

No. 21-6494

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IN THE  
**Supreme Court of the United States**

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BENJAMIN ROBERT COLE, Sr.,  
*Petitioner,*

*v.*

OKLAHOMA,  
*Respondent.*

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**On Petition for a Writ of Certiorari to the  
Oklahoma Court of Criminal Appeals**

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**BRIEF IN OPPOSITION**

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**CAPITAL CASE**  
**QUESTION PRESENTED**

Whether federal law requires state courts to apply *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), retroactively on state postconviction review.

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## BRIEF IN OPPOSITION

The Petition in this case relies entirely upon the arguments advanced in the petition in *Parish v. Oklahoma*, No. 21-467, as a basis for certiorari in this case. For the reasons given in the State's brief in opposition in *Parish*, certiorari should be denied in this case as it should be in *Parish*.

1. Petitioner Benjamin Robert Cole, Sr., murdered his nine-month-old daughter Brianna. Brianna was crying, so petitioner grabbed her legs and bent them backwards towards her head until her spine and aorta snapped. Petitioner was convicted of murder and sentenced to death in Oklahoma state court. *See Cole v. State*, 164 P.3d 1089, 1092 (Okla. Crim. App. 2007).

2. After oral argument in *McGirt*, petitioner filed a second application for postconviction relief in state court. For the first time, petitioner argued that the State lacked authority to prosecute him because his crime occurred within the borders of the historical Cherokee territory and Brianna qualified as Indian. The Court of Criminal Appeals denied that application as premature, and petitioner re-filed after *McGirt* was decided.

The Court of Criminal Appeals granted postconviction relief, rejecting the State's arguments that petitioner had procedurally defaulted his claim under state postconviction statutes and was precluded from raising his claim under the doctrine of laches. After this Court stayed the Court of Criminal Appeals' mandate in a similar case, *Oklahoma v. Bosse*, No. 20A161, the Court of Criminal Appeals stayed the mandate in this case.

Subsequently, the Court of Criminal Appeals in another case held as a matter of state law that *McGirt* was not retroactively applicable to void state convictions on state postconviction review. *See State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021). The Court of Criminal Appeals then applied that decision, which is the subject of the pending certiorari petition in *Parish*, to deny petitioner's claim in this case, withdrawing its earlier grant of postconviction relief. Pet. App. A.

3. As more fully explained in *Parish*, when this Court decided *McGirt*, it recognized that many state inmates who attempt to seek release under its decision would nonetheless remain in state custody “thanks to well-known state and federal limitations on postconviction review in criminal proceedings.” 140 S. Ct. at 2479. The Oklahoma Court of Criminal Appeals took *McGirt* at its word, applying one such well-known limitation: claims seeking to apply new decisions retroactively are, as a general rule, not redressable when raised for the first time on postconviction review.

Petitioner, who stands convicted of the brutal murder of a child after a full and fair trial and appellate process (where his current contentions were never raised), nonetheless seeks review of the Court of Criminal Appeals’ state law decision. For the reasons given by the State in *Parish*, certiorari is unwarranted. The State respectfully requests that the Court refer to that brief when considering the petition here. Additionally, because petitioner is a non-Indian seeking relief under *McGirt* for crimes committed against Indians, certiorari should be denied if the Court grants relief on either of the questions presented in the State’s pending petition in *Oklahoma v. Castro-Huerta*, No. 21-492.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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