

**Capital Case**

Case No. \_\_\_\_\_

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

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BENJAMIN ROBERT COLE, SR.,  
*Petitioner,*  
v.  
THE STATE OF OKLAHOMA,  
*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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No. \_\_\_\_\_

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**CAPITAL CASE**

**QUESTION PRESENTED**

Whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), applies retroactively to convictions that were final when *McGirt* was announced.

## **PARTIES TO THE PROCEEDINGS**

The parties to this action are named in the caption.

## **RELATED PROCEEDINGS**

*Cole v. State*, No. PCD-2020-529, Oklahoma Court of Criminal Appeals, Application for Post-Conviction Relief denied October 7, 2021 (originally granted April 29, 2021, then vacated August 31, 2021).

*United States v. Cole*, No. 21-CR-138-JED, United States District Court for the Northern District of Oklahoma, Order dismissing indictment entered October 14, 2021.

*Cole v. State*, No. PCD-2020-332, Oklahoma Court of Criminal Appeals, Application for *McGirt* Post-Conviction Relief dismissed as premature May 29, 2020.

*Cole v. Warrior*, No. 15-CV-049-GKF-PJC, United States District Court for the Northern District of Oklahoma, Order administratively closing case without prejudice entered November 24, 2015.

*Cole v. Trammell*, No. MA-2015-824, Oklahoma Court of Criminal Appeals, Order denying extraordinary relief entered October 2, 2015.

*In re Cole*, No. CV-2015-58, Pittsburg County District Court, Order Denying Petition for Writ of Mandamus entered September 8, 2015.

*Cole v. Trammell*, No 14-5272, United States Supreme Court, Petition for Writ of Certiorari denied October 6, 2014.

*Cole v. Trammell*, No. 11-5133, United States Court of Appeals for the Tenth Circuit, Judgment entered February 18, 2014.

*Cole v. Workman*, No. 08-CV-328-CVE-PJC, United States District Court for the Northern District of Oklahoma, Judgment entered Sept. 1, 2011.

*Cole v. State*, No. PCD-2005-23, Oklahoma Court of Criminal Appeals, Application for Post-Conviction relief denied January 24, 2008.

*Cole v. Oklahoma*, No. 07-9093, United States Supreme Court, Petition for Writ of Certiorari denied May 19, 2008.

*Cole v. State*, Case No. D-2004-1260, Oklahoma Court of Criminal Appeals, Judgment and Sentence affirmed July 11, 2007.

**TABLE OF CONTENTS**

QUESTIONS PRESENTED . . . . . i

PARTIES TO THE PROCEEDINGS . . . . . ii

RELATED PROCEEDINGS . . . . . ii

TABLE OF CONTENTS . . . . . iv

APPENDICES . . . . . v

TABLE OF AUTHORITIES. . . . . viii

PETITION FOR WRIT OF CERTIORARI. . . . . 1

OPINIONS AND ORDERS BELOW. . . . . 1

JURISDICTION. . . . . 2

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS .. . . . 2

STATEMENT OF THE CASE . . . . . 5

    A.    PRIOR HISTORY . . . . . 5

    B.    CURRENT CONTROVERSY . . . . . 7

REASONS THE PETITION SHOULD BE GRANTED. . . . . 14

CONCLUSION . . . . . 16

**APPENDICES**

**Page(s)**

**APPENDIX A . . . . . Pet. App. 1 - 3**  
Opinion Denying Post-Conviction Relief and Denying Motion to Stay Proceedings, Oklahoma Court of Criminal Appeals (OCCA) Opinion, *Cole v. State*, 2021 WL 4704035

**APPENDIX B . . . . . Pet. App. 3**  
Order Vacating Previous Order and Judgment Granting Post-Conviction Relief and Withdrawing Opinion From Publication, *Cole v. State*, 495 P.3d 670 (Okla. Crim. App. 2021)

**APPENDIX C . . . . . Pet. App. 4 - 27**  
Withdrawn Opinion Granting Relief, formerly available at *Cole v. State*, 492 P.3d 11 (Okla. Crim. App. 2021)(withdrawn), Opinion Granting Post-Conviction Relief (Okla. Crim. App. April 29, 2021)

**APPENDIX D . . . . . Pet. App. 28 - 32**  
Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance, *Cole v. State*, No. PCD-2020-332 (Okla. Crim. App. May 29, 2020)

**APPENDIX E . . . . . Pet. App. 33 - 71**  
Successive Application for Post-Conviction Relief, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Aug. 12, 2020)

**APPENDIX F . . . . . Pet. App. 72 - 76**  
Order Remanding for Evidentiary Hearing, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Aug. 24, 2020)

**APPENDIX G . . . . . Pet. App. 77 - 119**  
Petitioner’s Remanded Hearing Brief Applying *McGirt* Analysis to Cherokee Nation Reservation, *State v. Cole*, No. CF-2002-597 (Rogers Cnty. Dist. Ct. Sept. 21, 2020)

**APPENDIX H . . . . . Pet. App. 120 - 126**  
Order on Remand, *State v. Cole*, No. CF-2002-597 (Rogers Cnty. Dist. Ct. Nov. 12, 2020)

**APPENDIX I . . . . . Pet. App. 127- 155**  
Petitioner’s Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief, No. PCD-2020-529 (Okla. Crim. App. Dec. 7, 2020)

**APPENDIX J . . . . . Pet. App. 156 - 195**  
Supplemental Brief of Respondent After Remand, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Dec. 8, 2020)

**APPENDIX K . . . . . Pet. App. 196 - 207**  
State’s Supplemental Brief Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Jan. 21, 2021)

**APPENDIX L . . . . . Pet. App. 208 - 211**  
Petitioner’s Objection to State’s Motion to File Supplemental Brief, Motion to Strike State’s Supplemental Brief, and Motion to File Response to State’s Supplemental Brief, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Jan. 29, 2021)

**APPENDIX M . . . . . Pet. App. 212 - 220**  
*Hogner v. State*, F-2018-138, 2021 WL 958412, \_\_\_ P.3d \_\_\_, (Okla. Crim. App. March 11, 2021)

**APPENDIX N . . . . . Pet. App. 221 - 236**  
Brief in Support of Motion to Stay the Mandate for Good Cause Pending Certiorari Review, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Apr. 29, 2021)

**APPENDIX O . . . . . Pet. App. 237 - 238**  
Petitioner’s Response to State’s Motion to Stay the Mandate for Good Cause Pending Certiorari Review, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 3, 2021)

**APPENDIX P . . . . . Pet. App. 239 - 240**  
Order Staying Issuance of Mandate, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 12, 2021)

**APPENDIX Q . . . . . Pet. App. 241**  
Order in Pending Case, *Oklahoma v. Bosse*, No. 20A161 (May 26, 2021)

**APPENDIX R . . . . . Pet. App. 242 - 252**  
Brief in Support of Motion to Further Stay the Mandate in Light of the United States Supreme Court’s Order Staying the Mandate in *Oklahoma v. Bosse, Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 26, 2021)

**APPENDIX S . . . . . Pet. App. 253 - 255**  
Order Staying Issuance of Mandates Indefinitely, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 28, 2021)

**APPENDIX T . . . . . Pet. App. 256 - 266**  
*State of Oklahoma ex rel. Matloff v. Wallace*, No. PR-2021-366 (Okla. Crim. App. Aug. 12, 2021)

**APPENDIX U . . . . . Pet. App. 267 - 283**  
*Amicus Curiae* Brief of the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma in Support of Respondent, *Matloff*, No. PR-2021-366 (Okla. Crim. App. July 2, 2021)

**APPENDIX V . . . . . Pet. App. 284 - 301**  
Notice of Decision and Request to Modify this Court’s Prior Opinion in this Case Granting Post-Conviction Relief, or Alternatively Request to Continue Stay, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Aug. 26, 2021)

**APPENDIX W . . . . . Pet. App. 302 - 304**  
Motion to Stay Proceedings and Brief in Support, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Sept. 2, 2021)



**TABLE OF AUTHORITIES**

**CONSTITUTIONAL PROVISIONS**

U.S. Const. art. I, § 8 (Indian Commerce Clause) . . . . . 2  
U.S. Const. art. VI (Supremacy Clause) . . . . . 2, 3  
U.S. Const. amend. XIV, § 1 (Due Process Clause) . . . . . 3

**STATUTES**

18 U.S.C. § 1151 . . . . . 2  
18 U.S.C. § 1152 . . . . . 3  
28 U.S.C. § 2254 . . . . . 6  
28 U.S.C. § 1257 . . . . . 2  
Okla. Stat. tit. 22 § 1080 . . . . . 3  
Okla. Stat. tit. 22 § 1089 . . . . . 4

**FEDERAL CASES**

*Cole v. Oklahoma*, 128 S. Ct. 2474 (2008) . . . . . 5  
*Cole v. Trammell*, 755 F.3d 1142 (10th Cir. 2014) . . . . . 6  
*Cole v. Trammell*, 574 U.S. 891 (2014) . . . . . 6  
*Cole v. Warrior*, No. 15-CV-049-GKF-PJC. . . . . 6, 7  
*Cole v. Workman*, No. 08-CV-328-CVE-PJC,  
    (N.D. Okla. Sept. 1, 2011) . . . . . 6  
*McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) . . . . . i, 8, 9, 10, 11, 13, 14, 15  
*Oklahoma v. Bosse*, No. 20A161 (May 26, 2021) . . . . . 12

<i>Oklahoma v. Bosse</i> , No. 21-186 (Sept. 3, 2021) . . . . .	13
<i>Sharp v. Murphy</i> , 140 S. Ct. 2412 (2020) . . . . .	8
<i>Teague v. Lane</i> , 489 U.S. 288 (1989) . . . . .	10
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984) . . . . .	10
<i>United States v. Cole</i> , No. 21-CR-138-JED (N.D. Okla. May 13, 2021) . . . . .	11

**STATE CASES**

<i>Bench v. State</i> , 492 P.3d 19 (Okla. Crim. App. 2021)(withdrawn) . . . . .	11
<i>Bosse v. State</i> , 484 P.3d 286 (Okla. Crim. App. 2021)(withdrawn) . . . . .	11, 12
<i>Cole v. State</i> , 164 P.3d 1089 (Okla. Crim. App. 2007) . . . . .	5
<i>Cole v. State</i> , 492 P.3d 11 (Okla. Crim. App. 2021)(withdrawn) . . . . .	2
<i>Cole v. State</i> , 495 P.3d 670 (Okla. Crim. App. 2021) . . . . .	1
<i>Cole v. State</i> , D-2015-1260 (Okla. Crim. App.) . . . . .	7
<i>Cole v. State</i> , No. PCD-2005-23 (Okla. Crim. App.) . . . . .	6
<i>Cole v. State</i> , No. PCD-2020-332 (Okla. Crim. App.) . . . . .	8
<i>Cole v. State</i> , No. PCD-2020-529 (Okla. Crim. App. 2021) . . . . .	1, 9, 10, 12, 13
<i>Cole v. Trammell</i> , MA-2015-824 (Okla. Crim. App. 2015) . . . . .	7
<i>Hogner v. State</i> , No. F-2018-138, 2021 WL 958412, ___ P.3d ___, (Okla. Crim. App. March 11, 2021) . . . . .	11
<i>In re Benjamin R. Cole</i> , No. CV-2015-58 (Pittsburg Cnty. Dist. Ct. Sept. 8, 2015) . . . . .	7
<i>Parish v. Oklahoma</i> , No. 21-467 . . . . .	14, 15

*Ryder v. State*, 489 P.3d 528 (Okla. Crim. App. 2021)(withdrawn) . . . . . 11

*State v. Cole*, No. CF-2002-597 (Rogers Cnty. Dist. Ct.) . . . . . 9

*State of Oklahoma ex rel. Matloff v. Wallace*, No. PR-2021-366  
(Okla. Crim. App. Aug. 12, 2021) . . . . . 13, 14, 15

*Walker v. State*, 933 P.2d 327 (Okla. Crim. App. 1997) . . . . . 10

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Benjamin Robert Cole, Sr. respectfully petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals (OCCA) in *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Oct. 7, 2021).

**OPINIONS AND ORDERS BELOW**

The opinion of the OCCA denying Mr. Cole's subsequent state post-conviction action is available at 2021 WL 4704035. *See* Appendix A (Pet. App. at 1-2) (Petitioner's Appendix). That court's order vacating its previous order and judgment granting post-conviction relief and withdrawing the opinion from publication is available at *Cole v. State*, 495 P.3d 670 (Okla. Crim. App. 2021) (mem.). *See* Appendix B (Pet. App. at 3). The OCCA's opinion granting Mr.

Cole's state post-conviction relief was (but is no longer) available at *Cole v. State*, 492 P.3d 11 (Okla. Crim. App. 2021) (withdrawn). See Appendix C (Pet. App. at 4-27).

## **JURISDICTION**

The OCCA denied post-conviction relief on October 7, 2021. This petition is being filed within 90 days of that denial. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Indian Commerce Clause of the United States Constitution, Article I, Section 8, provides in relevant part:

The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

The Supremacy Clause to the United States Constitution, Article VI, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Due Process Clause of the Fourteenth Amendment, Section 1, to the U.S. Constitution provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Title 18, United States Code, Section 1151 (Indian country defined) provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Title 18, United States Code, Section 1152 (Laws governing) provides in relevant part:

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.

Section 1080 of Title 22 of the Oklahoma Statutes provides:

Any person who has been convicted of, or sentenced for, a crime and who claims:

- (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
- (b) that the court was without jurisdiction to impose sentence;
- (c) that the sentence exceeds the maximum authorized by law;
- (d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Section 1089(D) of Title 22 of the Oklahoma Statutes provides in relevant part:

8. If an original application for post-conviction relief is untimely or if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely original application unless:

a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or ....

9. For purposes of this act, a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis:

a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or

b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

## STATEMENT OF THE CASE

### A. Prior History

Mr. Cole was charged in Rogers County District Court with one count of first degree murder for the death of his nine-month-old daughter. Prior to his jury trial, counsel informed the trial court that Mr. Cole was not competent, requested he be evaluated by a mental health expert, and requested a post evaluation competency hearing. A competency hearing was conducted, and the jury returned a verdict finding Mr. Cole competent.

Mr. Cole then proceeded to trial and was found guilty of First Degree Murder. After evidence was presented in the second stage, the jury deliberated and found two of the three aggravating circumstances alleged: (a) the defendant was previously convicted of a felony involving the use of threat or violence to the person, and (b) the murder was especially heinous, atrocious, or cruel. The jury imposed a sentence of death, and the Rogers County District Court pronounced formal judgment and sentence on the verdicts on December 8, 2004.

Mr. Cole appealed his convictions and sentence of death to the OCCA. The OCCA denied all grounds for relief and affirmed the convictions and sentences. *Cole v. State*, 164 P.3d 1089 (Okla. Crim. App. 2007). A petition for writ of certiorari was filed in this Court and denied on May 19, 2008. *Cole v. Oklahoma*, 128 S. Ct. 2474 (2008). Mr. Cole also petitioned the OCCA for post-conviction



relief. The court denied the petition in an unpublished decision. Opinion Denying Application for Post-Conviction Relief, *Cole v. State*, Case No. PCD-2005-23 (Okla. Crim. App. Jan. 24, 2008).

Mr. Cole filed a petition for habeas corpus in the United States District Court for the Northern District of Oklahoma, which was denied. *Cole v. Workman*, 08-CV-328-CVE-PJC, (N.D. Okla. Sept. 1, 2011). On February 18, 2014, the Tenth Circuit affirmed. *Cole v. Trammell*, 755 F.3d 1142 (10th Cir. 2014). The ensuing petition for writ of certiorari in this Court was denied October 6, 2014. *Cole v. Trammell*, 574 U.S. 891 (2014) (mem).

On January 30, 2015, Mr. Cole filed a habeas corpus action in the United States District Court for the Northern District of Oklahoma asserting his execution would violate the Eighth and Fourteenth Amendments of the United States Constitution because he is incompetent to be executed. Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant Title 28, United States Code, Section 2254, *Cole v. Trammell*, Case No.15-CV-049-GKF-PJC (January 30, 2015). On July 8, 2015, 2015, the OCCA set an execution date for Mr. Cole of October 7, 2015.

The United States District Court for the Northern District of Oklahoma found that Mr. Cole had not exhausted an available state court remedy, and stayed the action while Mr. Cole exhausted it. Opinion and Order, *Cole v.*

*Warrior*, Case No.15-CV-049-GKF-PJC (July 8, 2015). In accordance with the district Court's order, Mr. Cole filed his Petition for Writs of Mandamus and/or Writs of Prohibition in Pittsburg County District Court, which was denied after an evidentiary hearing. Order Denying Petition for Writ of Mandamus, *In re Benjamin R. Cole*, CV-2015-58 (Pittsburg Cnty. Dist. Ct. Sept. 8, 2015).

In response to the Pittsburg County District Court denial, Mr. Cole filed with the OCCA his Petitions for Writ of Mandamus and Prohibition and Briefs in Support and Application for Stay of Execution. *Cole v. Trammell*, MA-2015-824 (Okla. Crim. App. Sept. 16, 2015). On October 2, 2015 the OCCA indefinitely stayed Mr. Cole's execution. Order Issuing Stay, *Cole v. State*, D-2014-1260 (Okla. Crim. App. Oct. 2, 2015). Just before issuing the stay, the OCCA denied Mr. Cole's Petitions for Writ of Mandamus and Prohibition. Order Denying Extraordinary Relief, *Cole v. Trammell*, MA-2015-824 (Okla. Crim. App. Oct. 2, 2015). On November 24, 2015, the United States District Court for the Northern District of Oklahoma issued an order administratively closing Mr. Cole's competency-to-be-executed habeas action without prejudice. Administrative Closing Order, *Cole v. Warrior*, No. 15-CV-049-GKF-PJC (N.D. Okla. Nov. 24, 2015).

## **B. Current Controversy**

On May 14, 2020, Mr. Cole filed a subsequent application for post-conviction relief challenging the State’s jurisdiction to prosecute him. Successive Application for Post-Conviction Relief, *Cole v. State*, No. PCD-2020-332 (Okla. Crim. App. May 14, 2020). Mr. Cole asserted exclusive jurisdiction rests with the federal courts because the victim was a citizen of the Cherokee Nation and the crime occurred within the boundaries of the Cherokee Nation Reservation. The OCCA concluded Mr. Goode’s claim was “premature” because *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (*McGirt*) and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*) were not final decisions. *See* Appendix D (Pet. App. at 31) (Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 4, *Cole v. State*, No. PCD-2020-332 (Okla. Crim. App. May 29, 2020)).

A little over a month later, on July 9, 2020, this Court issued its *McGirt* and *Sharp v. Murphy* opinions. The Court held that the federal government must be held to its word. Because it promised to reserve certain lands for tribes in the nineteenth century and never rescinded those promises, those lands remain reserved to the tribes today, and Oklahoma does not have jurisdiction.

Shortly after the final decisions in *Murphy* and *McGirt* were issued by this Court, Mr. Cole filed a subsequent application for post-conviction relief again raising the claim raised in No. PCD-2020-332, i.e., that exclusive jurisdiction

rests with the federal courts because the victim was a citizen of the Cherokee Nation and the crime occurred within the boundaries of the Cherokee Nation Reservation. Appendix E (Pet. App. at 33-71) (Successive Application for Post-Conviction Relief, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Aug. 12, 2020)).

The OCCA remanded the case to the District Court for Rogers County for an evidentiary hearing. *See* Appendix F (Pet. App. at 72-76)(Order Remanding for Evidentiary Hearing, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Aug. 24, 2020)). Mr. Cole submitted a brief prior to the hearing. *See* Appendix G (Pet. App. at 77-119) (Petitioner's Remanded Hearing Brief Applying *McGirt* Analysis to Cherokee Nation Reservation, *State v. Cole*, No. CF-2002-597 (Rogers Cnty. Dist. Ct. Sept.21, 2020)). After the hearing, the district court concluded Mr. Cole had established the victim was Indian and the crime for which Mr. Cole was convicted occurred in Indian Country. *See* Appendix H (Pet. App. at 125)(Order on Remand, *State v. Cole*, No. CF-2002-597 (Rogers Cnty. Dist. Ct. Nov. 12, 2020)).

Both parties filed supplemental briefing in the OCCA. *See* Appendix I (Pet. App. at 127-55) (Petitioner's Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief, No. PCD-2020-529 (Okla. Crim. App. Dec. 7, 2020)); *See* Appendix J (Pet. App. at 156-95) ((Supplemental

Brief of Respondent After Remand, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Dec. 8, 2020)). The State did not argue that *McGirt* announced a new rule that could not be retroactively applied. Instead, the State vigorously argued *McGirt* did not announce a new rule. *See* Pet. App. J at 178-79 (citing *Teague v. Lane*, 489 U.S. 288, 301, 307 (1989); *Walker v. State*, 933 P.2d 327, 338-39 (Okla. Crim. App. 1997) (“*McGirt* was a mere application of, and was dictated by, *Solem [v. Bartlett]*, 465 U.S. 463 (1984)]. Further, the decision did not break new ground or impose a new obligation on the State . . .”). *See also* Appendix K (Pet. App. at 201) (State’s Supplemental Brief Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Jan. 21, 2021)<sup>1</sup> (“As Petitioner’s *McGirt* claim was based on well-established precedent, it could have been reasonably formulated (and, in fact, was formulated before *McGirt*) and is not based on a new rule of constitutional law.”)).

While Mr. Cole’s application was pending, the OCCA applied *McGirt* to find the continued existence of and lack of State jurisdiction over the Cherokee Nation Reservation, where the crime of which Mr. Cole was convicted occurred.

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<sup>1</sup>Mr. Cole’s response to this filing is available at Appendix L (Pet. App. at 208-11) (Petitioner’s Objection to State’s Motion to File Supplemental Brief, Motion to Strike State’s Supplemental Brief, and Motion to File Response to State’s Supplemental Brief, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Jan. 29, 2021)).

See Appendix M (Pet. App. at 212-20) (*Hogner v. State*, No. F-2018-138, 2021 WL 958412, \_\_\_ P.3d \_\_\_, (Okla. Crim. App. March 11, 2021)). Around this time, similar rulings applied *McGirt* to each of Oklahoma’s “Five Civilized Tribes,” and the OCCA issued published opinions granting post-conviction relief to several capital defendants who were convicted in the absence of jurisdiction in Oklahoma state courts, regardless of whether the void state court convictions were final when *McGirt* was announced.<sup>2</sup>

Due to the judicially recognized and (still) unalterable fact that the State of Oklahoma never had jurisdiction to prosecute Mr. Cole for the subject crime, on April 6, 2021 the United States indicted Mr. Cole for the same crime in the United States District Court for the Northern District of Oklahoma. Indictment, *United States v. Cole*, No. 21-CR-138-JED, (N.D. Okla. April 6, 2021). The United States also sought to detain Mr. Cole prior to trial in federal court. Motion for Detention, *United States v. Cole*, No. 21-CR-138-JED, (N.D. Okla. May 13, 2021).

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<sup>2</sup> See, e.g., *Bosse v. State*, 484 P.3d 286 (Okla. Crim. App. 2021) (withdrawn); *Ryder v. State*, 489 P.3d 528 (Okla. Crim. App. 2021) (withdrawn); *Bench v. State*, 492 P.3d 19 (Okla. Crim. App. 2021) (withdrawn). Consistent with the State’s arguments in Mr. Cole’s and others’ cases, in granting post-conviction relief to Shaun Bosse, the OCCA noted the State had argued “that waiver should apply because there is really nothing new about the claim.” *Bosse*, 484 P.3d at 293 n.8.

On April 29, 2021, the OCCA held the victim in Mr. Cole’s case was Indian and the crime occurred in Indian Country, and concluded the State did not have jurisdiction to prosecute him. *See* Appendix C (Pet. App. at 4-27). The OCCA reversed and remanded the case to the District Court of Rogers County with instructions to dismiss. *See* Appendix C (Pet. App. at 17).

The State filed two motions to stay the mandate, the first based on the OCCA’s order staying the mandate for 45 days in *Bosse v. State*, 484 P.3d 286 (Okla. Crim. App. 2021) (withdrawn), pending certiorari review, *See* Appendix N (Pet. App. at 221-36) (Brief in Support of Motion to Stay the Mandate for Good Cause Pending Certiorari Review, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Apr. 29, 2021)<sup>3</sup>; and the second based on this Court’s stay of the mandate in *Bosse* pending certiorari review, *see* Appendix Q (Pet. App. at 241) (Order in Pending Case, *Oklahoma v. Bosse*, No. 20A161 (May 26, 2021)); *See* Appendix R (Pet. App. at 242-52) (Brief in Support of Motion to Further Stay the Mandate in Light of the United States Supreme Court’s Order Staying the Mandate in

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<sup>3</sup> See Appendix O (Pet. App. at 237-38)(Petitioner’s Response to State’s Motion to Stay the Mandate for Good Cause Pending Certiorari Review, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 3, 2021)); *See* Appendix P (Pet. App. at 239-40) (Order Staying Issuance of Mandate, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 12, 2021)).

*Oklahoma v. Bosse*,<sup>4</sup> *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 26, 2021)). On May 28, 2021, the OCCA stayed the issuance of the mandate indefinitely. *See* Appendix S (Pet. App. at 253-55) (Order Staying Issuance of Mandates Indefinitely, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 28, 2021)).

On August 12, 2021, the OCCA reversed course and discarded the settled law it had been relying on (and bedrock jurisdictional principles) by issuing *State of Oklahoma ex rel. Matloff v. Wallace*, No. PR-2021-366 (Okla. Crim. App. Aug. 12, 2021) (*See* Appendix T (Pet. App. at 256-66)).<sup>5</sup> In *Matloff*, the OCCA held *McGirt* “announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction.” Pet. App. T at 258. The OCCA explained that in previously granting post-conviction *McGirt* relief to petitioners like Mr. Cole, its attention had not “been drawn to the potential non-retroactivity of *McGirt*.” Pet. App. T at 259.

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<sup>4</sup> After the OCCA subsequently vacated its previous order granting post-conviction relief to Mr. Bosse, a joint stipulation was filed in this Court, resulting in its dismissal of Mr. Bosse’s case. *Oklahoma v. Bosse*, No. 21-186 (Sept. 3, 2021).

<sup>5</sup> Counsel for Mr. Cole submitted an amicus brief in *Matloff*. *See* Appendix U (Pet. App. at 267-83) (*Amicus Curiae* Brief of the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma in Support of Respondent, *Matloff*, No. PR-2021-366 (Okla. Crim. App. July 2, 2021)).



On August 26, 2021, the State filed in Mr. Cole’s case a Notice of Decision in [*Matloff*] and Request to Modify this Court’s Prior Opinion in this Case Granting Post-Conviction Relief, or Alternatively Request to Continue Stay. *See* Appendix V (Pet. App. at 284-301). On August 31, 2021, the OCCA entered its Order Vacating Previous Order and Judgment Granting Post-Conviction Relief and Withdrawing Opinion from Publication. *See* Appendix B (Pet. App. at 3). The OCCA premised its decision to vacate the previous order and judgment on *Matloff*. Mr. Cole filed a Motion to Stay Proceedings along with a brief in support (*See* Appendix W (Pet. App. at 302-04), pending certiorari review of *Matloff*). Finally, on October 7, 2021, the OCCA issued its order denying *McGirt* post-conviction relief, applying *Matloff’s* holding that *McGirt* announced a rule of criminal procedure that does not apply retroactively to cases with final convictions, and denied Mr. Cole’s motion to stay the proceedings pending certiorari review of *Matloff*. *See* Appendix A (Pet. App. at 1-2).

### **REASONS THE PETITION SHOULD BE GRANTED**

The petition for writ of certiorari in *Parish v. Oklahoma*, No. 21-467 (arising from *Matloff*), presents the same question presented in this case. As explained in the petition for writ of certiorari in *Parish*, *McGirt* must apply retroactively to convictions that were final when *McGirt* was announced. Mr.

Cole's petition for writ of certiorari is one of several that follows *Parish* and presents the same question.

Under *McGirt*, the federal government has—and always had—exclusive jurisdiction to prosecute the crimes of which Mr. Cole was convicted that occurred in Indian Country. The State has never had the power to do so. By holding *McGirt* is a mere procedural rule that is not retroactive to cases on collateral review, the OCCA has sought to preserve legally void convictions that the State never had authority to impose. Such a regime violates the Supremacy Clause by treating an exclusive allocation of power to the federal government as a mere regulation of the State's "manner" of trying a case. The decision also violates bedrock principles of due process and centuries-old understandings of habeas corpus. A conviction cannot stand where a State lacks authority to criminalize the conduct, and habeas courts have long set aside judgments by a court that lacks jurisdiction. If left unreviewed, *Matloff* would condemn many people, including Mr. Cole, to bear state convictions and serve state sentences for crimes the State had no power to prosecute.

A favorable decision in *Parish* would vindicate Mr. Cole's argument that *McGirt* applies retroactively to convictions that were final when *McGirt* was announced. Because the question presented in this case is before the Court in

*Parish*, Mr. Cole respectfully requests that the Court hold this petition pending the Court's decision in *Parish*.

### CONCLUSION

Oklahoma has no jurisdiction to proscribe and punish Mr. Cole's conduct, and the State is now holding him without any valid authority to do so. Mr. Cole respectfully requests the Court hold this petition pending disposition of the petition for a writ of certiorari in *Parish v. Oklahoma*, No. 21-467, and then dispose of it as appropriate. If *Parish* is resolved in the petitioner's favor, the Court should grant certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully submitted,

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