

Wiley Files Petition for a Writ of *Certiorari* in *Gore v. Oklahoma*

January 4, 2022

Washington, DC – Along with co-counsel F. Andrew Hessick of the University of North Carolina School of Law, Wiley, a preeminent Washington, DC law firm, filed a petition for a writ of *certiorari* on December 9, 2021 in the Supreme Court of the United States in *Gore v. Oklahoma* on behalf of Petitioner Glen Gore. The petition argues that *McGirt v. Oklahoma* applies retroactively to convictions that were final when *McGirt* was decided. The petition is currently featured on SCOTUSBlog’s “Petitions We’re Watching.”

In *McGirt*, the Court held that Oklahoma lacks authority to prosecute “Indians” who commit crimes covered by The Indian Major Crimes Act, 18 U.S.C. § 1153, in “Indian Country.” Instead, the federal government has exclusive jurisdiction over such crimes.

Gore is a Native American who was charged with committing a murder in 1982 in Ada, Oklahoma on the Chickasaw reservation. He was eventually convicted and sentenced to life in prison without parole. Following the decision in *McGirt*, an Oklahoma state trial court granted Gore post-conviction relief vacating his conviction. On appeal, however, the Oklahoma Court of Criminal Appeals reinstated Gore’s conviction on the ground that *McGirt* is not retroactive. Wiley’s petition asks the Court to review that decision.

The petition argues that *McGirt* should apply retroactively because it is a substantive holding. Ordinarily, procedural rules do not apply retroactively but substantive rules are retroactive. Wiley’s petition argues that *McGirt* announced a substantive rule because it does not determine what procedures a state must follow to prosecute an “Indian” for a covered crime committed in “Indian Country” but rather holds that Oklahoma has no authority to prosecute an “Indian” for a

Related Professionals

Richard A. Simpson
Partner, Deputy General Counsel
202.719.7314
rsimpson@wiley.law

Practice Areas

Insurance
Issues and Appeals
Litigation

covered crime at all. Put differently, Oklahoma had no authority to criminalize Gore's alleged conduct under state law and the state court that convicted him had no jurisdiction to do so. Because Oklahoma and the United States are separate sovereigns, the fact that the federal government may prosecute Gore for the same conduct does not mean that the issue presented is merely one of the proper forum, for the same reasons that Double Jeopardy principles do not prohibit state and federal prosecutions for the same conduct.

The petition also argues that important public policy considerations weigh in favor of applying *McGirt* retroactively. First, refusing to apply *McGirt* retroactively perpetuates the longstanding mistreatment of Native Americans. It allows Oklahoma to continue holding Native Americans in prison based on convictions resulting from prosecutions Oklahoma had no authority to bring, for violating state laws that Oklahoma had no authority to enforce and entered by courts with no jurisdiction. Second, Oklahoma's refusal to apply *McGirt* retroactively interferes with the federal government's plenary and exclusive power over relationships with tribes. Finally, a failure to apply *McGirt* retroactively will lead to the wrongful deprivation of individual liberty for Gore and other Native Americans convicted in state court of crimes the state had no authority to prosecute.

The petition was written by Richard A. Simpson, a partner in Wiley's Issues and Appeals, Litigation, and Insurance practices, and Insurance associate Heather Swadley, along with F. Andrew Hessick of the University of North Carolina School of Law, assisted by law students Rachel Holtzman, David Kenji Katahira, Aaron T. Harding, Caroline M. Pope, and Stephanie H. Long, and Wiley project assistant Sophia Winston-Mendoza.

To read the petition, [click here](#).