

LESSONS FROM *McGIRT V. OKLAHOMA*'S HABEAS AFTERMATH

BEN GIBSON[†]

ABSTRACT

In the summer of 2020, the U.S. Supreme Court handed down a decision in *McGirt v. Oklahoma*, concluding that Congress had never disestablished the historic boundaries of the Muscogee (Creek) Nation's reservation. In reaching this decision, the majority and dissent in *McGirt* sparred about the impact the Court's decision would have on the availability of post-conviction relief for prisoners who historically committed crimes on this and other reservations in Oklahoma. The dissent claimed this would create a clear pathway for scores of state prisoners to challenge their convictions. The majority insisted the results would not be so dire—state and federal procedural requirements would create obstacles for most prisoners seeking to invoke *McGirt* as a basis for post-conviction relief.

This Article surveys the state and federal court decisions on claims for post-conviction relief in which prisoners invoke *McGirt* (and its Tenth Circuit predecessor, *Murphy v. Royal*) and evaluates the lessons to be learned from these cases. Prisoners have met little success when invoking these claims. The courts' reasoning in these cases raise difficult questions regarding the nature and scope of habeas corpus. Most interesting, these claims question the subject matter jurisdiction of the original courts of conviction. Subject matter jurisdiction typically cannot be waived, but the courts that have denied these claims have found that the Antiterrorism and Effective Death Penalty Act's (AEDPA) procedural bars still apply to claims based on subject matter jurisdiction. This Article identifies potential constitutional problems with this application of AEDPA based upon the original meaning of the U.S. Constitution's Suspension Clause.

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INTRODUCTION

Law is complicated. But in the current doctrinal landscape, two areas give lawyers and judges particular fits: federal Indian law and habeas corpus. Case law in these areas is rife with unflattering superlatives. Federal Indian law has been described as “a complex patchwork of federal, state, and tribal law, which is better explained by history than by logic.”¹ Not to be outdone, the law of habeas corpus has been dubbed a “confused patchwork”² and a “Byzantine morass.”³ The law in each of these areas is frequently confused, conflicting, and unsettled.

In *McGirt v. Oklahoma*,⁴ the U.S. Supreme Court set these two areas of law on a collision course. In *McGirt*, the Supreme Court recognized that the historic reservation boundaries of the Muscogee (Creek) Nation remained intact.⁵ Writing for the majority, Justice Gorsuch explained there was “no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation.”⁶ Thus, Oklahoma lacked jurisdiction to prosecute Jimcy McGirt, a member of the Seminole Nation who committed a crime within the boundaries of the Muscogee Reservation.⁷ His state conviction could not stand.⁸

Such a decision, on its own, seems straightforward enough. And, from the outside looking in, its primary consequences would seem to be for federal Indian law—this was, after all, a case about whether an Indian reservation remained intact.⁹ But *McGirt* actually tells us much more about

1. *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (internal quotation marks omitted).

2. *Brecht v. Abrahamson*, 507 U.S. 619, 649 (1993) (White, J., dissenting).

3. *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

4. 140 S. Ct. 2452 (2020).

5. *Id.* at 2468.

6. *Id.*

7. *Id.* at 2474.

8. *Id.*

9. *Id.* at 2464 (“But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.”).

the doctrine of habeas corpus than it does about federal Indian law.¹⁰ Now, more than one year after the Court's decision, many state prisoners similarly situated to Jimcy McGirt have filed petitions for post-conviction review with Oklahoma state and federal courts challenging their convictions based on the original state court's lack of jurisdiction.¹¹ Their claims have met little success. To date, courts have dismissed almost all federal habeas petitions invoking *McGirt*—or its Tenth Circuit forerunner, *Murphy v. Royal*¹²—on procedural grounds.¹³ Meanwhile, almost all the *McGirt* claims that reached Oklahoma's highest criminal court—the Oklahoma Court of Criminal Appeals (OCCA)—succeeded.¹⁴ But after vacating eight convictions, the OCCA performed an about-face and determined *McGirt* claims should not apply retroactively for state criminals seeking post-conviction relief.¹⁵ What gives?

This Article describes how we came to this moment, surveys how courts have handled habeas petitions in the wake of *McGirt*, and offers an account for the disparity. Specifically, in Part I, this Article describes the Supreme Court's decision in *McGirt* and the resulting habeas implications for prisoners tried and convicted on land that has since been recognized as Indian Country. In Part II, this Article addresses the habeas consequences of the Court's decision. To do so, Part II surveys the habeas landscape in Oklahoma state courts and the Tenth Circuit since the Tenth Circuit decided *Murphy* and the Supreme Court decided *McGirt*. Finally, in Part III, this Article analyzes the approaches of the state and federal courts in dismissing these claims. Both courts have ultimately decided to avoid the merits of the claims when possible, instead dismissing the claims on procedural grounds. Both the jurisdictional nature of the claims at issue and the U.S. Constitution's protection of the writ of habeas corpus raise difficult questions about the appropriateness of the courts' respective approaches.

I. THE MCGIRT DECISION AND JURISDICTION

To understand the present moment, readers must understand what led to the Court's decision in *McGirt*, why the case has potential habeas implications for many other Oklahoma state prisoners, and why the majority and dissent in *McGirt* took opposing views of the decision's habeas consequences. This Part answers those questions in turn.

10. This is not to suggest *McGirt* has no broader implications for federal Indian law going forward. See, e.g., Joseph Palandrani, Note, "The Rule of the Strong, Not the Rule of Law": Reexamining Implicit Divestiture After *McGirt v. Oklahoma*, 89 FORDHAM L. REV. 2375, 2376–83 (2021) (discussing the potential implications of *McGirt* for how courts evaluate tribal authority over non-Native landowners going forward).

11. See *infra* Appendices 1, 2.

12. 875 F.3d 896 (10th Cir. 2017).

13. See *infra* Appendix 1.

14. See *infra* Appendix 2.

15. See *State ex rel. Matloff v. Wallace*, No. PR-2021-366, 2021 WL 3578089, at *6 (Okla. Crim. App. Aug. 12, 2021).

A. Diminishment and Disruption

The controversy in *McGirt* arose from a commonplace legal occurrence: a state prisoner, Jimcy McGirt, challenged his convictions for three serious sex offenses.¹⁶ The alleged conduct took place in 1996 in Broken Arrow, Oklahoma.¹⁷ McGirt was tried and convicted in an Oklahoma state court.¹⁸ A jury sentenced him to life in prison without the possibility of parole.¹⁹ Over twenty years later, McGirt filed a petition for post-conviction relief with the state court.²⁰

Courts are inundated with these types of applications for post-conviction relief every day.²¹ What made this one so special? McGirt filed his petition shortly after the Tenth Circuit—which includes Oklahoma—handed down a pioneering decision in *Murphy*.²² In *Murphy*, the Tenth Circuit concluded the historic boundaries of the Muscogee Reservation remained extant.²³ Despite congressional action that allotted a significant portion of the reservation to both Indians and non-Indians and scaled back tribal authority, the Tenth Circuit determined Congress had never actually disestablished the reservation.²⁴ Therefore, the reservation remained intact.²⁵

McGirt recognized the significance of the Tenth Circuit's *Murphy* decision for his own conviction.²⁶ When an Indian commits a crime in Indian territory, state courts generally lack jurisdiction to prosecute that crime.²⁷ Under the Major Crimes Act (MCA), “[a]ny *Indian* who commits” certain enumerated offenses “*within [the] Indian country*, shall be

16. See Brief for Respondent at 4, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. See Marc D. Falkoff, *The Hidden Costs of Habeas Delay*, 83 U. COLO. L. REV. 339, 367 (2012).

22. 875 F.3d 896 (10th Cir. 2017).

23. *Id.* at 966 (“Applying *Solem*, we conclude Congress has not disestablished the Creek Reservation.”).

24. *Id.* at 952–53 (describing the various ways Congress augmented authority on the reservation).

Throughout, this Article employs “Indian” as a term of art that is used to establish jurisdiction in federal criminal law. While preferences for identifying terminology vary among tribal members (for example, Native American or American Indian), case law and statutes have bestowed “Indian” with a specific meaning for the purposes of determining jurisdiction. Though imperfect in capturing the diversity of tribes and tribal members, this terminology is most consistent with case law and is, thus, employed throughout. The prevailing test for determining whether someone is an Indian for criminal jurisdictional purposes is the *Rogers* test. See, e.g., *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) (citing *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846)). Under this test, someone is an Indian for purposes of federal criminal law if they (1) have “some Indian blood” and (2) are recognized as an Indian by a federally recognized tribe or the federal government. *Id.*

25. *Murphy*, 875 F.3d at 966. Following the Tenth Circuit’s decision, the state of Oklahoma petitioned for certiorari to the Supreme Court. Petition for Writ of Certiorari, *Royal v. Murphy*, 138 S. Ct. 2026 (2017) (No. 17-1107). The Court granted certiorari and heard arguments. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020). The Court ultimately used *McGirt* as the vehicle for deciding the disestablishment issue. *Id.* It affirmed *Sharp* based on its decision in *McGirt*. *Id.*

26. See Brief for Petitioner at 8, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526).

27. See *infra* note 84.

subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.”²⁸ The MCA’s jurisdictional counterpart clarifies that “[a]ll Indians committing any offense listed in the first paragraph of and punishable under section 1153 . . . shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.”²⁹ To paraphrase, if an Indian commits one of an enumerated list of crimes within land considered Indian Country³⁰—such as a reservation—*only* the federal government has jurisdiction to try the crime.³¹

McGirt is an enrolled member of the Seminole Nation of Oklahoma.³² His crime—sexual abuse of a minor—is on the enumerated list in the MCA.³³ He committed his crime in Broken Arrow, which falls within the historic boundaries of the Muscogee Reservation.³⁴ Tribal membership and location of the crime matter when determining which sovereign has jurisdiction to try a crime.³⁵ Therefore, if the Muscogee Reservation still included Broken Arrow, Oklahoma never had jurisdiction to prosecute, convict, and sentence McGirt. His convictions would be void.

McGirt’s collateral challenge to his convictions acted as a funnel, serving as the narrow entry point for the Supreme Court to consider the much larger issue decided in *Murphy*: whether the historic boundaries of the Muscogee Reservation remained intact.³⁶ Along with McGirt, the Muscogee Nation—as an amicus curiae in the case—contended the land in question was still part of the Tribe’s modern-day reservation.³⁷ In response, Oklahoma argued the reservation had been done away with through a series of statutes, culminating with statehood.³⁸ According to

28. 18 U.S.C. § 1153(a) (emphasis added).

29. *Id.* § 3242.

30. Under federal law, Indian Country:

[M]eans (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.

Id. § 1151. For purposes of post-*McGirt* habeas claims, the first category of “all land within the limits of Indian reservations” is most relevant. *Id.*

31. *See, e.g.,* United States v. John, 437 U.S. 634, 651 (1978) (“Mississippi appears to concede . . . that if § 1153 provides a basis for the prosecution . . . for the offense charged, the State has no similar jurisdiction. This concession, based on the assumption that § 1153 ordinarily is pre-emptive of state jurisdiction when it applies, seems to us to be correct.”).

32. *McGirt v. Oklahoma* 140 S. Ct. 2452, 2459 (2020).

33. *See* 18 U.S.C. § 1153.

34. Brief for Respondent, *supra* note 16, at 11.

35. *See generally* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 9.02 (2019) [hereinafter COHEN’S HANDBOOK].

36. *See McGirt*, 140 S. Ct. at 2459–60 (“At one level, the question before us concerns Jimcy McGirt . . . At another level, then, Mr. McGirt’s case winds up as a contest between State and Tribe.”).

37. *Id.* at 2460.

38. *Id.* at 2465–69.

Oklahoma, various statutes had gradually diminished tribal power.³⁹ The Oklahoma Enabling Act then “transferred all nonfederal cases pending in territorial courts to Oklahoma’s new state courts,” making the state courts “the inheritors of the federal territorial courts’ sweeping authority to try Indians for crimes committed on reservations.”⁴⁰ Thus, while at one level the case was a narrow question about the validity of *McGirt*’s conviction, “[a]t another level, then, Mr. *McGirt*’s case w[ound] up as contest between State and Tribe.”⁴¹

How, then, do courts decide such a historic boundary dispute? First, courts look to see whether Congress established a reservation for a tribe.⁴² In establishing reservations, Congress did not need to use magic words.⁴³ For a long time, “reservation” did not have the technical meaning it has now.⁴⁴ Thus, Congress could use various words to indicate it intended to set aside land for a tribe.⁴⁵ For instance, the Supreme Court has said that a grant of land “for a home, to be held as Indian lands” created a reservation.⁴⁶ Such was the case with the Muscogee Nation.⁴⁷ The 1833 Treaty with the Muscogee Nation set the borders for what would be “a permanent home to the whole Creek nation of Indians” and stated that the “United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty.”⁴⁸ The *McGirt* Court regarded this language as more than sufficient to establish a reservation for the Muscogee Nation.⁴⁹

Once a reservation exists, courts then look for any subsequent statutes through which Congress may have diminished the reservation or otherwise changed the reservation’s boundary lines.⁵⁰ Again, Congress need not have used magic words to diminish a reservation.⁵¹ Rather, Congress need only have expressed the intent to diminish.⁵² For example, courts have found Congress has diminished a reservation when a statute spoke of it being

39. *Id.*

40. *Id.* at 2477.

41. *Id.* at 2460.

42. *Id.* Reservations could also be established by the President. *See, e.g.,* *Mattz v. Arnett*, 412 U.S. 481, 494 (1973) (“The reservation’s existence, pursuant to the Executive Order of 1891, is conceded.”).

43. *See* *Wyoming v. U.S. Env’t Prot. Agency*, 875 F.3d 505, 513 (10th Cir. 2017).

44. *McGirt*, 140 S. Ct. at 2461.

45. *Id.* at 2462–63.

46. *Id.* at 2461 (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 405 (1968)).

47. *Id.*

48. *Id.* (quoting 1833 Treaty, art. III, 7 Stat. 418).

49. *Id.*

50. *Id.* at 2462. Many of the “diminishment” cases arise from the same historic milieu. “The Dawes Act permitted the Federal Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement.” *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998). Congress expected tribes to dissolve and reservations to disappear within the coming decades. *Id.* But Congress did not treat every tribe the same; it explicitly disestablished some reservations while simply beginning, but never completing, the process of allotment with other reservations. *See* *Solem v. Bartlett*, 465 U.S. 463, 469 (1984).

51. *See* *Wyoming v. U.S. Env’t Prot. Agency*, 875 F.3d 505, 513 (10th Cir. 2017).

52. *McGirt*, 140 S. Ct. at 2463.

“discontinued, abolished, or vacated”⁵³ and when a statute stated that tribal lands should be “restored to the public domain.”⁵⁴

By contrast, the mere act of allotting tribal lands among Indians and non-Indians has been deemed insufficient to diminish a reservation.⁵⁵ Private ownership of land is not inconsistent with the existence of a reservation.⁵⁶ Thus, courts will not infer Congress intended to diminish a reservation from such equivocal and incomplete language.⁵⁷ For example, in *Mattz v. Arnett*,⁵⁸ the Supreme Court said Congress did not diminish the Klamath River Reservation by making all the reservation land “subject to settlement, entry, and purchase under the laws of the United States[.]”⁵⁹ Rather, the Court concluded that “allotment under the [Dawes] Act is completely consistent with continued reservation status.”⁶⁰ Congress must clearly express its intent by making “[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests[.]”⁶¹ Only then will a court find a reservation diminished.⁶²

Whatever the language, the Supreme Court has been clear that only Congress can diminish a reservation: “To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.”⁶³ Neither states nor private citizens can shrink a reservation through ongoing, informal encroachments.⁶⁴ Thus, even if the demographics of a region have changed wholesale over time on reservation

53. *Id.* (quoting *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)).

54. *Hagen v. Utah*, 510 U.S. 399, 412 (1994).

55. *See, e.g., Nebraska v. Parker*, 577 U.S. 481, 489 (2016). Congress often intended allotment as the first step in a process that would lead to the disestablishment of reservations. *See McGirt*, 140 S. Ct. at 2464–65. But without explicit language disestablishing a reservation, the reservation remains intact despite allotment. *Id.* at 2468–70.

56. *McGirt*, 140 S. Ct. at 2464 (“So the relevant statute expressly contemplates private land ownership within reservation boundaries.”).

57. *Id.* (“[T]his Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.”).

58. 412 U.S. 481 (1973).

59. *Id.* at 495, 497.

60. *Id.* at 497.

61. *Parker*, 577 U.S. at 488 (alteration in original) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). Congress’s policy at the time “was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing.” *Mattz*, 412 U.S. at 496. Congress then intended to abolish the reservations once the land had been allotted. *Id.* But, “as wishes are not laws, future plans aren’t either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.” *McGirt*, 140 S. Ct. at 2465.

62. *McGirt*, 140 S. Ct. at 2462–63.

63. *Id.* at 2462.

64. *Id.* In *Solem*, the Supreme Court indicated that when a statute is ambiguous about Congress’ intent to diminish, two other considerations could help inform the text: contemporary historical practices and subsequent treatment of the disputed land. 465 U.S. at 469–71. The *McGirt* Court did not fully repudiate these considerations from *Solem*, but the Court did make clear that the plain language of a statute must always trump any countervailing evidence about what happened on the ground. *See McGirt*, 140 S. Ct. at 2469 (“[W]hat value such evidence has can only be *interpretive*—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law’s adoption, not as an alternative means of proving disestablishment or diminishment.”).

land, this cannot change the land's underlying status.⁶⁵ When it comes to tribal land, only Congress can giveth and only Congress can taketh away.⁶⁶

Looking to the relevant texts, the majority in *McGirt* concluded that Congress never diminished the historic boundaries of the Muscogee Reservation.⁶⁷ Congress certainly *intended* to extinguish all of the Tribe's claims to the land at some future point.⁶⁸ As a first step, it had allotted portions of the Muscogee Nation while also stripping certain powers away from the Tribal government.⁶⁹ Furthermore, Oklahoma prosecuted most major crimes committed within the reservation for almost a century.⁷⁰ Still, the majority held that Congress's acts never formally diminished nor disestablished the Muscogee Reservation: "If Congress wishes to break the promise of a reservation, it must say so."⁷¹ And without express language from Congress shrinking the reservation, no subsequent practices or changes on the reservation could deprive the land of its status.⁷²

The majority believed that the equation in this case was simple—Congress granted the Muscogee Nation a reservation and never took formal action to diminish or disestablish the reservation, so the reservation persists.⁷³ Though Congress has often broken treaties with tribes, this was no such instance.⁷⁴ Justice Gorsuch, writing for the majority, insisted, "On the far end of the Trail of Tears was a promise."⁷⁵ In concluding that the Muscogee Nation's reservation remained intact, the Court simply kept that promise.⁷⁶ Nothing more, nothing less.

B. Jurisdiction and Habeas Implications

The majority's soaring rhetoric recognizes the long, complex, and tragic history of Oklahoma's five civilized tribes.⁷⁷ But this language also has the tendency to abstract from the on-the-ground facts and implications of the dispute at the heart of the case. Beautiful rhetoric cannot disguise a difficult reality: promise keeping is hard. The Court's decision meant that Jimcy McGirt, convicted of sexual crimes in state court, had his state convictions overturned.⁷⁸ The decision then placed the onus on federal prosecutors to determine whether they could re prosecute McGirt and obtain a

65. *McGirt*, 140 S. Ct. at 2468–69.

66. *Id.* at 2462.

67. *Id.* at 2464–65.

68. *Id.*

69. *Id.* at 2465–66.

70. *Id.* at 2470–71.

71. *Id.* at 2462.

72. *Id.* at 2474.

73. *Id.* at 2482.

74. *Id.* at 2462–63, 2482 ("If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.").

75. *Id.* at 2459.

76. *Id.* at 2482.

77. See, e.g., Joel West Williams, *The Far End of the Trail of Tears: McGirt v. Oklahoma*, 68 FED. LAW. 12, 13 (2021).

78. *McGirt*, 140 S. Ct. at 2482.

conviction for a crime committed twenty years prior.⁷⁹ It also left open the possibility that other Oklahoma state prisoners would come forward with similar claims, seeking to follow the path McGirt paved.⁸⁰

Where the boundary lines of contemporary reservations fall matter for many reasons, both civilly and criminally.⁸¹ For criminal defendants who commit their crimes on Indian reservations, the boundaries matter when determining which sovereign has jurisdiction to prosecute the crime.⁸² As described above, the MCA gives federal courts exclusive jurisdiction to try and punish a defendant when three conditions are met: (1) an enumerated crime is committed (2) by an Indian (3) in Indian Country.⁸³ Courts have interpreted a neighboring statute, the Indian Country Crimes Act (ICCA), to give federal courts exclusive jurisdiction for (1) crimes committed (2) *against* Indians (3) in Indian Country.⁸⁴ In trying and convicting McGirt, Oklahoma operated under the assumption that the territorial condition in these statutes was not met—namely, that Broken Arrow was not in Indian Country.⁸⁵ But now that the Court has made the status of

79. *Id.* at 2479–80.

80. *Id.*

81. See generally Calandra McCool, *Welcome to the Mvskoke Reservation: Murphy v. Royal, Criminal Jurisdiction, and Reservation Diminishment in Indian Country*, 42 AM. INDIAN L. REV. 355, 377–85 (2018) (describing the criminal and civil implications of the Tenth Circuit’s decision in *Murphy*); Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in McGirt v. Oklahoma*, U. CHI. L. REV. ONLINE *5–7 (Aug. 13, 2020), (“It is hard to defend the status quo of this jurisdictional framework. It is not desirable, successful, or even administrable. It is—to put it bluntly—confusing as hell.”).

82. See generally COHEN’S HANDBOOK, *supra* note 35, § 9.02[1][a]–[b].

83. See *supra* Section I.A; see also 18 U.S.C. § 1153(a).

84. By its plain language, the MCA covers only crimes committed by Indians, not crimes *against* Indians committed by non-Indians. See 18 U.S.C. § 1153(a) (“Any *Indian* who commits against the person or property of another Indian or other person . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.”) (emphasis added). But, as the Supreme Court explained in *McGirt*: “A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country.” 140 S. Ct. at 2479 (citing 18 U.S.C. § 1152). Section 1152 states that “[e]xcept 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 . . . except the District of Columbia, shall extend to the Indian Country.” 18 U.S.C. § 1152. Prior to the most recent enactment of this statute, the Supreme Court has indicated several times that states may not have jurisdiction over crimes committed by non-Indians against Indians on reservations. See *Williams v. United States*, 327 U.S. 711, 714 (1946) (“While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.”). Section 1152 would not alter this. A number of states do have jurisdiction to try crimes committed on reservations under Public Law 280. Public Law 280, Pub. L. No. 83-280 (1953) (codified as amended at 18 U.S.C. § 1162); see generally M. Brent Leonhard, *Criminal Jurisdiction in Indian Country*, 69 DEP’T JUST. J. FED. L. & PRAC. 45, 62–65 (2021) (discussing Public Law 280 and its implications for jurisdiction). In January of 2022, the Supreme Court granted a petition for writ of certiorari to address the question of whether states have jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country. See *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. Apr. 29, 2021), *cert. granted*, *Oklahoma v. Castro-Huerta*, 90 U.S.L.W. 3220 (U.S. Jan. 21, 2022) (No. 21-429); see also *Petition for Writ of Certiorari, Oklahoma v. Castro-Huerta*, 2021 U.S. S. CT. BRIEFS LEXIS 2696 (Sept. 17, 2021) (No. 21429).

85. See *McGirt*, 140 S. Ct. at 2471; *id.* at 2499 (Roberts, C.J., dissenting) (“[F]or 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently . . .”).

the Muscogee Reservation clear, any qualifying crimes committed by or against Indians on the Muscogee Reservation fall within exclusive federal jurisdiction.⁸⁶

The Court's decision will undeniably transform criminal law in Oklahoma.⁸⁷ Many cases that would previously have been tried in Oklahoma state court must now go to federal court.⁸⁸ For all crimes committed on the Muscogee Reservation going forward, prosecutors will have to determine whether the statutory conditions for exclusive jurisdiction under federal law have been met.⁸⁹ Where they have been, defendants may be tried in federal court. Where they have not, they may be tried in state court.

In addition to these prospective changes, the decision had the potential to provide a pathway for post-conviction relief for prisoners tried and convicted in Oklahoma state court. For over a century, Oklahoma tried and punished defendants who Oklahoma believed had committed their crimes outside of Indian Country, even if the crimes were committed by or against an Indian.⁹⁰ According to the Court in *McGirt*, Oklahoma's century-long assumption about jurisdiction was wrong, meaning many defendants who were tried and convicted in state court should have been tried in federal court.⁹¹ Prisoners who can prove that their crimes should have been governed by the MCA or ICCA might thereby have a viable path to challenging their convictions through state and federal post-conviction review processes.

86. *Id.* at 2479 (majority opinion).

87. See Clint Summers, *The Sky Will Not Fall in Oklahoma*, 56 TULSA L. REV. 471, 480–85 (2021) (discussing the extent of criminal implications in Oklahoma following *McGirt*); see also Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 635–36 (2021) (“In reality, holding that the land belonged to the tribe would simply mean that sometimes different laws would apply. The kinks of transitioning from life regulated completely by Oklahoma to life occasionally regulated by the Muscogee Creek Nation should have been the only question.”).

88. See *McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting) (“At the end of the day, there is no escaping that today’s decision will undermine . . . the State’s ability to prosecute serious crimes committed in the future.”).

89. This article primarily addresses the *legal* consequences for state prisoners who were convicted by state courts after convicting crimes that should have been covered by the MCA or ICCA. More work can and should be done on the forward-looking *practical* consequences of *McGirt*, including increased staffing for the federal and tribal prosecutors, defenders, law enforcement officers, and judges in Oklahoma. See, e.g., Annie Gowen & Robert Barnes, ‘Complete, Dysfunctional Chaos’: Oklahoma Reels After Supreme Court Ruling on Indian Tribes, WASH. POST (July 24, 2021, 9:00 AM), https://www.washingtonpost.com/national/complete-dysfunctional-chaos-oklahoma-reels-after-supreme-court-ruling-on-indian-tribes/2021/07/23/99ba0b80-ea75-11eb-8950-d73b3e93ff7f_story.html (discussing increased caseload and staffing after *McGirt*). The House Appropriations Committee has approved \$70 million in additional funding for the increased caseload related to *McGirt*. See Chris Casteel, *FBI Anticipates 7,500 Cases in Oklahoma Next Year in Wake of McGirt Ruling*, USA TODAY (July 16, 2021, 6:03 AM), <https://www.usatoday.com/story/news/2021/07/16/mcgirt-v-oklahoma-ruling-thousands-new-cases-fbi-director-christopher-wray/7979571002>.

90. *McGirt*, 140 S. Ct. at 2499.

91. Application to Stay Mandate of the Oklahoma Court of Criminal Appeals Pending Review on *Certiorari* at 14, *Bosse v. State*, 484 P.3d 286, 289 (Okla. Crim. App. 2021) (No. 20A161). According to Oklahoma, thirty post-conviction cases have been remanded to state district courts for evidentiary hearings since *McGirt*. *Id.* at 14.

These implications are compounded in Oklahoma.⁹² Four other tribes in Oklahoma—the Cherokee, Choctaw, Chickasaw, and Seminole Nations—share similar histories with the Muscogee Nation.⁹³ Each of the tribes negotiated their resettlements to reservations in similar manners.⁹⁴ And, based on the majority's reasoning in *McGirt*, it takes only a small step to conclude that Congress did not pass any statutes diminishing or disestablishing those reservations.⁹⁵ Thus, the same logic the Court employed in *McGirt* applies with equal force to any crimes Oklahoma tried and punished that were committed by or against Indians within the historic boundaries of the reservations of all five tribes.⁹⁶

Oklahoma recognized these consequences and was not afraid to highlight them in its briefing and oral argument before the U.S. Supreme Court in *McGirt* and *Murphy*.⁹⁷ The U.S. Supreme Court heard arguments in *Murphy*. During oral argument in *Murphy*, Justice Alito asked the counsel for the United States—arguing in support of the state of Oklahoma—about the practical implications of determining that the Muscogee Reservation had not been disestablished.⁹⁸ The government's counsel indicated that such a decision recognizing the historic reservation would mean that “[t]here could be several thousand convictions . . . in state court that might be . . . called into . . . question.”⁹⁹ In sum, if there were promises to be kept, the cost of keeping them would simply be too high.

Chief Justice Roberts continued this line of questioning with the counsel for *Murphy*.¹⁰⁰ He noted the very real consequences of a decision recognizing the historic reservation boundaries and asked what could be done: “What we’re talking about, people who were convicted of murder and sentenced to life by somebody who had no authority to prosecute them. That’s a matter or should be a matter of some concern to the government, don’t you think?”¹⁰¹ *Murphy*'s counsel tried to assuage such fears among the Justices.¹⁰² He insisted that the Tenth Circuit was already denying habeas petitions invoking *Murphy*.¹⁰³ Furthermore, he suggested that state procedural laws could stem the flow of petitions challenging

92. See *Bosse v. State*, 484 P.3d 286, 289 (Okla. Crim. App. 2021), *vacated*, 495 P.3d 669 (2021).

93. *Id.* (“The treaties concerning the Five Tribes which were resettled in Oklahoma in the mid-1800s . . . have significantly similar provisions; indeed, several of the same treaties applied to more than one of those tribes.”).

94. *Id.*

95. *Id.* at 290.

96. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting) (“The rediscovered reservations encompass the entire eastern half of [Oklahoma]—19 million acres that are home to 1.8 million people, only 10-15% of whom are Indians.”).

97. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020). The change in party names before the Supreme Court indicates a change in the warden from whom *Murphy* sought relief.

98. See Transcript of Oral Argument at 28–29, *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (No. 17-1107).

99. *Id.* at 31.

100. *Id.* at 46.

101. *Id.*

102. *Id.* at 45.

103. *Id.*

convictions.¹⁰⁴ For instance, he offered that “the state has a laches doctrine,” which could be used to preclude late applications for post-conviction relief.¹⁰⁵

These concerns resurfaced in the oral argument for *McGirt*.¹⁰⁶ The counsel for the state of Oklahoma indicated that “[w]e have currently over 1700 inmates whose crimes were committed in the former Indian territory who identify as Native American. So the state presumptively would not have jurisdiction over those people and have to release them.”¹⁰⁷ Still, McGirt’s counsel insisted that not all qualifying state prisoners would challenge their sentences.¹⁰⁸ Instead, because “federal penalties will often be higher” and “a number of defendants will have already served large chunks of their . . . sentence” the consequences would not be as great as predicted.¹⁰⁹ The counsel acknowledged “there will, of course, be consequences from the Court’s ruling, as there are from any of the Court’s rulings, and those consequences are not trivial, but nor are they existential, nor, indeed, overly serious.”¹¹⁰

These concerns spilled over into the opinion itself.¹¹¹ Though their respective analyses focused on whether Congress disestablished the reservation, the dissent and majority continued to shadowbox over the decision’s implications for state prisoners looking to challenge their convictions.¹¹² The majority insisted that the dissent and Oklahoma were making mountains out of molehills.¹¹³ The numbers would not necessarily be as apocalyptic as the State suggested “because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver.”¹¹⁴ Furthermore, “[o]ther defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.”¹¹⁵ As an example, the majority cited Oklahoma’s rule that “issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review.”¹¹⁶

The dissenting Justices were unconvinced.¹¹⁷ Chief Justice Roberts accused the majority of being blind to reality, insisting that “there is no

104. *See id.* at 46.

105. *Id.*

106. *See* Transcript of Oral Argument at 53, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526).

107. *Id.* at 54.

108. *Id.* at 18–19.

109. *Id.* at 19.

110. *Id.* at 23.

111. *See* *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476 (2020).

112. *See, e.g., id.* at 2479; *id.* at 2500–01 (Roberts, C.J., dissenting).

113. *McGirt*, 140 S. Ct. at 2479.

114. *Id.*

115. *Id.*

116. *Id.* at 2479 n.15 (quoting *Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013)).

117. *Id.* at 2500–01 (Roberts, C.J., dissenting).

escaping that today's decision will undermine numerous convictions obtained by the State, as well as the State's ability to prosecute serious crimes committed in the future."¹¹⁸ The Chief Justice also took issue with each of the majority's attempts to downplay the consequences of the decision.¹¹⁹ He regarded the fact that the federal government could hypothetically reprosecute the various crimes as small consolation for Oklahoma and the victims of the crimes.¹²⁰ Federal jurisdiction to reprosecute the crimes would not mean much if statutes of limitations had passed¹²¹ or evidence had grown stale.¹²² The Chief Justice also scoffed at the suggestion that procedural obstacles could staunch the flow of habeas petitions because, under Oklahoma law, "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal."¹²³

Justice Thomas dissented on separate grounds.¹²⁴ He agreed with the Chief Justice that the Muscogee Reservation had been disestablished at statehood.¹²⁵ However, he also indicated that the Supreme Court lacked jurisdiction to review the state court's denial of relief to McGirt in the first place because the OCCA had "concluded that petitioner's claim was procedurally barred."¹²⁶ He argued that even the state court had gotten its own law wrong on this point—whether claims invoking jurisdiction are subject to the state's usual bars on post-conviction applications—the Supreme Court could not inquire into the "background principles of Oklahoma law[.]"¹²⁷ According to Justice Thomas, such an adequate and independent state procedural bar applied by the state court should have ended the inquiry.¹²⁸

II. THE POST-MCGIRT HABEAS LANDSCAPE

We now stand over a year out from the Court's decision in *McGirt*. Petitions invoking *McGirt* have been filed in state and federal courts, allowing for the assessment of the decision's habeas implications. To frame this discussion, this Part first provides a brief background on the process involved for seeking post-conviction collateral relief in federal and

118. *Id.* at 2501.

119. *Id.*

120. *See id.* at 2500–01.

121. Under federal law, "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282. This means that death penalty eligible crimes, like murder, have no statute of limitations. *See id.* § 3281; *see also id.* § 1111(b) (making murder in the first degree a capital offense); *id.* § 3591 (defining death penalty eligible crimes). Federal law does extend the statute of limitations for some crimes. *See, e.g., id.* § 3295 (arson—10 years); *id.* § 3283 (certain offenses involving minors—no time limit).

122. *McGirt*, 140 S. Ct. at 2501 (Roberts C.J., dissenting).

123. *See id.* at 2501 n.9 (quoting *Murphy v. Royal*, 875 F.3d 896, 907 n.5 (10th Cir. 2017)).

124. *Id.* at 2502 (Thomas, J., dissenting).

125. *Id.*

126. *Id.* at 2503.

127. *Id.* (citing *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)).

128. *Id.*

Oklahoma courts. It then describes how these petitions have been treated in both federal and state courts.

A. Subject Matter Jurisdiction

Before describing the federal and state systems for bringing post-conviction challenges to a conviction, it is worth making explicit the basis for all post-*McGirt* habeas petitions: the convicting court lacked subject matter jurisdiction.¹²⁹ Subject matter jurisdiction is ordinarily a limit on federal courts because state courts are courts of general jurisdiction.¹³⁰ But the Supreme Court has made clear that subject matter jurisdiction has no such boundaries: “Subject-matter jurisdiction properly comprehended . . . refers to a tribunal’s ‘power to hear a case[.]’”¹³¹

Because subject matter jurisdiction implicates a court’s power to hear a case in the first instance, the Supreme Court has concluded that subject matter jurisdiction is “a matter that ‘can never be forfeited or waived.’”¹³² As Professor Paul Bator explained in his influential article on habeas corpus, “[I]n our federal-state context, it would be appropriate for the federal habeas court to deny conclusive effect to a state judgment of conviction *where the state is made wholly incompetent by federal law* to deal with the case.”¹³³ Here, courts have interpreted the MCA and ICCA to provide federal courts with exclusive jurisdiction over a number of crimes committed by or against Indians in Indian Country.¹³⁴ State courts lack subject matter jurisdiction—that is, they lack the power—to hear cases involving such crimes.¹³⁵

Both Oklahoma and the Tenth Circuit recognize lack of subject matter jurisdiction as a basis for post-conviction relief.¹³⁶ Oklahoma law explicitly enumerates lack of subject matter jurisdiction as a basis for relief.¹³⁷ And the Tenth Circuit has explained that “[a]bsence of jurisdiction in the convicting court is indeed a basis for federal habeas corpus relief

129. See, e.g., *Bosse v. State*, 484 P.3d 286, 299 (Okla. Crim. App. 2021) (Lewis, J., concurring), *vacated*, 495 P.3d 669 (2021).

130. See WRIGHT & MILLER, COURTS OF LIMITED JURISDICTION § 3522 (3d ed. 2021) (“It is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction. Most state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary.”).

131. *Union Pac. R.R. v. Brotherhood of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006)).

132. *Id.* (quoting *Arbaugh*, 546 U.S. at 515).

133. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 461 (1963) (emphasis added).

134. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2499 (2020).

135. As a matter of state law, Oklahoma’s courts have certainly treated the federal government’s exclusive jurisdiction over the MCA and ICCA as implicating subject matter jurisdiction. See, e.g., *Magnan v. State*, 207 P.3d 397, 402 (Okla. Crim. App. 2009).

136. See OKLA. STAT. tit. 22, § 1080(b) (2021); *Yellowbear v. Wyo. Atty. Gen.*, 525 F.3d 921, 924 (10th Cir. 2008).

137. See OKLA. STAT. tit. 22, § 1080(b) (2021).

cognizable under the due process clause.”¹³⁸ In theory, prisoners should be able to proceed in either state or federal courts based on such a claim.

B. Federal and State Habeas Processes

Federal habeas doctrine seeks to strike a delicate balance between correcting injustices and respecting finality in criminal law.¹³⁹ The common rationale is that individuals improperly convicted of a crime should not be left to languish in prison.¹⁴⁰ And yet, criminal proceedings involve a great deal of time, expense, and effort.¹⁴¹ As a result, courts operate under the presumption that the proceedings were correct to avoid having to redo them time and again.¹⁴²

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs contemporary federal collateral review of state convictions.¹⁴³ AEDPA authorizes federal courts to consider petitions for habeas corpus on “behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”¹⁴⁴ Such petitions by state court prisoners are brought under 28 U.S.C. § 2254.¹⁴⁵

But state prisoners cannot simply go to federal court whenever they please to seek relief from what they believe to be an unjust conviction.¹⁴⁶ By the time state prisoners bring a § 2254 habeas petition in federal court, their claims have likely already been heard through direct appeals and one round of collateral review before state courts.¹⁴⁷ Congress recognized and respected the role of state courts in the collateral review process in the drafting of AEDPA.¹⁴⁸ For instance, under AEDPA, federal courts cannot grant relief on a petition unless “the applicant has exhausted the remedies available in the courts of the State. . . .”¹⁴⁹ In other words, if the prisoner

138. *Yellowbear*, 525 F.3d at 924.

139. *See House v. Bell*, 547 U.S. 518, 536 (2006).

140. *See Fay v. Noia*, 372 U.S. 391, 441 (1963), *overruled by* *Wainwright v. Sykes*, 433 U.S. 72 (1977) (“Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison.”).

141. *See, e.g., Bator*, *supra* note 133, at 451 (explaining that finality, is driven, at least in part, by “conservation of resources”).

142. *See Prost v. Anderson*, 636 F.3d 578, 582 (10th Cir. 2011) (“The principle of finality, the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination, ‘is essential to the operation of our criminal justice system.’”) (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)).

143. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1566–73 (2021) (Gorsuch, J., concurring) (describing the evolution of “The Great Writ” from being a means for testing the jurisdiction of the convicting court, to a process for challenging all manner of constitutional infirmities in criminal proceedings).

144. 28 U.S.C. § 2254.

145. *Id.*

146. *Id.* § 2254(b).

147. *Id.* (requiring exhaustion of federal claims before state courts).

148. *See id.* § 2254(b)–(d); *see also Edwards*, 141 S. Ct. at 1564 (Thomas, J., concurring) (explaining how AEDPA’s procedural restrictions on habeas petitions guarantee that state courts primarily adjudicate the claims).

149. 28 U.S.C. § 2254(b)(1)(A).

did not first present the claim in post-conviction review made available by the state, the federal court will not consider it.¹⁵⁰

Likewise, federal courts must give particular deference to state court denials of collateral relief.¹⁵¹ Federal courts will not consider a habeas petitioner's claims if the petitioner "failed to meet the State's procedural requirements for presenting his federal claims."¹⁵² Federal courts lack the ability to second-guess habeas petitions that have been resolved via an "independent and adequate state procedural rule."¹⁵³ Thus, a federal court must always determine why a state court denied a petitioner post-collateral relief to ensure the claims are not procedurally defaulted.¹⁵⁴ And if a state court denied a prisoner's application for collateral relief on the merits, the federal court must give deference to that decision.¹⁵⁵ A federal court cannot grant a petition from that state prisoner unless the state court made "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or made "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."¹⁵⁶

State prisoners petitioning for federal habeas relief also must comply with AEDPA's statute of limitations.¹⁵⁷ AEDPA lists four occurrences that trigger a one-year clock for bringing a petition for federal habeas relief: (1) the date on which direct review ended and the conviction became final; (2) if the state prevented the filing of an application, the date on which that impediment was removed; (3) the date on which a new constitutional right was recognized by the Supreme Court and made retroactively applicable; or (4) the date on which the facts underlying the claim could have been discovered through due diligence.¹⁵⁸ The clock starts running from the latest of these dates.¹⁵⁹ So, for example, even if a prisoner's conviction became final years before, the petition can still be timely under AEDPA if the Supreme Court later recognizes and makes retroactive a new constitutional right.¹⁶⁰ Furthermore, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect

150. AEDPA does away with the exhaustion requirement if "there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." *Id.* § 2254(b)(1)(B)(i)-(ii).

151. *See Edwards*, 141 S. Ct. at 1564-65 (Thomas, J., concurring).

152. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

153. *Id.* at 750.

154. In limited instances, federal courts will overlook a procedural default and evaluate a petitioner's claims on the merits. *See House v. Bell*, 547 U.S. 518, 536 (2006) (describing the "cause and prejudice" and "miscarriage of justice" exceptions to the general bar on considering procedurally defaulted claims for habeas relief).

155. 28 U.S.C. § 2254(d).

156. *Id.*

157. *Id.* § 2244(d).

158. *See id.* § 2244(d)(1)(A)-(D).

159. *Id.* § 2244(d)(1).

160. *Id.* § 2244(d)(1)(C).

to the pertinent judgment or claim is pending shall not be counted toward any period of limitation”¹⁶¹

Finally, under 28 U.S.C. § 2244(b), the road to relief becomes even narrower if a state prisoner has already filed a previous federal habeas petition.¹⁶² Under AEDPA, a federal court generally must dismiss claims made in a “second or successive habeas corpus application under section 2254.”¹⁶³ If the petitioner already brought the claims in a previous application, the federal court cannot consider them.¹⁶⁴ If the claims were not brought in a previous application, the federal court can consider them only in one of two instances: (1) “the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[;]” or (2) if previously unattainable facts become known that could establish the petitioner’s innocence by clear and convincing evidence.¹⁶⁵ Even if the successive petition falls within one of these exceptions, the petitioner must also get approval from a circuit court before a federal district court can consider the merits of the claims.¹⁶⁶

Aside from the statutory requirements of AEDPA, the Supreme Court has made clear that its invalidation of one prisoner’s conviction does not automatically invalidate convictions for all prisoners with final judgments who may raise similar claims.¹⁶⁷ In *Teague v. Lane*,¹⁶⁸ the Supreme Court explained that even if the Court announces a rule that invalidates a conviction, other prisoners who may have suffered from the same error may not be able to benefit from that rule.¹⁶⁹ Concerns about finality led the Court to adopt a rule limiting the retroactive effect of new rules it announces:

A new rule of criminal procedure applies to cases on direct review, even if the defendant’s trial has already concluded. But under the habeas corpus statute as interpreted by this Court, a new rule of criminal procedure ordinarily does not apply retroactively to overturn final convictions on federal collateral review.¹⁷⁰

161. *Id.* § 2244(d)(2). The Supreme Court has also recognized that § 2244(d) “is subject to equitable tolling in appropriate cases.” *Holland v. Florida*, 560 U.S. 631, 645 (2010).

162. 28 U.S.C. § 2244(b).

163. *Id.* § 2244(b)(1)–(2), (4).

164. *Id.* § 2244(b)(1)–(2).

165. *See id.* § 2244(b)(2).

166. *Id.* § 2244(b)(3).

167. *See Teague v. Lane*, 489 U.S. 288, 310 (1989) (“Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”).

168. 489 U.S. 288 (1989).

169. *Id.* at 310.

170. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphases omitted) (internal citation omitted).

To determine whether a rule announced by the Supreme Court applies retroactively requires several steps.¹⁷¹ First, courts must determine whether a rule is “new.” A rule is new if it was not dictated by precedent that existed at the time the defendant’s conviction became final.¹⁷² If the rule is considered new, courts proceed to the second step. In step two, courts must determine whether the new rule is substantive or procedural.¹⁷³ A substantive rule is one that “alter[s] the range of conduct or the class of persons that the law punishes.”¹⁷⁴ By contrast, “procedural rules alter ‘only the manner of determining the defendant’s culpability.’”¹⁷⁵ If the rule is new and procedural, it will not apply retroactively.¹⁷⁶ Though the Court decided *Teague* before AEDPA was passed—meaning AEDPA now governs the application of habeas—the Supreme Court has since indicated that Congress codified *Teague*’s retroactivity rule in AEDPA.¹⁷⁷

As the foregoing discussion makes clear, federal habeas does not exist separate from state proceedings. Thus, to fully understand how federal courts approach petitions for habeas relief, one must understand the underlying state procedures. Because the *McGirt* claims all arise within the context of Oklahoma, they are governed by Oklahoma’s post-conviction relief laws.¹⁷⁸

Oklahoma, like the federal government, provides a procedure for state prisoners to seek collateral review after being convicted and exhausting their direct appeals.¹⁷⁹ An Oklahoma statute provides that “[a]ny person who has been convicted of, or sentenced for, a crime . . . 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.”¹⁸⁰ A prisoner bringing such a claim must allege, as relevant here, that the conviction or sentence violated the U.S. Constitution or Oklahoma law, that the court that imposed the sentence lacked jurisdiction, or that the prisoner is for some other reason unlawfully held in custody or other restraint.¹⁸¹

171. *Id.* at 1555.

172. *Id.*

173. *See* *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). Up until recently, the Supreme Court had left open the possibility that a newly recognized “watershed” rule of criminal procedure would apply retroactively. *See* *Edwards*, 141 S. Ct. at 1555 (citing *Teague v. Lane*, 489 U.S. 288, 311 (1989)). The Court made clear in *Edwards*, though, that there are no watershed rules left to be discovered that would apply retroactively. *Id.* at 1560.

174. *Edwards*, 141 S. Ct. at 1562 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (internal quotation marks omitted).

175. *Id.* (quoting *Schriro*, 542 U.S. at 353).

176. *Id.*

177. *See* *Williams v. Taylor*, 529 U.S. 362, 380 (2000) (“It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.”).

178. *See* OKLA. STAT. tit. 22, § 1080 (2021).

179. *Id.*

180. *Id.* Also, in addition to applications for post-conviction relief governed by § 1080, Oklahoma law has a separate law specifically for habeas corpus. *See id.* § 1331 (“Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of restraint, and shall be delivered therefrom when illegal.”).

181. *Id.* § 1080(a)–(f).

As with federal habeas corpus, state prisoners seeking post-conviction relief in Oklahoma must adhere to certain procedures when presenting their claims.¹⁸² For instance, when a prisoner first files an application for post-conviction relief, any “[i]ssues that were previously raised and ruled upon by [the OCCA] are procedurally barred from further review under the doctrine of *res judicata*; and issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review.”¹⁸³ Furthermore, where it is clear that a petitioner knew of a potential avenue for relief but did not diligently pursue it, the doctrine of laches might prohibit post-conviction relief.¹⁸⁴

Oklahoma law is also more stringent for those prisoners filing subsequent applications for relief.¹⁸⁵ Prisoners must raise all potential claims in their “original, supplemental or amended application[s]” for post-conviction relief.¹⁸⁶ If a claim is not included in the initial application, the prisoner is likely out of luck—Oklahoma law makes clear that “[a]ny ground [for relief] finally adjudicated or not [raised in the initial application], or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application”¹⁸⁷ This bar on subsequent applications is lifted only if “the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.”¹⁸⁸

A separate set of procedural rules apply to Oklahoma state prisoners sentenced to death.¹⁸⁹ Oklahoma limits post-conviction applications from such prisoners to issues that “[w]ere not and could not have been raised in a direct appeal” and that “[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.”¹⁹⁰ Applications must be submitted within ninety days of the filing of any answer or reply brief entered on direct appeal (whichever is later).¹⁹¹ And any successive applications must be filed within sixty days “from the date the previously unavailable legal or factual

182. See generally *Mayes v. State*, 921 P.2d 367, 370 (Okla. Crim. App. 1996) (discussing limits on post-conviction claims).

183. *Stevens v. State*, 422 P.3d 741, 745–46 (Okla. Crim. App. 2018) (citing OKLA. STAT. tit. 22, § 1086).

184. See *Paxton v. State*, 903 P.2d 325, 327 (Okla. Crim. App. 1995) (“Thus, the doctrine of laches may prohibit the consideration of an application for post-conviction relief where a petitioner has forfeited that right through his own inaction. Further, we wish to emphasize that the applicability of the doctrine of laches necessarily turns on the facts of each particular case.”).

185. See OKLA. STAT. tit. 22, § 1086 (2021).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* § 1089.

190. *Id.* § 1089(C)(1)–(2).

191. *Id.* § 1089(D)(1).

basis serving as the basis for [the] new issue is announced or discovered.”¹⁹²

Like federal courts, Oklahoma courts will generally not retroactively apply newly announced procedural rules.¹⁹³ Oklahoma recognizes the same exceptions as federal courts to this bar on retroactive application.¹⁹⁴

In short, the path to collateral relief for a prisoner convicted in Oklahoma state court is long, arduous, and technical. The prisoner must bring their claim in the correct way.¹⁹⁵ After being convicted and using a state direct appeal process, the prisoner must exhaust any available state post-conviction procedures before coming to federal court.¹⁹⁶ All the while, prisoners must ensure they abide by state procedural requirements so that their claims are not procedurally defaulted if they go to federal court.¹⁹⁷ They also must ensure they bring the right kind of claim—prisoners cannot base their claims for post-conviction relief on new rules of criminal procedure.¹⁹⁸ There are many reasons both federal and state courts could dismiss applications for post-conviction relief without ever reaching the merits of the claims.¹⁹⁹

These various procedural rules at the state and federal levels appear to be why the *McGirt* majority felt comfortable speculating that defendants seeking to challenge their state court convictions would face prohibitive state and federal procedural obstacles.²⁰⁰ There are now enough state and federal cases to assess how these well-known limitations have functioned for claims for post-conviction relief invoking *McGirt* and *Murphy*.

C. Federal Courts

Since the Tenth Circuit decided *Murphy* in 2017, Oklahoma’s federal district courts have seen a steady stream of § 2254 habeas petitions based on claims that crimes were committed in Indian Country.²⁰¹ *McGirt* has only sped up this trend.²⁰² As of August 2021, federal courts have ruled on forty-nine § 2254 habeas petitions from Oklahoma state prisoners invoking *Murphy* and *McGirt*.²⁰³ Of these, only one petitioner has had his

192. *Id.* at R. 9.7(G)(3).

193. *Ferrell v. State*, 902 P.2d 1113, 1114–15 (Okla. Crim. App. 1995).

194. *See id.*

195. *See* OKLA. STAT. tit. 22, § 1089 (1987).

196. 28 U.S.C. § 2254(b).

197. *See* *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

198. *See* *Teague v. Lane*, 489 U.S. 288, 310 (1989).

199. *See supra* Section II.B (discussing various procedural restrictions on applications for post-conviction relief).

200. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 (2020).

201. *See infra* Appendix I. This Article has categorized the cases based upon each court’s primary reasoning for its outcome. In many of the cases, the court gave other reasons in the alternative that it could have dismissed or denied the habeas petitions.

202. *Id.*

203. *Id.*

petition granted and conviction overturned.²⁰⁴ The rest have been dismissed primarily for procedural reasons.²⁰⁵ This Section briefly describes the different approaches federal courts have taken to dispose of habeas petitions invoking *McGirt* and *Murphy*.

Federal courts dismissed twelve of the forty-nine cases for not complying with the requirement for second or successive habeas petitions under § 2244(b).²⁰⁶ Many of the state prisoners invoking *McGirt* to invalidate their convictions had been in state prison for a long time and had previously filed at least one federal habeas petition.²⁰⁷ This made the path to federal habeas relief narrower for them.²⁰⁸ Recall that courts consider new claims in a second or successive habeas petition in only limited situations.²⁰⁹ Specifically, prisoners must base successive petitions either on a new rule of constitutional law that the Supreme Court has made retroactive or on facts that could not have been previously known.²¹⁰

The Tenth Circuit concluded that neither of these exceptions apply to claims based on *Murphy* or *McGirt*.²¹¹ Soon after deciding *Murphy*, the Tenth Circuit was confronted with a habeas petition from a state prisoner who alleged the state court lacked jurisdiction to try and punish him because he had committed his crimes on an Indian reservation.²¹² The prisoner filed his first federal habeas petition in 2002.²¹³ The petitioner argued his new petition was not second or successive under § 2244(b) because “a jurisdictional claim [could] be brought at any time and [could not] be waived or forfeited.”²¹⁴ The Tenth Circuit disagreed.²¹⁵ It explained that lack of jurisdiction was not one of the enumerated exceptions to § 2244(b)’s bar on considering successive petitions.²¹⁶ The facts underlying the claim could have been discovered prior to the *Murphy* and *McGirt* decisions: “Nothing prevented [the petitioner] from asserting in his first § 2254 application a claim that the Oklahoma state court lacked jurisdiction because the crime he committed occurred in Indian Country.”²¹⁷ Thus,

204. See *Deerleader v. Crow*, No. 20-CV-0172-JED-CDL, 2021 WL 150014, at *1 (N.D. Okla. Jan. 15, 2021).

205. See *infra* Appendix I.

206. *Id.*

207. See, e.g., *Tripp v. Whitten*, CIV-20-965-SLP, 2020 WL 7865721, at *1 (W.D. Okla. Nov. 16, 2020) (explaining defendant had pleaded guilty in 2005 and already filed a federal habeas petition).

208. See 28 U.S.C. § 2244(b), (d).

209. See *id.* § 2244(b).

210. *Id.* § 2244(b)(2)(A)–(B).

211. See *Dopp v. Martin*, 750 F. App’x 754, 757 (10th Cir. 2018) (explaining there is no subject matter jurisdiction for second or successive habeas petitions).

212. *Id.* at 756.

213. *Id.* at 755.

214. *Id.* at 756.

215. *Id.*

216. *Id.* at 756–57 (citing *Prost v. Anderson*, 636 F.3d 578, 592 (2011)); see also *In re Cline*, 531 F.3d 1249, 1253 (10th Cir. 2008) (dismissing petition as second, or successive, when the petitioner raised the claim that the trial court lacked jurisdiction over him).

217. *Dopp*, 750 F. App’x at 757.

the court denied his petition.²¹⁸ Elsewhere, the Tenth Circuit concluded the other exception for successive habeas petitions—namely, the recognition of a new, retroactive rule of constitutional law by the Supreme Court—also should not apply because *McGirt* was decided based on precedent and statutory interpretation, not the Constitution.²¹⁹

Seventeen of the forty-nine petitions have been dismissed based on AEDPA's one-year statute of limitations.²²⁰ As indicated above, convictions for many of the state prisoners invoking *McGirt* and *Murphy* became final years ago.²²¹ This means that AEDPA's one-year statute of limitations will likely have passed unless a petitioner can establish that the statute of limitations should run from a later date, such as the date on which a new constitutional right was recognized by the Supreme Court or the date on which the factual predicates for the habeas claim could have been discovered.²²²

As with successive habeas petitions, federal courts have not relaxed the one-year statute of limitations for habeas claims asserting that the trial court lacked jurisdiction.²²³ Oklahoma's federal district courts have concluded that "the *McGirt* Court did not recognize any new constitutional rights when it determined that Congress did not disestablish the Muscogee Creek Nation Reservation."²²⁴ Alternatively, courts should restart the clock from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."²²⁵ But, according to the federal courts that have considered this issue, a petitioner invoking *McGirt* or *Murphy* already "knew the factual predicate for his jurisdictional claim—i.e., the location of his crimes and his status at as a tribal member"—before the cases were decided.²²⁶ Thus, it makes no difference that a petitioner "did not understand the legal

218. District courts to consider this same issue have also determined lack of jurisdiction is not an exception to the bar on courts considering second or successive habeas applications. *See, e.g.*, Barnett v. Fed. Bureau of Prisons, No. CIV-20-00757-JD, 2021 WL 325716, at *3 (W.D. Okla. Feb. 1, 2021); Hunter v. Pettigrew, No. 20-CV-0367-TCK-JFJ, 2021 WL 1873460, at *3 n.3 (N.D. Okla. Apr. 21, 2021).

219. *See In re Morgan*, No. 20-6123, 4 (10th Cir. Sept. 18, 2020) ("In other words, the Court cited well-established precedent and reviewed Congressional action to determine whether a federal statute applied. That hardly speaks of a 'new rule of constitutional law[.]'; *see also id.* ("[E]ven if *McGirt* did present a new rule of constitutional law, the Court did not explicitly make its decision retroactive.").

220. *See infra* Appendix 1.

221. *See, e.g.*, Barbre v. Whitten, No. CIV-18-259-RAW-KEW, 2020 WL 3976518, at *1–2 (E.D. Okla. Aug. 22, 2019) (regarding petition as untimely because plaintiff had pleaded guilty in 2016 and had not subsequently challenged his plea in state court).

222. *See* 28 U.S.C. § 2244(d)(1)(C)–(D).

223. *See Cole v. Pettigrew*, No. 20-CV-0459-JED-CDL, 2021 WL 1535364, at *2 n.4 (N.D. Okla. Apr. 19, 2021) ("[T]he plain language of § 2244(d)(1)'s one-year statute of limitations makes no exception for claims challenging subject-matter jurisdiction.").

224. *See Berry v. Braggs*, No. 19-CV-0706-GKF-FHM, 2020 WL 6205849, at *7 (N.D. Okla. Oct. 22, 2020).

225. 28 U.S.C. § 2244(d)(1)(D).

226. *Seals v. Smith*, No. CIV-19-1069-D, 2020 WL 6038760, at *4 (W.D. Okla. June 4, 2020) (quoting *Jackson v. Bryant*, No. CIV-18-616-R, 2019 WL 3884872, at *2 (W.D. Okla. July 23, 2019)).

significance of those facts until he learned of the *Murphy* decision.”²²⁷ Accordingly, the federal courts have measured the statute of limitations from the date of final judgment, not a later date based on *McGirt* or *Murphy*.²²⁸

Still, courts have dismissed another sixteen of the forty-nine petitions because the *McGirt* claims had not been exhausted before a state court.²²⁹ Under § 2254(b), a federal court can consider a state prisoner’s habeas petition only once the prisoner has exhausted each claim for post-conviction relief in state court.²³⁰ The federal courts have made clear that *McGirt* and its jurisdictional ruling do not represent an exception to this state exhaustion requirement.²³¹ According to the federal courts, petitioners still must go through Oklahoma state courts before going to federal court, even if the state court never had jurisdiction to try and punish the petitioner in the first place.²³²

Only one of the remaining four petitions succeeded.²³³ In *Deerleader v. Crow*,²³⁴ the petitioner was able to run the procedural gauntlet and have the court consider his petition on the merits.²³⁵ Because the evidence demonstrated that the petitioner was an Indian and was on the Muscogee Reservation at the time he committed his crimes, the Oklahoma state courts lacked jurisdiction to try and punish him.²³⁶ Given this jurisdictional infirmity, the district court “grant[ed] the petition for writ of habeas corpus . . . and issue[d] an unconditional writ setting aside the invalid judgment and sentence, barring retrial in state court on the underlying charges, and directing [the warden] to immediately release Deerleader from state custody.”²³⁷ Deerleader’s successful petition has been the exception, not the rule.²³⁸

227. *Id.*

228. *See Berry*, 2020 WL 6205849, at *7.

229. *See infra* Appendix 1.

230. 28 U.S.C. § 2254(b).

231. *See Largent v. Nunn*, No. CIV-20-683-J, 2020 WL 6734673, at *2 (W.D. Okla. Oct. 20, 2020) (“[T]he Section 2254 exhaustion requirement contains no exception for jurisdictional claims.”).

232. *See, e.g., id.*

233. The other three were either denied on the merits or based upon some other procedural rule. *See Woods v. Nunn*, No. CIV-21-237-G, 2021 WL 2125527, at *2–3 (W.D. Okla. Apr. 28, 2021) (report and recommendation); *Woods v. Nunn*, No. CIV-21-237-G, 2021 WL 2117910 (W.D. Okla. May 25, 2021) (adopting report and recommendation and dismissing habeas petition because the petitioner had failed to allege he or his victims were Indian); *White v. Crow*, No. 20-5106, 2021 WL 1259391, at *3 n.3 (10th Cir. April 26, 2021) (denying a certificate of appealability) (“Mr. White does not identify, and we have not found, any evidence in the record suggesting he is an Indian.”); *Kirk v. Oklahoma*, No. CIV-21-164-J, 2021 WL 1316075, at *2 (W.D. Okla. Apr. 8, 2021) (dismissing *McGirt* habeas claim for failure to raise it before the magistrate).

234. No. 20-CV-0172-JED-CDL, 2021 WL 150014 (N.D. Okla. Jan. 15, 2021).

235. *Id.* at *5.

236. *Id.*

237. *Id.*

238. *See infra* Appendix 1.

D. State Courts

Oklahoma state prisoners have had more, albeit fleeting, success in state court.²³⁹ Thus far, the OCCA has decided nine post-conviction cases in which the state prisoner invoked *McGirt*.²⁴⁰ The OCCA granted the application for relief in each of the first eight cases.²⁴¹ In the ninth, it denied the petition and overruled the prior eight.²⁴² With this about-face from the OCCA, the majority's prediction in *McGirt* that procedural obstacles would prevent post-conviction relief for the masses has now been vindicated.²⁴³ This Section briefly describes how the OCCA performed a 180-degree turn months into litigation on this issue.

The first post-conviction case relying on *McGirt* the OCCA considered was *Bosse v. State*.²⁴⁴ In 2010, Shaun Michael Bosse—a non-Indian—was convicted in Oklahoma state court of three counts of first degree murder and one count of first degree arson.²⁴⁵ A jury sentenced him to death.²⁴⁶ Bosse invoked *McGirt* in his application for post-conviction relief, arguing that the state court lacked jurisdiction to try and punish him because he committed his crimes against members of the Chickasaw Nation within the boundaries of the Chickasaw Reservation.²⁴⁷

The court determined that Bosse's claim had merit.²⁴⁸ The court found the conditions for exclusive federal jurisdiction—that a qualifying crime was committed by or against an Indian in Indian Country—was satisfied in Bosse's case.²⁴⁹

First, the OCCA addressed the status of Bosse and his victims.²⁵⁰ Bosse is not an Indian.²⁵¹ But, before the lower court, the parties stipulated that all three of Bosse's victims were enrolled members of the Chickasaw Nation.²⁵² Based on this stipulation, “[t]he District Court concluded as a

239. See *infra* Appendix 2.

240. See *infra* Appendix 2. The OCCA has also rejected a *McGirt* claim on a direct appeal. See *Parker v. State*, No. F-2019-247, 2021 WL 30009985, at *7–11 (Okla. July 15, 2021) (rejecting defendant's claim that the state court lacked jurisdiction to prosecute him because defendant could not prove Indian status). Elsewhere, Oklahoma has said that “courts have so far dismissed or vacated convictions in 129 felony cases because of *McGirt*.” Annie Gowen & Robert Barnes, ‘*Complete, Dysfunctional Chaos*’: Oklahoma Reels After Supreme Court Ruling on Indian Tribes, WASH. POST (July 24, 2021), https://www.washingtonpost.com/national/complete-dysfunctional-chaos-oklahoma-reels-after-supreme-court-ruling-on-indian-tribes/2021/07/23/99ba0b80-ea75-11eb-8950-d73b3e93ff7f_story.html (last visited Dec. 21, 2021). For purposes of this Article, only those opinions published by the OCCA are included.

241. See *infra* Appendix 2.

242. See *State ex rel. Matloff v. Wallace*, No. PR-2021-366, 2021 WL 3578089 (Okla. Crim. App. Aug. 12, 2021).

243. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 (2020).

244. 484 P.3d 286 (Okla. Crim. App. 2021), *withdrawn*, 495 P.3d 669 (Okla. Crim. App. 2021).

245. *Id.* at 288.

246. *Id.*

247. *Id.*

248. *Id.* at 291.

249. *Id.*

250. *Id.* at 289.

251. Application to Stay Mandate, *supra* note 91, at 4.

252. *Bosse*, 484 P.3d at 289.

matter of law that all three victims had some Indian blood and were recognized as Indian by a tribe or the federal government.”²⁵³ The OCCA adopted these findings and conclusions, meaning that one of the conditions for exclusive federal jurisdiction—Indian status—had been met.²⁵⁴

Second, the court dealt with the status of the land on which Bosse committed the crimes.²⁵⁵ The OCCA explained that diminishment of a reservation must be assessed on the specific statutes and treaties “concerning relations between the United States and a tribe.”²⁵⁶ But the Chickasaw Nation shares a similar history with the Muscogee Nation.²⁵⁷ Thus, relying heavily on the Supreme Court’s reasoning in *McGirt*, “the District Court concluded that Congress never erased the boundaries and disestablished the Chickasaw Nation Reservation.”²⁵⁸ Having found the boundaries of the reservation extant, the district court determined that Bosse committed his crimes on the reservation.²⁵⁹ The OCCA also adopted these findings and conclusions.²⁶⁰

Even though Oklahoma state courts did not have jurisdiction to try Bosse in the first place, Bosse also had to prove that no procedural barriers prevented the court from considering the merits of his claim.²⁶¹ Oklahoma argued his *McGirt* claim was late, had been waived, and was barred under the doctrine of laches.²⁶² If any of these procedural barriers applied, it would have been enough to end Bosse’s claim for post-conviction relief.²⁶³

The OCCA disagreed with Oklahoma.²⁶⁴ None of the procedural barriers prevented the court from considering Bosse’s claims based on *McGirt*.²⁶⁵ The OCCA explained that “the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction.”²⁶⁶ Because Bosse argued the state courts that prosecuted him lacked jurisdiction to do so in the first place, the OCCA concluded that “[n]o procedural bar applies, and this issue is properly before us.”²⁶⁷ Without any procedural obstacles in the way, the OCCA granted Bosse’s

253. *Id.*

254. *Id.* at 289–91.

255. *Id.*

256. *Id.* at 289.

257. *Id.* at 291.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 293–94.

262. *Id.* at 293.

263. See OKLA. STAT. tit. 22, § 1089 (2021).

264. *Bosse*, 484 P.3d at 293–94.

265. *Id.*

266. *Id.* (first citing *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010); then citing *Wallace v. State* 935 P.2d 366, 372 (Okla. Crim. App. 1997); and then citing *Murphy v. State*, 124 P.3d 1198, 1200 (Okla. Crim. App. 2005)).

267. *Id.* at 288, 294.

application for post-conviction relief.²⁶⁸ Seven subsequent cases followed the same reasoning.²⁶⁹

But about five months after the *Bosse* decision, the OCCA used a different tactic in *State ex rel. Matloff v. Wallace*.²⁷⁰ There, an Oklahoma district court judge granted relief to another prisoner based on *McGirt*, again concluding that “defects in subject matter jurisdiction can never be waived[.]”²⁷¹ The state, however, sought a writ of prohibition from the OCCA to vacate the lower court’s order granting post-conviction relief.²⁷² Despite granting relief to the eight prior prisoners who had come before the court with *McGirt* claims, the OCCA reversed the lower court’s grant of post-conviction relief.²⁷³

In doing so, the OCCA departed from its prior reasoning, relying heavily on the Oklahoma state law principle that “new rules generally do not apply retroactively to convictions that are final”²⁷⁴ The OCCA recognized that the state’s retroactivity bar is heavily informed by the Supreme Court’s decision *Teague*.²⁷⁵ The OCCA explained:

Just as *Teague*’s doctrine of non-retroactivity ‘was an exercise of [the Supreme Court’s] power to interpret the federal habeas statute,’ we have barred state post-conviction relief on new procedural rules as part of our independent authority to interpret the remedial scope of state post-conviction statutes.²⁷⁶

While the OCCA had not contemplated this rule in the prior *McGirt* cases, the court explained that it had been acting “without [its] attention ever having been drawn to the potential non-retroactivity of *McGirt*”²⁷⁷ The State came back to the OCCA, having discovered

268. Following the OCCA’s decision in *Bosse*, Oklahoma filed and the Supreme Court granted a motion for an emergency stay of the OCCA’s mandate. See *Oklahoma v. Bosse*, 141 S. Ct. 2696 (2021). The stay lasts until the Supreme Court either denies Oklahoma’s forthcoming petition for certiorari in the case or until the Supreme Court disposes of the case on the merits. *Id.* The application for the stay raised two primary questions: (1) whether the OCCA improperly relied on federal law when deciding that claims invoking subject matter jurisdiction cannot be waived and (2) whether concurrent state-federal jurisdiction is available for crimes committed by non-Indians against Indians on reservations. See Application to Stay Mandate, *supra* note 91, at 4. The U.S. Supreme Court has not taken action in *Bosse* but has since granted certiorari in a different case to address the second question. See *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. Apr. 29, 2021), *cert. granted*, *Oklahoma v. Castro-Huerta*, 90 U.S.L.W. 3220 (U.S. Jan. 21, 2022) (No. 21-429). The Court opted not to consider whether to overrule *McGirt* altogether. See *id.*; see also Petition for Writ of Certiorari, *Oklahoma v. Castro-Huerta*, 2021 U.S. S.C.T. BRIEFS LEXIS 2696 (Sept. 17, 2021) (No. 21429).

269. See *infra* Appendix 2.

270. See *State ex rel. Matloff v. Wallace*, No. PR-2021-366, 2021 WL 3578089 (Okla. Crim. App. Aug. 12, 2021).

271. *Id.* at *1.

272. *Id.*

273. *Id.* at *2.

274. *Id.*

275. *Id.* at *2–3 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

276. *Id.* at *3 (internal citations omitted) (alterations in original) (quoting *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008)).

277. *Id.*

United States v. Cuch,²⁷⁸ a Tenth Circuit case in which the court concluded that reservation boundaries changes should not be applied retroactively to invalidate prior convictions.²⁷⁹

In *Cuch*, federal prisoners challenged their convictions on the grounds that the federal courts that tried and convicted them lacked jurisdiction to do so.²⁸⁰ The prisoners committed their crimes on land then thought to be part of the Uintah Reservation.²⁸¹ But following the prisoners' convictions, the Supreme Court in *Hagen v. Utah* "declared that the lands in question were not part of the Uintah Reservation."²⁸² Thus, the prisoners argued that "the state of Utah, not the federal government, had jurisdiction over crimes committed in the disputed area."²⁸³

A panel of the Tenth Circuit rejected this argument from the federal prisoners.²⁸⁴ Even though the prisoners' habeas petitions implicated the convicting court's subject matter jurisdiction, the panel explained, "The Supreme Court can and does limit the retroactive application of subject matter rulings."²⁸⁵ Nothing about the convicting court's lack of subject matter jurisdiction "br[ought] into question the truth finding functions of the federal courts that prosecuted Indians for acts committed within the historic boundaries of the Uintah Reservation."²⁸⁶ Furthermore, the "substantial injustice and hardship" that would be visited upon victims and law enforcement officials weighed in favor of not making *Hagen* apply retroactively.²⁸⁷ Therefore, the Tenth Circuit refused to make *Hagen* retroactive.²⁸⁸

Utilizing the holding in *Cuch*, the OCCA reversed course from its previous *McGirt* rulings and determined that *McGirt* should not retroactively apply.²⁸⁹ The OCCA explained that, "*McGirt* raise[d] no serious questions about the truth-finding function of the state courts that tried [the prisoner.]"²⁹⁰ And the court, like the Tenth Circuit in *Cuch*, considered "the disruptive and costly consequences that retroactive application of *McGirt* would . . . have" ²⁹¹ Applying its borrowed rule from *Teague*, the OCCA then concluded that *McGirt* announced a new rule of criminal procedure and thus should not be applied retroactively.²⁹² The OCCA also

278. *United States v. Cuch*, 79 F.3d 987, 990 (10th Cir. 1996).

279. *Matloff*, 2021 WL 3578089, at *3–4.

280. *Cuch*, 79 F.3d at 988.

281. *Id.*

282. *Id.* (citing *Hagen v. Utah*, 510 U.S. 399 (1994)).

283. *Id.*

284. *Id.*

285. *Id.* at 990.

286. *Id.* at 992.

287. *Id.*

288. *Id.* at 995.

289. *State ex rel. Matloff v. Wallace*, No. PR-2021-366, 2021 WL 3578089, at *2 (Okla. Crim. App. Aug. 12, 2021).

290. *Id.* at *8.

291. *Id.*

292. *Id.* at *5–6.

made clear that “[a]ny statements, holdings, or suggestions to the contrary in . . . previous cases are hereby overruled.”²⁹³

III. EVALUATING THE NATURE OF HABEAS CORPUS RELIEF IN LIGHT OF *McGIRT*

As a reminder, the *McGirt* majority suggested the various procedural rules embedded in state and federal law would serve as potential impediments to state petitioners challenging their convictions.²⁹⁴ The *McGirt* dissent was not so sure, suggesting that under Oklahoma law, state prisoners can always invoke claims for post-conviction relief based on subject matter jurisdiction.²⁹⁵ As of now, the majority’s prediction has been borne out—procedural obstacles under AEDPA have made successful federal habeas petitions based on *McGirt* almost a null set.²⁹⁶ And, according to the OCCA, *McGirt* lacks a retroactive effect under Oklahoma state law.²⁹⁷

But if subject matter jurisdiction can never be waived and is implicated in all cases in which a state prisoner seeks post-conviction relief based on *McGirt* or *Murphy*, why have state and federal courts denied these claims largely on procedural grounds? The reasoning contained in the respective federal and state grounds reveals a great deal about contemporary treatment of the writ of habeas corpus and how it comports with the writ’s historical roots.

A. Rejected *McGirt* Petitions in Federal Courts

Recall the Tenth Circuit considers lack of subject matter jurisdiction a basis for habeas relief.²⁹⁸ So, this is not the basis for Oklahoma’s federal courts rejecting such claims. Rather, federal courts faced with claims based on *McGirt* and *Murphy* have thus far held that habeas claims invoking subject matter jurisdiction are subject to all the same procedural bars as any other federal claim.²⁹⁹ Under Tenth Circuit precedent, the mere fact that a claim is “jurisdictional” in nature does not excuse it from AEDPA’s procedural requirements.³⁰⁰ The scores of federal petitions based on *McGirt* and *Murphy* have pressure tested AEDPA and the procedural requirements it imposes for a federal court to consider a habeas petition on the merits. These cases lay bare an underlying assumption—federal courts

293. *Id.* at *3.

294. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 (2020); *see also* Summers, *supra* note 87, at 489–99 (discussing hurdles petitioners will face in state and federal post-conviction proceedings).

295. *McGirt*, 140 S. Ct. at 2501 n.9 (quoting *Murphy v. Royal*, 875 F.3d 896, 968 n.5 (10th Cir. 2017)).

296. *See infra* Appendix 1.

297. *See Matloff*, 2021 WL 3578089, at *5–6.

298. *See Yellowbear v. Wyo. Atty. Gen.*, 525 F.3d 921, 924 (10th Cir. 2008).

299. *See infra* Appendix 1.

300. *See, e.g., Prost v. Anderson*, 636 F.3d 578, 592 (10th Cir. 2011) (“[L]ike a statutory claim of innocence, lack of jurisdiction is not one of the two authorized grounds upon which a successive § 2254 motion may be filed.”); *Dopp v. Martin*, 750 F. App’x 754, 757 (10th Cir. 2018) (“[T]he jurisdictional nature of Dopp’s claim does not exempt his § 2254 application from dismissal for lack of jurisdiction as a successive and unauthorized application.”).

assume that AEDPA's procedural bars hold strong against claims based on the subject matter jurisdiction of the convicting court.

The question then necessarily arises: why is it that in the battle between the rule that claims regarding subject matter jurisdiction "can never be forfeited or waived"³⁰¹ and AEDPA's procedural bars on late, unexhausted, and successive claims, AEDPA's procedural barriers have prevailed? Below, this Section offers two reasons that could support the position taken thus far by federal courts and suggests why these reasons might not hold up to scrutiny.

The federal courts that have dismissed jurisdictional claims on procedural grounds have primarily relied on precedent and strict interpretations of AEDPA. These courts rely on Tenth Circuit cases that say habeas claims based on subject matter jurisdiction are no different from any other habeas claim and thus are still subject to AEDPA's procedural bars.³⁰² These Tenth Circuit cases explain that AEDPA provides only limited exceptions³⁰³ for overcoming the various procedural bars.³⁰⁴ And a claim based on subject matter jurisdiction is not among those exceptions.³⁰⁵ Specifically, the Tenth Circuit has said, "[L]ack of jurisdiction is not one of the two authorized grounds upon which a successive § 2254 motion may be filed."³⁰⁶ "Thus, the jurisdictional nature of [the petitioner's] claim does not exempt his § 2254 application from dismissal . . . as a successive and unauthorized petition."³⁰⁷

This might matter because federal habeas corpus is fundamentally a matter of congressional power and intent.³⁰⁸ The first possible explanation may be that habeas relief exists only to the extent Congress allows it,³⁰⁹ at least absent some potential constitutional limitation. The Supreme Court has explained that "the power to award the writ by any of the courts of the

301. *Union Pac. R.R. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009).

302. *See, e.g., Prost*, 636 F.3d at 592 ("[L]ike a statutory claim of innocence, lack of jurisdiction is not one of the two authorized grounds upon which a successive § 2254 motion may be filed."); *Hatch v. Oklahoma*, 92 F.3d 1012, 1015 (10th Cir. 1996) ("[L]ack of jurisdiction is not an authorized ground upon which a second or successive habeas petition may be filed under the 1996 Act."); *In re Wackerly*, No. 10-7062, 2010 WL 9531121, at *2 (10th Cir. Sept. 3, 2010) ("[N]othing in the unqualified language of [AEDPA's] provisions suggests any exemption for jurisdictional claims."); *Morales v. Jones*, 417 F. App'x 746, 749 (10th Cir. 2011) ("As with any other habeas claim, [a claim based on subject matter jurisdiction] is subject to dismissal for untimeliness."); *Murrell v. Crow*, 793 F. App'x 675, 679 (10th Cir. 2019) (dismissing habeas petition based on subject matter jurisdiction for being untimely) ("[W]e see no indication that the jurisdictional nature of Murrell's due-process claim should guide our . . . inquiry here.").

303. These exceptions are discussed *supra* Section II.B.

304. *See, e.g., Prost*, 636 F.3d at 592.

305. *Id.*

306. *Dopp v. Martin*, 750 F. App'x 754, 757 (10th Cir. 2018) (quoting *Prost*, 636 F.3d at 592).

307. *Id.*

308. *See* Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1915 (2008) ("[T]he Court's textualist-leaning Justices have made explicit their view that Congress controls the jurisdiction of the federal courts, at least with respect to jurisdiction-ousting statutes.").

309. *See id.* at 914–15.

United States, must be given by written law.”³¹⁰ The Court has also indicated that “judgments about the proper scope of the writ are ‘normally for Congress to make.’”³¹¹ Thus, when it comes to if, when, and how post-conviction relief can be granted pursuant to federal habeas, Congress can give and Congress can take away. The writ cannot be any larger than Congress intends it to be.

This explanation, though, does not explain why subject matter jurisdiction, which is generally not waivable,³¹² would suddenly become subject to AEDPA’s procedural bars.³¹³ Simply saying that Congress did not intend for subject matter jurisdiction to be among AEDPA’s exceptions avoids the question. If subject matter jurisdiction is always excepted from usual presentation rules, it is not clear why it would need a separate exception under AEDPA. Given the rule that claims regarding subject matter jurisdiction “can never be forfeited or waived,”³¹⁴ why should these claims be treated any different in the habeas context? Does subject matter jurisdiction even need to be among AEDPA’s listed exceptions if it can always be raised?

A second explanation might be that claims invoking subject matter jurisdiction are different under AEDPA than they are on direct review because courts owe particular deference to finality in the federal habeas context.³¹⁵ As Justice Gorsuch recently explained in a concurrence, “[F]inality, the idea that at some point a criminal conviction reaches an end, a conclusion, a termination, is essential to the operation of our criminal justice system.”³¹⁶ Subject matter jurisdiction can always be raised prior to the outcome of a proceeding,³¹⁷ but perhaps once a case is final, claims based on subject matter jurisdiction are no longer invincible in the

310. *Ex parte Bollman*, 8 U.S. 75, 94 (1807).

311. *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)).

312. *See Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009).

313. To be sure, waiver and a procedural bar are distinct ideas. Subject matter jurisdiction’s unwaivable nature is generally invoked when explaining why courts need to evaluate subject matter jurisdiction *sua sponte* even if the parties have not called the court’s jurisdiction into question. *See, e.g., Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) (“[C]hallenges to subject-matter jurisdiction may be raised by the defendant ‘at any point in litigation,’ and courts must consider them *sua sponte*.”) (quoting *Gonzales v. Thaler*, 656 U.S. 134, 141 (2012)). It can, and must, be raised at any point during litigation to ensure the court has authority to decide the case. *Id.* at 1848–49. By contrast, AEDPA’s procedural bars address how a habeas claim must be raised. *See* 28 U.S.C. §§ 2244, 2254. It is unclear whether this distinction makes any difference here, though. The same concerns that underlie subject matter jurisdiction’s unwaivability—that the court deciding the case must have authority to hear it in the first place—would still remain in the face of AEDPA’s procedural barriers.

314. *Brotherhood of Locomotive Eng’rs*, 558 U.S. at 81 (quoting *Gonzales*, 656 U.S. at 141).

315. *See* RESTATEMENT (SECOND) OF JUDGEMENTS § 12 cmt. d (AM. L. INST. 1982) (“[One] approach is to say that the issue of subject matter jurisdiction . . . is implicitly resolved by the act of entering judgment. On this view, the entry of judgment should be taken as equivalent to actual litigation on the issue of subject matter jurisdiction and hence result in its becoming *res judicata*.”).

316. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1571 (2021) (Gorsuch, J., concurring) (emphasis omitted).

317. *See* RESTATEMENT (SECOND) OF JUDGEMENTS § 11 cmt. d (AM. L. INST. 1982) (“Under generally prevailing procedural rules, the question of a court’s subject matter jurisdiction may be raised at any time before the judgment has become final.”).

post-conviction context. As Chief Justice Marshall explained when describing the limits of the writ of habeas corpus, “A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case.”³¹⁸ AEDPA potentially codifies this interest in finality through its various procedural bars.³¹⁹ Concerns about subject matter jurisdiction then must give way to interests in finality.

But this explanation does not square with how the Supreme Court and habeas scholars have talked about the writ. In his very next line discussing the writ of habeas corpus, Justice Marshall indicated that “[t]he judgment of a court of record *whose jurisdiction is final*, is as conclusive on all the world as the judgment of this court would be.”³²⁰ And in a recent concurrence in a habeas case, Justice Gorsuch made clear that “the final result of proceedings in *courts of competent jurisdiction* establishes what is correct in the eyes of the law.”³²¹ Finality concerns only prevail when a court of competent jurisdiction made the original decision.³²² “[T]he principle of finality rests on the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction.”³²³ Scholars of the writ likewise have indicated that subject matter jurisdiction is core to the nature of habeas and thus finality only follows from proper jurisdiction.³²⁴

Moreover, the Constitution may require that such claims be allowed to proceed, even if otherwise procedurally defaulted. Article I, Section Nine, Clause Two of the Constitution—known as the Suspension Clause—promises “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”³²⁵ The Supreme Court has said that, “[A]t the

318. *Ex parte Watkins*, 28 U.S. 193, 202 (1830).

319. *See Duncan v. Walker*, 533 U.S. 167, 178 (2001).

320. *Watkins*, 28 U.S. at 202–03 (emphasis added).

321. *Edwards*, 141 S. Ct. at 1571 (Gorsuch, J., concurring) (emphasis added) (internal quotation marks omitted); *see also Swain v. Pressley*, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (“Since I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction *entered by a court of competent jurisdiction*, I see no issue of constitutional dimension raised by the statute in question.”) (emphasis added); *Ex parte Siebold*, 100 U.S. 371, 375 (1879) (“The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.”); *Ex parte Wilson*, 114 U.S. 417, 420–21 (1885) (“It is well settled by a series of decisions that this court . . . cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.”).

322. *Edwards*, 141 S. Ct. at 1571, 1573.

323. RESTATEMENT (SECOND) OF JUDGEMENTS § 12 cmt. a (AM. L. INST. 1982); *see also id.* at cmt. d (“The question therefore is whether the public interest in observance of the particular jurisdictional rule is sufficiently strong to permit a possibly superfluous vindication of the rule by a litigant who is undeserving of the accompanying benefit that will redound to him.”).

324. *See, e.g., Bator, supra* note 133, at 461 (“[I]n our federal-state context, it would be appropriate for the federal habeas court to deny conclusive effect to a state judgment of conviction where the state is made wholly incompetent by federal law to deal with the case.”). *But see id.* (“In many cases, where a strong, or even colorable case can be made for the existence of jurisdiction, the original tribunal should be deemed competent to decide that question itself, so that its decision, if based on full and fair litigation of the question, should at least presumptively be immune from collateral attack.”).

325. U.S. CONST., art. I, § 9, cl. 2.

absolute minimum the Clause protects the writ as it existed when the Constitution was drafted and ratified.”³²⁶ Because the ratification-era writ protected prisoners confined pursuant to the judgment of a court without jurisdiction, AEDPA’s bar on late and second or successive claims likely cannot constitutionally bar *McGirt* claims.

In *Edwards v. Vannoy*,³²⁷ a recent Supreme Court decision in which the Court refused to give retroactive effect to a prior habeas decision, Justice Gorsuch gave some insight into the history of the writ of habeas corpus.³²⁸ While habeas corpus had referred to various court procedures at common law, “the Great Writ”—*habeas corpus ad subjiciendum*—gave prisoners the ability to challenge the validity of their custody.³²⁹ But Justice Gorsuch explained that, for most cases at the founding, habeas corpus “provided no recourse for a prisoner confined pursuant to a final judgment of conviction.”³³⁰ Only one exception existed to this general rule: “A habeas court could grant relief if the court of conviction lacked jurisdiction over the defendant or his offense.”³³¹ This relief had originally been limited to “federal custodians.”³³² But following the Civil War, “Congress granted federal courts the power to issue habeas writs to state authorities as well.”³³³ The uniquely jurisdictional nature of habeas began to fade away throughout the twentieth century, resulting in a greatly inflated concept of habeas and what types of errors petitioners could challenge via the writ.³³⁴ Regardless, at no point did anyone purport to eliminate the writ’s essential core as a protection against imprisonment pursuant to the judgment of a court without jurisdiction.

If at the time of the founding the writ of habeas corpus had this distinctly jurisdictional function, the writ should always allow for claims challenging the court’s subject matter jurisdiction, regardless of when or how often the claim was brought.³³⁵ The Court has recognized that “[a]t common law, *res judicata* did not attach to a court’s denial of habeas relief.”³³⁶ “[A] renewed application could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner’s right to a discharge independently, and not to be

326. *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (internal quotation marks omitted) (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). See generally Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008) (discussing the history of the writ).

327. 141 U.S. 1547 (2021).

328. See *id.* at 1566–73 (Gorsuch, J., concurring).

329. *Id.* at 1567.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 1568–70.

335. See *McCleskey v. Zant*, 499 U.S. 467, 479 (1991), *superseded by statute*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1217, *as recognized in* *Banister v. Davis*, 140 S. Ct. 1698, 1707 (2020).

336. *Id.* at 479.

influenced by the previous decisions refusing discharge.”³³⁷ That being said, the Supreme Court has said that AEDPA’s bars on second or successive habeas petitions do not violate the Suspension Clause.³³⁸ Still, the Court has not squarely addressed whether these procedural bars applied specifically to claims based on subject matter jurisdiction—the very types of claims that habeas corpus was intended to protect—would constitute a suspension of the writ. Thus, to disallow certain claims based on subject matter jurisdiction because they are untimely, unexhausted, or successive *may* constitute an unlawful suspension of the writ of habeas corpus.³³⁹ If this account is correct, prisoners now find themselves in an inversion—habeas corpus has expanded far beyond the original scope of the writ while the core of what the writ once encompassed receives less protection.

There are several potential issues with this interpretation of the Suspension Clause. First, “[T]he first Congress made the writ of habeas corpus available only to prisoners confined under the authority of the United States, not under state authority.”³⁴⁰ Thus, the Suspension Clause’s original meaning would not have encompassed state prisoners challenging the jurisdiction of the state court that convicted them. For the Suspension Clause to encompass such petitioners, the Reconstruction Amendments would have had to broaden the meaning of the Clause.³⁴¹ Some scholars have proposed that the Fourteenth Amendment did just that.³⁴²

337. *Id.* (quoting W. CHURCH, WRIT OF HABEAS CORPUS § 386, 570 (2d ed. 1893)). Prior to AEDPA’s passage, though, the Supreme Court had recognized that some limits can be placed on successive petitions via the judicially created “writ of abuse.” *See id.* at 479–81. “[T]he doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.” *Id.* at 489.

338. *See Felker v. Turpin*, 518 U.S. 651, 664 (“The added restrictions which [AEDPA] places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a ‘suspension’ of the writ contrary to Article I, § 9.”). The Tenth Circuit has also said that AEDPA’s statute of limitations, likewise, does not constitute an unlawful suspension of the writ of habeas corpus. *See Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (“There may be circumstances where the limitation period at least raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective. . . . [H]owever, we are satisfied that such circumstances are not implicated here.”) (internal citation omitted).

339. *See Felker*, 518 U.S. at 664. Whether these provisions as applied to claims challenging a conviction based on the convicting court’s lack of subject matter jurisdiction would depend, in part, on whether such restrictions fall within the scope of the abuse of the writ articulated by the Court in *Felker*.

340. *Id.* at 663.

341. *See Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (“The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”); *cf.* Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1164 (1992) (“The Fourteenth Amendment invests the federal government with the authority and responsibility to protect each individual’s civil rights from invasion by the state governments.”).

342. Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 863, 866–68 (1994); Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 611–12 (2014); *see* Gerald L. Neuman, *The Habeas Corpus Suspension Clause after Boumediene v. Bush*, 110 COLUM. L. REV. 537, 562–63 (2010) [hereinafter *Suspension Clause after Boumediene v. Bush*] (“That expansion could reflect a holistic interpretation of the Suspension Clause that takes into

Second, the Supreme Court has told us that “[c]ertain accommodations can be made to reduce the burden [of] habeas corpus proceedings . . . without impermissibly diluting the protections of the writ.”³⁴³ Thus, the Supreme Court has concluded that “[t]he substitution of a new collateral remedy that is neither inadequate nor ineffective [sic]” to test the legality of a person’s detention “does not constitute a suspension of the writ” of habeas corpus.³⁴⁴ Perhaps the fact that Oklahoma provides a robust system for state prisoners to bring post-conviction challenges can serve as an “adequate substitute for habeas corpus.”³⁴⁵ Then AEDPA’s bar on successive, untimely, or unexhausted claims invoking subject matter jurisdiction may not present a constitutional issue. It is unclear, however, “when, if ever, the state’s own remedies can count as adequate substitutes for the federal writ.”³⁴⁶ Can a body other than Congress create an adequate substitute? It is also unclear whether consideration of collateral relief by non-Article III judges can constitute an adequate substitute.³⁴⁷

The near universal dismissal of claims based on *McGirt* and *Murphy* by federal courts brings to the surface an underlying assumption about AEDPA: as the relevant federal courts read it, it can and does prohibit untimely, unexhausted, or successive habeas claims invoking subject matter jurisdiction. But such an assumption may be unconstitutional based on the meaning of the Suspension Clause.³⁴⁸ Above, this Article discussed possible reasons for this assumption and called into question the sufficiency of these reasons. Future courts and scholars should bring clarity to the relationship between jurisdictional claims and AEDPA’s procedural bars and to the scope of the Suspension Clause for state and federal prisoners.

B. Rejected *McGirt* Applications in Oklahoma State Courts

The OCCA’s decision in *Matloff* provides further insight into the nature of habeas corpus—specifically, it calls into question when the Supreme Court’s decisions should be retroactive for purposes of post-conviction relief. Recall in *Matloff*, the OCCA relied heavily on *Teague*’s rule against retroactivity in concluding that *McGirt*’s holding should apply only prospectively as a new rule of criminal procedure.³⁴⁹ In *Matloff*, the OCCA concluded that the Court’s *McGirt* decision represented a new rule

account not only the Bill of Rights, but also the realignment of state and federal authority produced by the Fourteenth Amendment.”); see also Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 604–11 (2002) [hereinafter *The Habeas Corpus Suspension Clause*] (discussing the possible effects of the Fourteenth Amendment on the Suspension Clause).

343. *Boumediene*, 553 U.S. at 795 (2008).

344. *Swain v. Pressley*, 430 U.S. 372, 373 (1977).

345. *Boumediene*, 553 U.S. at 783.

346. *Suspension Clause After Boumediene v. Bush*, *supra* note 342, at 563.

347. See Paul Diller, *Habeas and (Non-)Delegation*, 77 UNIV. CHI. L. REV. 585, 614–15 (2010).

348. See *infra* note 366.

349. *State ex rel. Matloff v. Wallace*, No. PR-2021-366, 2021 WL 3578089, at*3–4 (Okla. Crim. App. Aug. 12, 2021).

of criminal procedure.³⁵⁰ Given that the claims at issue in *McGirt* and *Murphy* implicate subject matter jurisdiction, the OCCA's conclusion begs the question: is subject matter jurisdiction a rule of criminal procedure?³⁵¹

In *Matloff*, the OCCA operated under the assumption that a new rule regarding subject matter jurisdiction is procedural for the purposes of *Teague*'s bar on retroactivity.³⁵² According to the OCCA, "*McGirt*'s recognition of an existing Muscogee (Creek) Reservation effectively decided which sovereign must prosecute major crimes committed by or against Indians within its boundaries"³⁵³ The OCCA concluded that such a decision implicates procedure, not substance, because it "affected only the manner of determining the defendant's culpability."³⁵⁴

The OCCA's decision that jurisdictional claims are procedural (and thus should not be applied retroactively) suffers from two potential problems.

First, subject matter jurisdiction is not an issue of procedure.³⁵⁵ The Supreme Court has stated that "rules that regulate only the *manner of determining* the defendant's culpability are procedural."³⁵⁶ By contrast, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."³⁵⁷ Which category does subject matter jurisdiction fall into? Neither.

Subject matter jurisdiction challenges the substantive–procedural distinction drawn in *Teague* and its progeny. It does not cleanly fit into

350. *Matloff*, 2021 WL 3578089, at *5–6.

351. The decision also begs another question I will address less fully: is the rule announced in *McGirt* "new"? In concluding that *McGirt* should not be applied retroactively, the OCCA also concluded that *McGirt* announced a new rule. *Id.* at *6. This conclusion is suspect.

According to the Supreme Court, a rule is new "when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. But a case does not announce a new rule "when it is merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (quoting *Teague*, 489 U.S. at 307) (internal quotation marks omitted) (alterations omitted). Thus:

[W]here the beginning point of [the Court's analysis] is a rule of "general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."

Id. at 348 (quoting *Wright v. West*, 505 U.S. 277, 309 (1992)). In *Murphy v. Royal*, the Tenth Circuit explained that recognizing the extant boundaries of the Muscogee Nation did not create a new rule. 875 F.3d 896, 929 n. 36 (10th Cir. 2017) ("The . . . cases we discuss in our de novo analysis are applications of the *Solem* framework. We need not decide whether these cases qualify as 'constitutional' and 'procedural' under *Teague* because, even if they do, they are not 'new.'").

352. *Matloff*, 2021 WL 3578089, at *6.

353. *Id.* (emphasis omitted).

354. *Id.* (internal quotation marks and emphasis omitted).

355. See *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) ("[A]t the absolute minimum the Clause protects the writ as it existed when the Constitution was drafted and ratified.") (internal quotation marks omitted).

356. *Id.*

357. *Id.*

either category.³⁵⁸ According to the OCCA, subject matter jurisdiction is not substantive because it does not address what conduct is criminalized.³⁵⁹ But it also is not procedural because it goes beyond the manner of determining culpability.³⁶⁰ Instead, subject matter jurisdiction goes to the authority of the convicting court to try and convict a defendant in the first place.³⁶¹ To summarize, substantive rules address *what* is criminalized, procedural rules address *how* the crime will be adjudicated, and jurisdictional rules address *who* has the authority to adjudicate the crime.

Thus, it may not even make sense to speak of jurisdiction in the terms of retroactivity.³⁶² Rather, “In such cases, the Court has relied less on the technique of retroactive application than on the notion that the prior inconsistent judgments or sentences were void *ab initio*.”³⁶³ If subject matter jurisdiction is understood in these terms, the OCCA committed a category error by thinking that *Teague*’s retroactivity rule applies here.³⁶⁴ Thus, courts that conclude that jurisdictional rulings should not apply in future cases must move beyond *Teague* to reach this conclusion.³⁶⁵

Second, if subject matter jurisdiction rulings should not be applied retroactively, the Supreme Court’s decision in *Teague* may raise Suspension Clause concerns.³⁶⁶ Recall, the Supreme Court has interpreted

358. See *Gosa v. Mayden*, 413 U.S. 665, 678–79 (1973) (“In the present cases we are not concerned, of course, with procedural rights or trial methods . . . [b]ut neither are we concerned . . . with a constitutional right that operates to prevent another trial from taking place at all.”).

359. *State ex rel. Matloff v. Wallace*, No. PR-2021-366, 2021 WL 3578089, at *6 (Okla. Crim. App. Aug. 12, 2021).

360. See *Gosa*, 413 U.S. at 679.

361. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998).

362. See *Edwards v. Vannoy*, 141 S. Ct. 1547, 1568 (2021) (Gorsuch, J., concurring) (“Under the view that prevailed in this country for most of our history, and in England for even longer, *Teague*’s question about the ‘retroactive’ application of ‘watershed’ rules of criminal procedure to undo final criminal judgments would have made no sense.”).

363. *United States v. Johnson*, 457 U.S. 537, 550 (1982), *abrogated by* *Griffith v. Kentucky*, 479 U.S. 314, 321–28 (1987).

364. The Tenth Circuit panel in *Cuch* cited to a Supreme Court case, *Gosa v. Mayden*, as authority for limiting the application of a subject matter jurisdiction ruling. *United States v. Cuch*, 79 F.3d 987, 990 (10th Cir. 1996) (citing *Gosa v. Mayden*, 413 U.S. 665 (1973)). In *Gosa*, the Supreme Court declined to make a previous ruling on the jurisdiction of military tribunals retroactive. See 413 U.S. at 685 (discussing *O’Callahan v. Parker*, 395 U.S. 258 (1969)). Still, the Court downplayed the jurisdictional nature of *O’Callahan*, explaining the constitutional roots of the decision: “[I]t was, instead, one related to the forum, that is, whether, as we have said, the exercise of jurisdiction by a military tribunal, pursuant to an act of Congress, over his nonservice-connected offense was appropriate when balanced against the important guarantees of the Fifth and Sixth Amendments.” *Id.* at 677. Insofar as the Court in *Gosa* held that rulings based on subject matter jurisdiction need not be applied retroactively, the Court did not explore whether such a decision comported with the requirements of the Suspension Clause.

365. As one concurring Justice in *Matloff* observed, the decision not to apply *McGirt* retroactively “is hard to explain in an objective legal context but provides a just and pragmatic resolution to the *McGirt* dilemma.” *State ex rel. Matloff v. Wallace*, No. PR-2021-366, 2021 WL 3578089, at *10 (Okla. Crim. App. Aug. 12, 2021) (Lumpkin, J., concurring). Stripping away the veneer of legal reasoning provided by *Teague*, this Justice observed that in *Cuch*, the Tenth Circuit “applied policy rather than the law which would have rendered the judgments void due to lack of subject matter jurisdiction.” *Id.*

366. The Oklahoma Constitution also includes a Suspension Clause. See OKLA. CONST. art. II, § 10. It appears that challenges based on subject matter jurisdiction were at the heart of the writ as

AEDPA to codify *Teague*.³⁶⁷ When *Teague* prevents rulings based on jurisdiction from being applied retroactively, this raises the same concerns addressed in the prior Section.³⁶⁸ At common law, a challenge to the convicting court's subject matter jurisdiction was at the heart of the writ of habeas corpus.³⁶⁹ And it appears such challenges could be brought at any time.³⁷⁰ Thus, any limits on bringing such claims might run afoul of the Suspension Clause.

The Supreme Court in *Teague* came with a partial answer to these concerns. The Court shied away from bright-line rules about the extent of the historic writ, explaining that it had “never . . . defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.”³⁷¹ Rather, the Supreme Court has “recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review.”³⁷² But even if this is the case, a key question remains unanswered: did such concerns about finality limit habeas challenges based on subject matter jurisdiction under common law? Are there bright-line rules for the scope of habeas that are embedded in the Constitution?

The OCCA, though ostensibly interpreting and applying state law in *Matloff*, provided a helpful window into these unresolved federal issues. By relying heavily on *Teague* and its progeny, the OCCA raised difficult questions about the relationship between jurisdictional rulings and their retroactive effect. These questions will need to be answered. The Supreme Court will need to confront the tensions between subject matter jurisdiction, finality, and retroactivity to bring clarity to the scope of habeas corpus and the extent of the protections afforded by the Suspension Clause.

CONCLUSION

McGirt, though seemingly about federal Indian law, has opened the door for difficult and understudied questions about federal habeas corpus doctrine. This is apparent through the outcomes of federal and state cases invoking *McGirt* and *Murphy* over the past several years. The patterns uncover fundamentally different conceptions of the nature of habeas relief.

understood by Oklahoma as well. *See, e.g., Ex parte Sullivan*, 138 P. 815, 821 (Okla. Crim. App. 1914) (“[T]he jurisdiction of the court to render the particular judgment or issue the process is a proper subject of inquiry; and the proceedings of the committing court will be examined so far as necessary to determine the question of jurisdiction.”). “If there was no legal power to render the judgment, or issue the process, there was no court of competent jurisdiction, and consequently no judgment or process.” *Id.*

367. *See Williams v. Taylor*, 529 U.S. 362, 380 (2000).

368. *See supra* Section III.A.

369. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1567 (2021) (Gorsuch, J., concurring).

370. *See McCleskey v. Zant*, 499 U.S. 467, 479 (1991), *superseded by statute*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1217, *as recognized in Banister v. Davis*, 140 S. Ct. 1698, 1707 (2020).

371. *Teague v. Lane*, 489 U.S. 288, 308 (1989) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986)).

372. *Id.*

Federal courts have effectively shut down all habeas petitions based on *McGirt*, invoking various procedural mechanisms to dispose of the petitions. And prisoners have found little more relief in Oklahoma state courts, where *McGirt* now only applies prospectively.

In reaching these respective conclusions, federal and state courts have relied on flawed and incomplete reasoning. In particular, the courts have avoided answering difficult questions that go to the core of habeas corpus in denying *McGirt* claims. If subject matter jurisdiction is typically not waivable, why can AEDPA's procedural rules limit claims that are based on jurisdiction? And if subject matter jurisdiction is at the core of the common law writ of habeas corpus, is the ability to challenge a conviction based on the convicting court's lack of subject matter jurisdiction essential to the writ of habeas and thus protected by the Suspension Clause? The habeas petitions flowing from *McGirt* and *Murphy* have raised these questions. They now need answers.

APPENDIX 1: FEDERAL COURT DECISIONS ON *MCGIRT/MURPHY* HABEAS PETITIONS

Case	Date	Court	Resolution
Kincaid v. Bear 2017 WL 5560424	November 8, 2017	W.D. Okla.	Dismissed as second/successive under § 2244(b)
Billings v. Bureau of Indian Affairs 2018 WL 2189772	April 26, 2018	W.D. Okla.	Dismissed for exhaustion under § 2254(b)
Hayes v. Bear 2018 WL 2943459	June 12, 2018	W.D. Okla.	Dismissed as untimely under § 2244(d)
Scott v. Bryant 2018 WL 3618369	July 30, 2018	E.D. Okla.	Dismissed as second/successive under § 2244(b)
McElhaney v. Bear 2018 WL 3624968	July 30, 2018	E.D. Okla.	Dismissed as second/successive under § 2244(b)
Canady v. Bear 2018 WL 3824381	August 2, 2018	W.D. Okla.	Dismissed as untimely under § 2244(d)
Canady v. Bryant 2018 WL 3812250	August 10, 2018	W.D. Okla.	Dismissed as untimely under § 2244(d)
Boyd v. Martin 747 F. App'x 712	August 28, 2018	10th Cir.	Denying application for second/successive under § 2244(b)
Pettit v. Bryant 2018 WL 4224448	September 5, 2018	N.D. Okla.	Dismissed as untimely under § 2244(d)

Case	Date	Court	Resolution
Matlock v. Bryant 2018 WL 4355197	September 12, 2018	N.D. Okla.	Dismissed for exhaustion under § 2254(b)
Dopp v. Martin 750 F. App'x 754	October 24, 2018	10th Cir.	Denial of certificate of appealability (COA) as second/successive under § 2244(b)
Morgan v. Bureau of Indian Affairs 2018 WL 5660301	October 31, 2018	W.D. Okla.	Dismissed for exhaustion under § 2254(b)
Pettit v. Whitten 2018 WL 6729988	December 21, 2018	N.D. Okla.	Dismissed as untimely under § 2244(d)
Pattersen v. Whitten 2018 WL 6840153	December 31, 2018	N.D. Okla.	Stayed for exhaustion under § 2254(b)
Martin v. Bear 2019 WL 1437603	March 29, 2019	E.D. Okla.	Dismissed as untimely under § 2244(d)
Jones v. Bear 2019 WL 3422101	April 17, 2019	W.D. Okla.	Dismissed as untimely under § 2244(d)
Duffield v. Bear 2019 WL 2092577	May 13, 2019	W.D. Okla.	Dismissed as untimely under § 2244(d)
Parris v. Whitten 2019 WL 2928754	July 8, 2019	N.D. Okla.	Dismissed as untimely under § 2244(d)
Jackson v. Bryant 2019 WL 3884872	July 23, 2019	W.D. Okla.	Dismissed as untimely under § 2244(d)
Barbre v. Whitten 2019 WL 3976518	August 22, 2019	E.D. Okla.	Dismissed as untimely under § 2244(d)
Barnett v. Oklahoma 2020 WL 8768537	September 18, 2020	W.D. Okla.	Dismissed as second/successive under § 2244(b)
Berry v. Braggs 2020 WL 6205849	October 22, 2020	N.D. Okla.	Dismissed as untimely under § 2244(d)
Moncanda v. Pettigrew 2020 WL 6588728	October 22, 2020	W.D. Okla.	Dismissed for exhaustion under § 2254(b)
Tucker v. Lawson 2020 WL 7222089	October 28, 2020	W.D. Okla.	Abstained for exhaustion in state court
Seals v. Smith 829 F. App'x 378	November 12, 2020	10th Cir.	Dismissed as untimely under § 2244(d)
Largent v. Nunn 2020 WL 6731112	November 16, 2020	W.D. Okla.	Dismissed for exhaustion under § 2254(b)

Case	Date	Court	Resolution
Ross v. Oklahoma 2020 WL 7775453	November 20, 2020	W.D. Okla.	Abstained for state post-conviction proceedings
Draper v. Pettigrew 2020 WL 8225500	December 22, 2020	W.D. Okla.	Dismissed for exhaustion under § 2254(b)
Tripp v. Whitten 2020 WL 7865284	December 31, 2020	W.D. Okla.	Dismissed as second/successive under § 2244(b)
Shavers v. Pettigrew 2021 WL 66659	January 7, 2021	W.D. Okla.	Dismissed for exhaustion under § 2254(b)
Deerleader v. Crow 2021 WL 150014	January 15, 2021	N.D. Okla.	Relief granted
Cash v. United States 2021 WL 666974	January 20, 2021	W.D. Okla.	Dismissed for exhaustion under § 2254(b)
Berry v. Whitten 2021 WL 262560	January 26, 2021	N.D. Okla.	Dismissed as second/successive under § 2244(b)
Nieberger v. Pettigrew 2021 WL 647375	January 28, 2021	N.D. Okla.	Dismissed as second/successive under § 2244(b)
Barnett v. Federal Bureau of Prisons 2021 WL 325716	February 1, 2021	W.D. Okla.	Dismissed as second/successive under § 2244(b)
Malone v. Crow 2021 WL 957264	February 5, 2021	N.D. Okla.	Dismissed as second/successive under § 2244(b)
Hunter v. Pettigrew 2021 WL 1873460	April 2, 2021	N.D. Okla.	Dismissed as second/successive under § 2244(b)
White v. Crow 2021 WL 1259391	April 6, 2021	10th Cir.	Denied of COA on merits
Sampson v. Dowling 2021 WL 1318662	April 8, 2021	N.D. Okla.	Dismissed as untimely under § 2244(d)
Kirk v. Oklahoma 2021 WL 1316075	April 8, 2021	W.D. Okla.	Dismissed for failure to raise before magistrate judge
Cole v. Pettigrew 2021 WL 1535364	April 19, 2021	N.D. Okla.	Dismissed as untimely under § 2244(d)

Case	Date	Court	Resolution
Ross v. Pettigrew 2021 WL 1535365	April 19, 2021	N.D. Okla.	Dismissed as untimely under § 2244(d)
Cummins v. Martin 2021 WL 1535372	April 19, 2021	W.D. Okla.	Dismissed for exhaus- tion under § 2254(b)
Collins v. FNU LNU 2021 WL 1630549	April 27, 2021	W.D. Okla.	Dismissed for exhaus- tion under § 2254(b)
Harris v. Pettigrew 2021 WL 1723225	April 30, 2021	W.D. Okla.	Dismissed as untimely under § 2244(d)
Newberry v. Oklahoma 2021 WL 1823116	May 6, 2021	N.D. Okla.	Dismissed for exhaus- tion under § 2254(b)
Woods v. Nunn 2021 WL 2117910	May 25, 2021	W.D. Okla.	Dismissed on merits
Driggers v. Crow 2021 WL 2371347	June 9, 2021	W.D. Okla.	Abstained for post-con- viction proceedings
Pitts v. Crow 2021 WL 2715966	July 1, 2021	W.D. Okla.	Dismissed for exhaus- tion under § 2254(b)

APPENDIX 2: STATE COURT DECISIONS ON *MCGIRT/MURPHY* HABEAS
DECISIONS

Case	Date	Court	Outcome
Bosse v. State 484 P.3d 286	March 11, 2021	Okla. Crim. App.	Application Granted
Hogner v. State 2021 WL 958412	March 11, 2021	Okla. Crim. App.	Application Granted
Grayson v. State 485 P.3d 250	April 1, 2021	Okla. Crim. App.	Application Granted
Sizemore v. State 485 P.3d 867	April 1, 2021	Okla. Crim. App.	Application Granted
Spears v. State 485 P.3d 873	April 1, 2021	Okla. Crim. App.	Application Granted
Cole v. State 2021 WL 1727054	April 29, 2021	Okla. Crim. App.	Application Granted
Ryder v. State 2021 WL 1727017	April 29, 2021	Okla. Crim. App.	Application Granted

Case	Date	Court	Outcome
Bench v. State 2021 WL 1836466	May 6, 2021	Okla. Crim. App.	Application Granted
State ex rel. Matloff v. Wallace 2021 WL 3578089	August 12, 2021	Okla. Crim. App.	Application De- nied