



## COLE v. STATE

2021 OK CR 28

Case Number: PCD-2020-529

Decided: 10/07/2021

**BENJAMIN ROBERT COLE, SR., Petitioner v. THE STATE OF OKLAHOMA, Respondent**



Cite as: 2021 OK CR 28, \_\_\_ \_\_

### OPINION DENYING POST-CONVICTION RELIEF AND DENYING MOTION TO STAY PROCEEDINGS

#### LUMPKIN, JUDGE:

¶1 Benjamin Robert Cole, Sr. was tried by jury and convicted of First Degree Murder in the District Court of Rogers County, Case No. CF-2002-597. In accordance with the jury's recommendation the Honorable J. Dwayne Steidley sentenced Petitioner to death. Petitioner appealed his conviction and sentence in Case No. D-2004-1260, and this Court denied relief. *Cole v. State*, 2007 OK CR 27, 164 P.3d 1089. Petitioner previously sought post-conviction relief and was denied the same by this Court. See *Cole v. State*, Case No. PCD-2005-23 (Okl.Cr. Jan. 24, 2008)(unpublished) and *Cole v. State*, Case No. PCD-2020-332 (Okl.Cr. May 29, 2020)(unpublished). For the third time, Petitioner seeks post-conviction relief from this conviction and sentence.

¶2 The Capital Post-Conviction Procedure Act, 22 O.S.2011, § 1089(D)(8) provides for the filing of successive post-conviction applications. The statutes governing our review of second or successive capital post-conviction applications provide even fewer grounds to collaterally attack a judgment and sentence than the narrow grounds permitted in an original post-conviction proceeding. *Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29.

¶3 In his sole proposition, Petitioner claims the District Court of Rogers County lacked jurisdiction to try him. Petitioner argues that his daughter, B.C., had some quantum of Cherokee blood and her murder occurred within the boundaries of the Cherokee Nation. He relies upon *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S. Ct. 2452 (2020), in support of his claim.

¶4 Although this Court initially granted Petitioner relief based upon this proposition after an evidentiary hearing in district court, 1 we subsequently decided *State ex rel. Mark Matloff, District Attorney v. The Honorable Jana Wallace, Associate District Judge*, 2021 OK CR 21, \_\_\_ P.3d \_\_\_, and denied retroactive application of *McGirt* to cases on collateral review. Thereafter, prior to issuance of the mandate, the order granting post-conviction relief was withdrawn in this case. 2

¶5 In *Matloff*, we began our consideration of the retroactivity issue by finding, "*McGirt* announced a rule of criminal procedure . . . to recognize a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation." *Id.*, at ¶ 26. This rule affected only the method of deciding a criminal defendant's culpability, therefore, it was a procedural ruling. *Id.*, at ¶ 27. We further found that the *McGirt* rule was new because it broke new ground, imposed new obligations on both the state and the federal governments and the result was not required by precedent existing when the conviction at issue in *Matloff* was final. *Id.*, at ¶ 28.

¶6 In reaching our decision on the non-retroactivity of *McGirt*, this Court held that our authority under state law to constrain the collateral impact of *McGirt* and its progeny "is consistent with both the text of the opinion and the Supreme Court's apparent intent . . . The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the

ruling was announced." *Id.*, at ¶ 33. Ultimately, we held in *Matloff* that "*McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction . . ." *Id.*, at ¶ 40.

¶7 Applying *Matloff* to the instant case, we find Petitioner's claim in this successive post-conviction proceeding warrants no relief.

## DECISION

¶8 Petitioner's Application for Post-Conviction Relief and Motion for Stay of Proceedings are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

### APPEARANCES AT EVIDENTIARY HEARING

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### OPINION BY LUMPKIN, J.

ROWLAND, P.J.: Concur  
HUDSON, V.P.J.: Concur  
LEWIS, J.: Concur

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## FOOTNOTES

<sup>1</sup> *Cole v. State*, 2021 OK CR 10, 492 P.3d 11.

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Cite	Name	Level
<u>2007 OK CR 27</u> , <u>164 P.3d 1089</u> ,	<u>COLE v. STATE</u>	Discussed
<u>2017 OK CR 22</u> , <u>406 P.3d 27</u> ,	<u>SANCHEZ v. STATE</u>	Discussed
<u>2021 OK CR 10</u> ,	<u>WITHDRAWN</u>	Cited
<u>2021 OK CR 21</u> ,	<u>STATE ex rel. MATLOFF v. WALLACE</u>	Cited
<u>2021 OK CR 26</u> ,	<u>COLE v. STATE</u>	Cited

**Title 22. Criminal Procedure**

Cite	Name	Level
<u>22 O.S. 1089</u> ,	<u>Post-Conviction Relief for Death Penalty Conviction - Grounds for Appeal</u>	Cited