

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



STATE OF OKLAHOMA,

*Petitioner,*

v.

DEVIN WARREN SIZEMORE,

*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

No. F-2018-1140

*Devin Warren Sizemore*, Appellant v.

*State of Oklahoma*, Appellee

Date of Final Opinion: April 1, 2021

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Oklahoma District Court (Pittsburg County)

No. CF-2016-00593

*State of Oklahoma*, Plaintiff v.

*Devin Warren Sizemore*, Defendant

Date of Judgment and Sentence: October 31, 2018

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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-18a, and reported at 485 P.3d 867.

The order of the Oklahoma Court of Criminal Appeals, dated August 24, 2020, remanding the case for an evidentiary hearing is included below at App. 33a-38a. The Order with Findings of Fact and Conclusions of Law of the District Court in and for Pittsburg County, State of Oklahoma, dated October 28, 2020, is included below at App.19a-32a. These orders were not designated for publication.



## JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on April 1, 2021. 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.

**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 drowned his twenty-one-month-old daughter in a pond in 2016. The police heard the child's screams and were on the scene almost immediately;

they had received a tip from respondent's mother earlier that day expressing fear for her son and granddaughter. Tr. II 304-05, 344-45. When the first policeman arrived, respondent attacked the officer and attempted to drown him. Respondent was eventually overcome and taken into custody after several more officers arrived on the scene. Tr. II 348-350. However, the police were too late to save the child. She had been held underwater for thirty seconds and was discovered face down in the water. Tr. II 346, 400. She went into hypothermic shock before arriving at the hospital and then died. Tr. II 493.

The State prosecuted respondent for one count of murder in the first degree and one count of battery and assault of a police officer. The jury found him guilty on both counts, and the court imposed a sentence of life imprisonment without the possibility of parole on count I and 5 years of imprisonment on count II. Respondent then appealed his convictions 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.35a. On remand, the parties stipulated that respondent had 1/128 Choctaw blood and that he was a member of the Choctaw Nation. App.21a-22a. The court then held that the Choctaw reservation remains in existence based on the precedent established in *McGirt*. App.29a-32a. Based on the stipulations and its own findings, the district court concluded that respondent was an Indian who committed a crime in Indian country. App.32a.

The Court of Criminal Appeals vacated 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.8a-9a.

Three judges wrote separate opinions. 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 disestablishment of the Indian reservations in Oklahoma," but concluded that he was bound to follow it. App.12a.

Judge Lewis specially concurred, concluding that under *McGirt*, "Oklahoma has no jurisdiction over an Indian who commits a crime in Indian Country" and the Choctaw Nation's reservation was not disestablished. App.15a.

Judge Hudson also concurred in the result. App. 16a-18a. Like Judge Lumpkin, he concurred "as a matter of *stare decisis*," but he observed that *McGirt* is a "hugely destabilizing force to public safety in eastern Oklahoma." App.16a, 18a. He noted that some crime victims and their family members "can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies," and "[s]ome cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time." App.17a-18a. "*McGirt* must seem like a cruel joke," he concluded, "for those victims and their family members who are forced to endure such extreme consequences in *their* case." App.18a.



## 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 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*. 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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AUGUST 27, 2021