. Barnes*, 405 U.S. 1201, 1203, (1972) (Powell, J., in chambers).

The questions presented in this case are materially identical to the second and third questions presented in *Bosse*. For the compelling reasons explained in the petition in *Bosse*, review on these questions is warranted. Accordingly, the Court should either grant review in this case or hold the petition pending the resolution of the questions 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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