

No. 20A167  
CAPITAL CASE

**IN THE SUPREME COURT OF THE UNITED STATES**

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STATE OF OKLAHOMA, *Applicant*,

-vs-

BENJAMIN ROBERT COLE, *Respondent*.

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To the Honorable Neil M. Gorsuch,  
Associate Justice of the United States Supreme Court and  
Circuit Justice for the Tenth Circuit

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**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*  
BRIEF AND *AMICUS CURIAE* BRIEF OF THE CHEROKEE NATION**

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**CHEROKEE NATION’S MOTION FOR LEAVE TO FILE AMICUS CURIAE  
BRIEF**

Pursuant to Supreme Court Rule 22, the Cherokee Nation (“Nation”) respectfully requests leave to file the attached *amicus curiae* brief, to oppose the State of Oklahoma’s (“State”) motion for an order “granting or extending a stay of the mandate of the Oklahoma Court of Criminal Appeals (“OCCA”)” until the Court denies the State’s anticipated petition for certiorari or rules on the merits of this case.

Good cause exists for granting the Nation’s motion for leave to file. The State’s request for a stay affects the Nation’s sovereign interests because it affects the administration of justice on the Cherokee Reservation and because the Nation submits the OCCA’s ruling that is the subject of the State’s request is correct, and the Nation is now implementing that decision. These fundamental interests provide good cause for the Nation to participate as *amicus curiae*, as the Muscogee (Creek) Nation did in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam).

The State has indicated that it will seek certiorari on one or both of two grounds, each of which implicates the Nation’s exercise of sovereignty. First, the State has said it may seek certiorari on the question of whether the existence of Indian country is a jurisdictional question that can be waived in applications for post-conviction relief in state court. Second, the State has said it may seek certiorari on the question of whether the State has concurrent criminal jurisdiction over crimes committed by non-Indians against Indians on the Cherokee Reservation, notwithstanding the General Crimes Act, 18 U.S.C. § 1152 (“GCA”), which vests such

jurisdiction in the federal government alone. The jurisdictional consequences of the existence of Indian country and the allocation of criminal jurisdiction on the Cherokee Reservation have long been and remain questions of great legal and practical importance to the Nation. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Today, the Nation has a sovereign interest in the allocation of criminal jurisdiction within its Reservation in Oklahoma, which arises from its treaties with the United States pursuant to which it holds the Cherokee Reservation. The Nation also has a sovereign responsibility to protect public safety on the Reservation and to see that those who victimize Cherokee citizens are brought to justice in a forum which lawfully exercises jurisdiction.

The importance of these questions and their resolution has been heightened by the Nation's inter-governmental work to implement the OCCA's decisions that apply this Court's decision in *McGirt* to the Cherokee Nation and its Reservation. The Nation is committed to implementing fully the OCCA's ruling in this case and others, which have upheld the continuing existence of the Cherokee Reservation by applying the reasoning of *McGirt*. *See Hogner v. State*, 2021 OK CR 4; *Spears v. State*, 2021 OK CR 7; *Cole v. State*, 2021 OK CR 10 (State's App. at 001-021). Delay in the issuance of the mandate in this case is delay in its implementation. And that delay makes the Nation's work with other governments to reallocate jurisdiction more difficult, as it leaves the rules by which that jurisdiction is to be allocated in limbo. As a practical matter, negotiation and cooperation between the Nation and federal,

state, and local governments in the exercise of law enforcement authority require a clear understanding of where jurisdiction lies.

Additionally, the State has put at issue, by incorporating by reference, its request for stay in *Oklahoma v. Bosse*, No. 20A161 (U.S. docketed April 26, 2021), the extent to which the federal, state, and tribal nations' governments' efforts to implement *McGirt* impose irreparable harm on the State. The Nation has a critical interest in this question too—as it implicates the Nation's ongoing work to see that justice is served on the Cherokee Reservation.

Pursuant to the Court's Order of April 15, 2020, the Nation has submitted this motion and the attached *amicus curiae* brief on 8½ by 11-inch paper, consistent with the formatting for requests for stay under Supreme Court Rule 33.2. The Nation requests leave to file a brief in compliance with that Order.

### **BRIEF OF AMICUS CURIAE CHEROKEE NATION**

This case concerns the murder of a Cherokee child by her non-Indian father on the Cherokee Reservation. The Nation grieves the loss of an innocent child and shares the pain of her family. Justice must be done for the heinous act that caused that immeasurable loss, but that can only be done under the rule of law. And in this case the GCA, 18 U.S.C. § 1152, assigns the federal government exclusive jurisdiction over crimes committed by non-Indians against Indians in “Indian country,” which includes the Cherokee Reservation. Delivering justice under law is important in every case, as it legitimizes the punishment of offenders found guilty. And the Nation is engaged in continuing efforts to see that all criminals are brought to justice under

the rule of law set forth in the OCCA's decisions, *McGirt*, and the long-settled rules that allocate criminal jurisdiction in Indian country. The State's stay request does nothing to realize that goal.

In its request, the State purports to seek a stay for the same reasons it did so in *Bosse*. App. to Stay Mandate of the Okla. Ct. of Crim. Appeals Pending Review on Cert. ("Br.") at 1. To that extent, the Cherokee Nation opposes the State's request for the same reasons that the Chickasaw Nation opposed the State's request in *Bosse*, see Br. of *Amicus Curiae* the Chickasaw Nation, *Oklahoma v. Bosse*, No. 20A161 ("Chickasaw *Bosse* Br."). But the Cherokee Nation also submits that the stay should be denied because it would hinder the Cherokee Nation's efforts to implement the rulings of the OCCA recognizing the existence of the Cherokee Reservation, and those efforts are essential to the peace and protection of all persons living on or visiting the Cherokee Reservation. For these reasons, the stay should be denied.

## BACKGROUND

Benjamin Robert Cole ("Cole"), a non-Indian, was convicted in Oklahoma state court of murdering his child, a Cherokee citizen. Cole was sentenced to death for his crime. His direct appeal and subsequent requests for post-conviction relief in state and federal court failed. On August 12, 2020, after this Court decided *McGirt* and *Murphy*, Cole filed a successive petition for post-conviction relief with the Oklahoma Court of Criminal Appeals ("OCCA").<sup>1</sup> On August 24, 2020, the OCCA remanded to

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<sup>1</sup> The State references an earlier petition for post-conviction relief which Cole filed while *McGirt* and *Murphy* were pending. Br. at 2. The OCCA dismissed that petition shortly after it was filed, concluding the petition was premature because neither *Murphy* nor *McGirt* was final. *Cole v. State*, No. PCD-2020-332 (Okla. Ct. Crim. App. May 29, 2020), at 4, <https://bit.ly/3yFzt0t>. After this Court



the state district court for an evidentiary hearing on the continuing existence of the Cherokee Reservation.

The District Court concluded that the evidence presented at the hearing showed that the Cherokee Reservation was established by treaty, that Congress never disestablished the Reservation, that the Reservation still exists today, and that Cole's crime occurred on the Reservation. *See* Order on Remand, *State v. Cole*, No. CF-2002-597, at 3-6 (Okla. Dist. Ct. Rogers Cnty. Nov. 12, 2020), <https://bit.ly/3uu9GF8> ("Dist. Ct. Order"). The case then returned to the OCCA, which on April 29, 2021, issued an opinion in which it relied on the District Court's findings of facts, applied the GCA, and found that the State lacked jurisdiction to prosecute Cole. *See* State's App. at 001-015.

The same day, the State filed with the OCCA a motion to stay the mandate pending certiorari review. *See* Mot. to Stay Mandate for Good Cause Pending Cert. Review, <https://bit.ly/3upTXXP>. In its motion, the State argued that the OCCA should grant an indefinite stay until this Court decided the State's forthcoming petition for certiorari, relying on the OCCA's decision to grant a limited, forty-five day stay in *Bosse*, and asserting that the State's petition in this case would raise the same issues raised in *Bosse*. *Id.* at 1-2. In its supporting brief, the State also urged the same supposed practical concerns about the implementation of *McGirt* that it raised in this Court in its stay request in *Bosse*. *Compare* Br. in Supp. of Mot. to Stay

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decided *McGirt* and *Murphy*, Cole filed the petition giving rise to this case, which before the OCCA is No. PCD-2020-529.

Mandate for Good Cause Pending Cert. Review 3-9 *with* App. to Stay Mandate of Okla. Ct. of Crim. App. Pending Review on Cert. at 7-25, *Oklahoma v. Bosse*, No. 20A161 (“State *Bosse* Br.”). Cole did not oppose the motion, although he did oppose a stay that would last beyond June 1. *See* Pet.’s Resp. to State’s Mot. to Stay Mandate, at 1 (State’s App. 025). However, he stated in his response that “[f]ollowing June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*.” *Id.* On May 12, 2021, the OCCA issued an order staying the issuance of the mandate, but only until June 1, 2021. State’s App. at 027-028.

The State filed the instant request for stay on May 21, 2021. Following the full Court’s May 26, 2021 decision to stay the mandate in *Bosse*, the State filed a motion and brief in support with the OCCA to stay its mandate further until the conclusion of certiorari review, “consistent with the Supreme Court’s stay in *Bosse* . . . .” Mot. to Further Stay Mandate in Light of U.S. Sup. Ct.’s Order Staying Mandate in *Okla. v. Bosse*, at 2, <https://bit.ly/3oTobBp>. In its brief in support, the State relied on the fact that Cole had expressly asked the OCCA to “proceed in accordance with the course taken by the Supreme Court in *Bosse*,” Br. in Supp. of Mot. to Further Stay Mandate in Light of U.S. Sup. Ct.’s Order Staying Mandate in *Okla. v. Bosse*, at 1, 5-6, <https://bit.ly/3wIPf9f>, in addition to this Court’s decision to stay the *Bosse* mandate, *id.* at 5. The OCCA has not yet ruled on that motion.

### **REASONS FOR DENYING THE APPLICATION**

A stay of the mandate is an extraordinary remedy. To obtain such a stay an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a

fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

*Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (citations omitted). A “reasonable probability” of certiorari generally exists where there is a conflict in the lower courts on a question of federal law, the question is important, and the posture of the case is appropriate for certiorari review. See *Conkright v. Frommert*, 556 U.S. 1401, 1402-03 (2009) (Ginsburg, J., in chambers); *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303-06 (2003) (Kennedy, J., in chambers). A failure to show irreparable harm is an independently sufficient reason to deny a stay request. See *Nken v. Holder*, 556 U.S. 418, 438-39 (2009) (Kennedy, J., concurring); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (all citing *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers)).

The Cherokee Nation joins in full the arguments of the Chickasaw Nation in its *amicus* brief in *Bosse*, which explain why the State should not obtain a stay in this case. The Cherokee Nation’s own efforts to implement *McGirt* further support that conclusion, for the reasons shown *infra* at 9-13.

**I. APPLICANT HAS NOT SHOWN THAT CERTIORARI IS LIKELY TO BE GRANTED, OR A FAIR PROSPECT OF REVERSAL, IN THIS CASE.**

The State argues that the Court should issue an indefinite stay for the same reasons that it sought a stay in *Bosse*. Br. at 4. In *Bosse*, the State represented that it would seek certiorari on two questions, which it argued justified a stay: whether a

petitioner can be procedurally barred from raising the existence of Indian country in a petition for post-conviction relief; and whether the State has criminal jurisdiction in Indian country under the GCA. *See State Bosse Br.* at 2. The Cherokee Nation joins the Chickasaw Nation’s explanation of why certiorari and reversal on those points is unlikely. *See Chickasaw Bosse Br.* at 8-24. As to the second question, the OCCA’s decision follows over a century of precedent holding that federal jurisdiction under the GCA is exclusive of state jurisdiction. *See id.* at 20-23. Mindful of the impending resignation of the Oklahoma Attorney General and his replacement by the Governor with a new Attorney General, *see Oklahoma Attorney General Mike Hunter Announces He Will Resign*, KOCO (May 26, 2021 5:42 PM), <https://bit.ly/3yImzij>; *see Okla. Const. art. VI, § 13*, the Nation is also concerned that the State’s quest for certiorari, either here or in *Bosse*, will frustrate the delivery of justice under the rule of law set forth in *McGirt* for other reasons.<sup>2</sup> Neither question the State poses justifies doing so.

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<sup>2</sup> The Governor has said that he believes there is a “legal path forward” to either narrow *McGirt*’s application to the criminal context, or “overturn *McGirt* entirely’ by running potential cases ‘back up the flagpole to the Supreme Court.” Houston Keene, *Oklahoma Gov. Says Dangerous Criminals Walking Free Thanks to ‘Horribly Wrong’ Supreme Court Ruling*, FOXNews (Apr. 7, 2021), <https://fxn.ws/3yCvCkV>. The Governor has said “he believes the Supreme Court ruling was ‘100% wrong’ and that there’s a 50% chance to overturn the ruling.” *Id.* Of course, neither *Bosse* nor *Cole* concern the existence of the Muscogee (Creek) Reservation, and neither concerns civil jurisdiction, and so the Court could not “overturn” or “narrow” *McGirt* in this manner in a ruling on either *Bosse* or *Cole*. (The same is true of a companion case regarding the Choctaw Reservation, in which the State has sought a stay. *See Oklahoma v. Ryder*, No. 20A168 (U.S. docketed May 21, 2021).). Moreover, the State has waived any effort to challenge the existence of the Chickasaw or Cherokee Nations’ Reservations in these cases by failing to contest their continued existence below. *See Dist. Ct. Order* at 2, 6. So, these possible basis for seeking certiorari provide no reason to grant a stay in this case. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (citing *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957)) (“We ordinarily will not decide questions not raised or litigated in the lower courts.”).

Therefore, the State’s briefing in *Bosse* and here provides no reason to stay the mandate in this case.

**II. APPLICANT DOES NOT FACE IRREPARABLE HARM, AS THE NATION’S EFFORTS TO PROTECT THE PUBLIC SHOW.**

The State’s incorporation of its briefing in *Bosse* includes its argument that the State will face irreparable harm if the *Bosse* decision is not stayed. *See* State’s *Bosse* Br. at 23-25. The State does not face irreparable harm here, for the same reasons that the Chickasaw Nation explained in its *amicus* brief in *Bosse*. *See* Chickasaw *Bosse* Br. at 25-35. The practical demands of remedying injustice by implementing this Court’s decision in *McGirt* and the follow-on OCCA decisions provide no reasoned basis for re-interpreting a statute that has a settled meaning, nor do they supply irreparable harm. The State’s alleged “harm” is nothing more than its dissatisfaction with *McGirt* and the follow-on OCCA cases and its frustration with its duty to implement those decisions, dressed up as irreparable harm. *Id.* at 1-2.

The State’s allegations of harm are also overblown—as shown by the work that the Cherokee Nation is doing to implement the opinions in *McGirt* and *Cole* to ensure public safety and to provide justice on the Reservation in accordance with those rulings. Immediately after this Court decided *McGirt*, in anticipation of the judicial recognition of the Cherokee Reservation boundaries, the Nation’s Legislature undertook the planning and enactment of wide-ranging legislation that revised its criminal, traffic, and juvenile codes to address the effects of the acknowledgment of those boundaries. *See* Office of the Att’y Gen, Cherokee Nation, *Tribal Code*, <https://bit.ly/3un7E9L> (last accessed May 28, 2021) (providing links to 2021

amendments to Titles 10A, 21, 22, and 47 of the Cherokee Nation Code). The Nation is also now working with state and municipal law enforcement to provide access to the Nation's criminal codes in state and electronic ticketing, jail, and records software. That will enable state and local law enforcement officers to charge crimes under the revised Cherokee Nation Code in the exercise of their authority under inter-governmental cross-deputization agreements or memorandums of understanding with the Nation.

The Nation has already entered into cross-deputization agreements with all the county and municipal law enforcement agencies on the Cherokee Reservation, as well as the Oklahoma Highway Patrol, Oklahoma State Bureau of Investigation, and State Fire Marshal. *See* Okla. Sec'y of State, *Tribal Compacts and Agreements*, <https://bit.ly/3fP7brL> (last accessed May 28, 2021) (enter "Cherokee" into "Doc Type" search and select "Submit"). Since December 2020, we have entered into over twenty-eight such agreements with municipal and state government authorities. *See id.* The Nation is also currently working with municipalities on the Reservation to finalize memorandums of understanding that would allow municipalities to take payment for traffic and misdemeanor offenses committed by Indians under tribal law and share the resulting fees and fines with the Nation. *See* Curtis Killman, *Here's How Cherokee Tribal Courts Are Handling the Surge in Cases Due to the McGirt Ruling*, *Tulsa World* (May 17, 2021), <https://bit.ly/3fOcSq2>. This will help municipalities provide police protection within their limits on the Reservation. We also continue to meet and communicate with local District Attorneys, city prosecutors, state, county

and municipal law enforcement, state agencies including Oklahoma Department of Public Safety and Office of Juvenile Affairs, city and county elected officials, and other stakeholders to discuss ways to collaborate and ensure public safety throughout the Reservation.

The Nation has also expanded its own law enforcement capacity across the board. Since *McGirt* was decided, the Nation has hired six additional tribal prosecutors and six criminal justice support staff, two new judges, and a new court clerk. We also continue to hire more marshals to police the Reservation. And the Nation's Office of the Attorney General is hiring new investigators and probation officers.

Cooperation and comity produce results: The Nation has executed a letter of intent with local county commissioners and is in process of finalizing a lease that would allow the Cherokee Nation to operate a District Courtroom in the Rogers County Courthouse in Claremore, Oklahoma. The Nation is also opening two additional court locations in Jay, Oklahoma, in Delaware County, and Muskogee, Oklahoma, in Muskogee County. This expanded criminal justice system is doing good work: Since the OCCA acknowledged the continued existence of the Cherokee Reservation, our prosecutors have filed approximately 1,000 criminal cases. The Nation has also entered into detention agreements with twelve of the fourteen counties that are entirely or partially within the Cherokee Reservation, and with three juvenile detention centers in the Reservation, under which these facilities have agreed to house Indians arrested in the Reservation.

The Nation is particularly committed to protecting Indian children on the Reservation. On September 1, 2020, the Cherokee Nation and the State of Oklahoma finalized an agreement in which the Nation agreed, pursuant to the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, to allow Oklahoma to exercise concurrent jurisdiction with the Nation over Indian children domiciled on the Cherokee Reservation for purposes of most child custody proceedings. *See Intergovernmental Agreement Between State of Okla. & Cherokee Nation Regarding Jurisdiction over Indian Children Within Nation's Reservation* (Sept. 1, 2020), <https://bit.ly/3vsbAY9>.

We are also committed to ensuring that members of the public have access to and are informed about the Nation's criminal justice system and can obtain protection from tribal law enforcement. We are developing an online portal for the Nation's court system, so that document filing and fee payment may be done online and so the public can readily access tribal judicial records. The Nation also has established an emergency law enforcement phone line, which is staffed by dispatch twenty-four hours a day. And the Cherokee Nation Attorney General's Office has established a phone line where members of the public can call and speak to a Nation attorney, twenty-four hours a day, about their questions regarding tribal law and jurisdiction.

The Nation stands shoulder-to-shoulder with local, state, and federal officials and governments throughout the Cherokee Reservation, to implement measures necessary to protect our citizens and all people who live on or visit the Cherokee Reservation. Granting a stay would not accomplish anything different from the results we have obtained by working with other governments to ensure that people

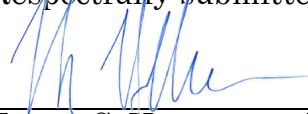


know the law, that the law is applied, and that criminals face justice. But it would disrupt our ability to engage in that process, because it creates substantial uncertainty about the results in criminal cases pending before the OCCA.

### CONCLUSION

The State's application for a stay should be denied.

Respectfully submitted,



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