

## STATE EX REL. MATLOFF v. WALLACE: REVERSING COURSE ON SUBJECT MATTER JURISDICTION

*Andrew Case\**

### *I. Introduction*

In July of 2020, The United States Supreme Court handed down its ruling in *McGirt v. Oklahoma*,<sup>1</sup> reaffirming lands in Northeast Oklahoma as Indian Country for purposes of the Major Crimes Act (MCA).<sup>2</sup> In so holding, the Court reaffirmed exclusive federal jurisdiction over major crimes committed by Indians within those areas.<sup>3</sup> Prior to the ruling, the State of Oklahoma exercised criminal jurisdiction over crimes committed within this area, even over crimes included within the MCA.<sup>4</sup>

Following the *McGirt* decision, a number of cases were vacated for lack of subject matter jurisdiction due to the crimes' inclusion within the MCA. While reviewing many of the cases in question following *McGirt*, the Oklahoma Court of Criminal Appeals examined whether *McGirt* retroactively applied to final convictions in *State ex rel. Matloff v. Wallace*.<sup>5</sup> After an analysis of the *McGirt* rule under the *Teague v. Lane*<sup>6</sup> test, the court held the *McGirt* rule was not retroactively applicable to cases where the conviction was final at the time of the *McGirt* decision. This analysis relied on two primary categorizations of the *McGirt* rule: (1) the rule was new, and (2) the rule was procedural in nature.<sup>7</sup>

This Note will advance the idea that the Oklahoma Court of Criminal Appeals failed to properly apply the *Teague* test to the *Matloff* case following the *McGirt* decision. Categorizing the *McGirt* rule as procedural was essentially the only option for refusing retroactive application under *Teague*. Whether the *McGirt* rule constitutes a new one or merely a restatement of existing law is also a very important aspect of the *Matloff*

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\* Third-year student, University of Oklahoma College of Law.

1. 140 S. Ct. 2452 (2020).

2. *Id.* at 2459–82 (citing 18 U.S.C. § 1153).

3. *Id.* at 2478.

4. *Id.* at 2477–78.

5. 2021 OK CR 21, ¶ 5, 497 P.3d 686, 687, *cert. denied sub nom.* Parish v. Oklahoma, 142 S. Ct. 757 (2022).

6. 489 U.S. 288, 301 (1989).

7. *Matloff*, 2021 OK CR ¶¶ 6, 26, 28, 497 P.3d at 688, 691.

decision, one which had the potential to implicate the judgment of Oklahoma courts if the rule was not held to be a new one. First, in Part II, this Note will provide the necessary context for the *Matloff* decision including the MCA, the *McGirt* decision, and the cases immediately following *McGirt*. Second, in Part III, this Note will explain the *Matloff* decision as it was handed down. Third, in Part IV, this Note outlines the court's determination that the *McGirt* rule could not be applied retroactively to final convictions due to the court's initial categorization of the rule as procedural. Having categorized the rule as procedural, the court then also defined it as new and breaking new ground. These determinations—when applied as part of the *Teague* test—allow only for prospective application of rules announced by Supreme Court opinions. Finally, Part V examines the Oklahoma Court of Criminal Appeals' analysis and identifies why the rule appears far more substantive than procedural, while also establishing a legal foundation that acts to rebut the court's finding that *McGirt* announced a new rule as opposed to merely reaffirming existing law.

## II. Background of Federal Major Crimes Jurisdiction

### A. The Major Crimes Act (MCA)

Congress enacted the Major Crimes Act (MCA)<sup>8</sup> in 1885 to establish federal jurisdiction over an enumerated list of major crimes committed by Indians “against the person or property of another Indian or other person . . . within the Indian country.”<sup>9</sup> In so doing, Congress established a framework in which the United States holds jurisdiction—exclusive of the states—over (1) specific major crimes (2) committed by Indians (3) within Indian Country.<sup>10</sup>

The simplest requirement of the MCA is that the accused offense is one of those enumerated in the statute. These offenses include “murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title.”<sup>11</sup>

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8. Ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153).

9. 18 U.S.C. § 1153.

10. *Id.*

11. *Id.*

Next, the offense must have been committed by an Indian.<sup>12</sup> In *United States v. Rogers*,<sup>13</sup> the Supreme Court established the test now used to determine whether an individual qualifies as an Indian for purposes of the MCA.<sup>14</sup> Under *Rogers*, courts apply a two-pronged test requiring “(1) some quantum of Indian blood; and (2) [recognition] as an Indian by a tribe or the federal government.”<sup>15</sup> Due to differing levels of tribal recognition, qualification as an Indian can pose a difficult question in some circumstances, though the Supreme Court has yet to provide a definitive answer.<sup>16</sup>

Finally, the offense must have been committed within the boundaries of Indian Country.<sup>17</sup> It is important to note that the statute is written to include Indian Country, as this is defined elsewhere in federal law more broadly than an Indian Reservation.<sup>18</sup> The definition of Indian Country in 18 U.S.C. § 1151 includes “dependent Indian communities . . . whether within or without the limits of a state” and “all Indian allotments” as well as Indian Reservations.<sup>19</sup> The question of what lands in the State of Oklahoma constitute Indian Country, as in some other states,<sup>20</sup> required an answer from the Supreme Court.<sup>21</sup>

### B. *The McGirt Decision*

Jimmy McGirt was convicted in Oklahoma state court on charges of three sexual offenses.<sup>22</sup> McGirt “argued in postconviction proceedings that the State lacked [subject matter] jurisdiction to prosecute him.”<sup>23</sup> He founded this argument upon his contention that he was “an enrolled member of the [Oklahoma] Seminole Nation” and had committed the crimes for which he

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12. *Id.*

13. 45 U.S. 567 (1846).

14. Kaylee Snyder, Note, *State v. Nobles: Chance to Settle Needless Jurisdictional Turbulence*, 45 AM. INDIAN L. REV. 361, 362 (2020-2021) (citing *United States v. Rogers*, 45 U.S. (4 How.) 567 (1845)).

15. *Id.* at 363 (citing *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) and *United States v. Zepeda*, 729 F.3d 1103, 1113 (9th Cir. 2015)).

16. *See id.*

17. 18 U.S.C. § 1153.

18. 18 U.S.C. § 1151.

19. *Id.*

20. *See Hagen v. Utah*, 510 U.S. 399 (1994).

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

22. *Id.* at 2459.

23. *Id.*

was convicted on the Creek Reservation.<sup>24</sup> Having met all the requirements under the MCA, McGirt argued the statute stripped the State of Oklahoma of any jurisdiction in his case.<sup>25</sup> This argument fell flat in state courts, leading McGirt to his successful petition for certiorari.<sup>26</sup>

Having met the requirement that he be an Indian and that the crime be one enumerated in the MCA, McGirt needed only to prove his crimes took place in Indian Country. McGirt argued that the Creek Reservation was Indian Country for purposes of the MCA.<sup>27</sup> Before the Supreme Court, the State of Oklahoma argued that the land once occupied by the Creeks no longer had the characteristics sufficient to be considered Indian Country as recognized by the MCA.<sup>28</sup> To support this argument, the State of Oklahoma primarily cited changes during the “allotment era” in the United States, acts of Congress, and modern events and demographics.<sup>29</sup>

The Court held previously that Indian Reservations may not be disestablished without an act of Congress that clearly and directly indicates its intent to do so.<sup>30</sup> This holding—nearly summarily—dismissed Oklahoma’s contention that allotment era legislation had the power or immediate intent to disestablish the Creek Reservation. The Court further dismissed allotment as disestablishing the reservation by looking to 18 U.S.C. 1151, which extended Indian Country status to lands for which patents had been issued.<sup>31</sup> The primary feature of allotment era efforts by the United States government was the issuing of patents for land previously held as a part of reservations.<sup>32</sup>

Oklahoma then argued changes in “historical practices and demographics” indicated a dissolution of the Creek Reservation.<sup>33</sup> Much of this argument came from *Solem v. Bartlett*,<sup>34</sup> in which the Court presented the influx of non-Indian settlers and changes in demographics following an

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24. *Id.*

25. Pro Se Petitioner’s Post Conviction Petition in Error with Incorporated Brief at 1-2, *McGirt v. State*, No. PC-2018-1057 (Okla. Crim. App. 2018).

26. *McGirt v. Oklahoma*, 140 S. Ct. 659 (2019) (mem.).

27. *McGirt*, 140 S. Ct. at 2459–60.

28. *Id.*

29. *Id.* at 2463, 2465, 2468.

30. *Nebraska v. Parker*, 577 U.S. 481, 487–88 (2016) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

31. *McGirt*, 140 S. Ct. at 2464.

32. *Id.* at 2463.

33. *Id.* at 2468.

34. 465 U.S. 463 (1984).

act to determine whether its intent was to diminish reservation status.<sup>35</sup> However, the Court notes in the present case that this was not a dispositive test, but merely a means to decipher the intent of an ambiguous statute.<sup>36</sup>

Having looked to statutes for explicit language disestablishing the reservation and then to history to further indicate intent, the Court was unable to find anything that might indicate more than preparation for diminishing reservation boundaries.<sup>37</sup> The Court found little persuasive value in Oklahoma's policy arguments, including arguments that there would be an influx of appeals and new cases in the federal court system due to a long history of crimes like *McGirt's* being tried in state courts.<sup>38</sup> Finally, the Court affirmed the continued existence of the Creek Reservation in light of Oklahoma's history of exercising unlawful jurisdiction in the area, saying that "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law."<sup>39</sup>

Having affirmed the existence of the Creek Reservation, the Court established that *McGirt's* conviction fell under the MCA. However, *McGirt* was one of a very large class of individuals with convictions in state court that were now violations of the MCA. This meant there were many convictions from courts that had no subject matter jurisdiction to hand them down. The *McGirt* holding did not recognize a new area of land as Indian Country but affirmed the land to have been Indian Country all along. This meant Oklahoma state courts had to determine how to handle those cases tried in courts that had historically lacked the jurisdiction required to give their judgments validity.

### C. *McGirt Application to the Choctaw Reservation*

In *McGirt*, the United States Supreme Court reaffirmed the existence of the Creek Reservation and its boundaries in Northeast Oklahoma.<sup>40</sup> This holding presented new questions of jurisdiction for the remaining tribes within the region. For the Choctaw Nation, the question of whether Oklahoma had jurisdiction over major crimes under the MCA manifested itself in *Sizemore v. State*.<sup>41</sup>

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35. *Id.* at 471–72.

36. *McGirt*, 140 S. Ct. at 2468–69.

37. *See id.* at 2463–69.

38. *Id.* at 2480.

39. *Id.* at 2482.

40. *Id.* at 2452, 2479, 2482.

41. 2021 OK CR 6, ¶ 8, 485 P.3d 867, 869, *cert. denied*, 142 S. Ct. 935 (2022).

Devin Sizemore was “convicted of First Degree Murder . . . and Battery/Assault and Battery on a Police Officer” in Pittsburg County, Oklahoma.<sup>42</sup> Sizemore appealed the decision to the Oklahoma Court of Criminal Appeals, who remanded the case back to the district court for an evidentiary hearing.<sup>43</sup> The order directed the District Court of Pittsburg County to provide “findings of fact and conclusions of law” as to (1) whether Devin Sizemore held Indian status and (2) whether the boundaries of the Choctaw Indian Reservation should be treated as Indian Country for purposes of the MCA.<sup>44</sup>

During the ordered evidentiary hearing, both parties stipulated to Sizemore’s status as an Indian,<sup>45</sup> as well as the fact that “[t]he crime occurred ‘within the historical geographic area of the Choctaw Nation, as set forth in the 1830, 1837, 1855, and 1866 treaties between the Choctaw Nation, the Chickasaw Nation, and the United States.’”<sup>46</sup> Per the stipulations—and with analysis of applicable statutes per *McGirt*—the district court concluded that (1) Sizemore qualified as an Indian and (2) the crimes were committed in Indian Country.<sup>47</sup> Upon receipt of the court’s findings of fact and conclusions of law, the Oklahoma Court of Criminal Appeals held that the *McGirt* ruling governed the case and the “District Court of Pittsburg County did not have jurisdiction to prosecute Sizemore.”<sup>48</sup>

The *Sizemore* holding confirmed the status of the Choctaw Reservation as Indian Country, effectively extending the *McGirt* ruling to this portion of Northeast Oklahoma. The case provided evidence of how the Oklahoma Court of Criminal Appeals would handle other cases within boundaries traditionally recognized as Indian Country, regardless of whether they were previously treated as such.

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42. *Id.* ¶ 3, 485 P.3d at 868.

43. *Id.* ¶ 9, 485 P.3d at 869.

44. *Id.*

45. Court Order with Findings of Fact & Conclusions of Law in Accordance with Order Remanding for Evidentiary Hearing Issued August 19, 2020, at 2, *State v. Sizemore*, No. CF-2016-593 (Okla. Dist. Ct. of Pittsburg Cnty. 2020), <https://turtletalk.files.wordpress.com/2021/04/district-court-order.pdf>.

46. *Id.* at 5–6 (quoting Defendant’s Evidentiary Hearing Exhibit No. 1).

47. *Id.* at 9.

48. *Sizemore*, ¶ 16, 485 P.3d at 871.

### III. State *ex rel.* Matloff v. Wallace

#### A. Procedural History

Clifton Merrill Parish was convicted of second-degree murder in 2012 in Pushmataha County, Oklahoma.<sup>49</sup> Following his conviction, Parish appealed to the Court of Criminal Appeals—though there was no mention of lack of subject matter jurisdiction.<sup>50</sup> In 2014, the court affirmed the ruling of the district court.<sup>51</sup> Parish then filed an application for post-conviction relief in 2020, following the *McGirt* ruling.<sup>52</sup>

In Parish's application for post-conviction relief, he put forth the proposition that—per *McGirt*—the district court lacked the subject matter jurisdiction necessary to try him for or convict him of second-degree murder.<sup>53</sup> Citing *McGirt's* interpretation of 18 U.S.C. § 1151, Parish argued that Bryan County, Oklahoma—the location of his crime—constituted Indian Country for purposes of the MCA, thus making the statute applicable to his case.<sup>54</sup>

The district court found Parish's argument persuasive, thereby granting his application for post-conviction relief and dismissing the case without cost.<sup>55</sup> Following Judge Wallace's order granting post-conviction relief, the State of Oklahoma—represented by Mark Matloff, District Attorney of Pushmataha County—petitioned the Court of Criminal Appeals for a writ of prohibition vacating the order.<sup>56</sup>

#### B. The Question

In determining whether to grant the writ of prohibition which the state sought against Judge Wallace's order, the Court of Criminal Appeals

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49. Judgment & Sentence at 1, State v. Parish, No. CF-2010-26 (Okla. Dist. Ct. of Pushmataha Cnty. 2012).

50. Petitioner's Application for Post-Conviction Relief & Request to Vacate & Set Aside the Judgment & Sentence Because the Court Lacked Subject Matter Jurisdiction at 4–5, Parish v. State, No. CF-2010-26 (Okla. Dist. Ct. of Pushmataha Cnty. 2020).

51. *Id.* at 4.

52. *See id.* at 4–5.

53. *Id.* at 5.

54. *Id.* at 5, 7–8.

55. Order at 1, State v. Parish, No. CF-2010-26 (Okla. Dist. Ct. of Pushmataha Cnty. 2021).

56. State *ex rel.* Matloff v. Wallace, 2021 OK CR 21, ¶ 1, 497 P.3d 686, 687, *cert. denied sub nom.* Parish v. Oklahoma, 142 S. Ct. 757 (2022).

ordered petitioner Mark Matloff and Parish's post-conviction counsel, Debra Hampton, "to submit briefs . . . addressing the following":

In light of *Ferrell v. State*, *United States v. Cuch*, *Edwards v. Vannoy*, cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?<sup>57</sup>

The order went on to invite the Oklahoma Attorney General and Choctaw Nation to file briefs on the question presented.<sup>58</sup> The Cherokee Nation, Chickasaw Nation, and Muscogee-Creek nations joined in the Choctaw Nation brief. The Capital Habeas Unit of the Federal Public Defender's Office of the Western District of Oklahoma and Oklahoma Criminal Defense Lawyers Association also filed amicus briefs, which were filed in the official record.<sup>59</sup>

### C. *The Holding and Reasoning*

The Oklahoma Court of Criminal Appeals granted Matloff's petition for the writ of prohibition, preventing enforcement of Judge Wallace's order to dismiss the case against Parish.<sup>60</sup> The court held that, announcing a new procedural rule, *McGirt* did not retroactively apply in order to void convictions finalized before the Supreme Court's ruling.<sup>61</sup> Finally, the court clarified that one should interpret this decision to have overruled "[a]ny statements, holdings, or suggestions to the contrary in . . . previous cases."<sup>62</sup>

In support of the holding, the court cited its own application of non-retroactivity doctrine in prior cases and noted the doctrine's similarity to that of the United States Supreme Court regarding habeas corpus.<sup>63</sup> The court initially looked to *Ferrell v. State*,<sup>64</sup> where the two exceptions to this rule included cases in which the rule placed "certain kinds of primary

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57. Order Granting Stay of Proceedings and Directing Supplemental Briefs at 3–4, *State ex rel. Matloff v. Wallace*, 497 P.3d 686 (No. PR-2021-366) (citations omitted).

58. *Id.* at 4.

59. *Matloff*, ¶ 6 n.2, 497 P.3d at 688 n.2.

60. *Id.* ¶ 6, 497 P.3d at 688.

61. *Id.*

62. *Id.* ¶ 15, 497 P.3d at 689.

63. *Id.* ¶ 7, 497 P.3d at 688–89.

64. 1995 OK CR 54, ¶¶ 6–7, 902 P.2d 1113, 1114–15 (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

conduct beyond the power of the criminal law-making authority to proscribe” or require “the observance of those procedures that are implicit in the concept of ordered liberty.”<sup>65</sup>

The court framed its application of the non-retroactivity doctrine as supporting the need for finality in criminal convictions. In so doing, the court cited finality as an important aspect of the criminal law without which the law’s “deterrent effect” would be severely diminished.<sup>66</sup> Of course, new rules may apply to cases that may be “pending on direct appeal” at the time of the rule’s announcement, and the non-retroactivity doctrine indicates nothing to the contrary.<sup>67</sup> That is, only a final conviction is immune to appeal for rule changes—whether procedural or substantive. Beyond the need for finality in criminal convictions, the court listed “reliance” and “public safety interests” as factors “weigh[ing] strongly against the application of new procedural rules to convictions already final when the rule is announced.”<sup>68</sup>

Having established the existing doctrine regarding a new rule’s application to a final conviction, the court went on to examine a case with similar—though not entirely identical—circumstances.<sup>69</sup> The Supreme Court, in *Hagen v. Utah*, held that Congress had diminished certain lands within Utah, and the lands did not constitute Indian Country for purposes of the MCA.<sup>70</sup> Following this decision, the United States Circuit Court of Appeals for the Tenth Circuit reviewed two cases in which individuals were convicted of crimes in federal district court. In the most notable of these two cases, *United States v. Cuch*, the Tenth Circuit held that the federal district court convictions, though lacking subject matter jurisdiction, were valid due to their finality and the court’s authority to apply new rules prospectively.<sup>71</sup>

The Oklahoma Court of Criminal Appeals noted that convictions with jurisdictional defects do not, on their face, represent issues with fairness or the fact-finding function of a court.<sup>72</sup> With respect to fact-finding, state and federal courts retain equivalent legitimacy and protections. The court found

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65. *Id.* ¶ 7, 902 P.2d at 1115 (citing *Teague*, 489 U.S. at 310)).

66. *Id.*

67. *Matloff*, ¶ 8, 497 P.3d at 689.

68. *Id.* ¶ 11, 497 P.3d at 689.

69. *Id.* ¶ 16, 497 P.3d at 689–90.

70. 510 U.S. 399 (1994).

71. 79 F.3d 987 (10th Cir. 1996).

72. *Matloff*, ¶ 21, 497 P.3d at 690.

fairness to be a balancing test to some degree, citing fairness to the prosecutors and law enforcement officials as well as fairness to the criminally accused in their analysis.<sup>73</sup> Finally, the court noted that the cases in *Cuch* were founded in well-established jurisdiction when they were initially decided.<sup>74</sup>

The *Matloff* opinion founded itself on two primary facets of the *McGirt* ruling. First, the rule announced was one of a procedural nature as opposed to substantive.<sup>75</sup> Second, *McGirt* announced what amounted to a *new* rule.<sup>76</sup> The Oklahoma Court of Criminal Appeals differentiated procedural rules from substantive rules through *Ferrell's* definition of substantive rules as those that place conduct or classes of persons beyond the reach of a criminal statute.<sup>77</sup> Then, it looked to *Ferrell* in holding that a rule breaking new ground (as the court so determined) does not require retroactive application. Together, the court held the *McGirt* ruling to not only be prospectively applicable, but that retrospective application may fly in the face of justice for victims of crimes.

#### D. The Consequences

Prior to *Parish*, the Court of Criminal Appeals remanded numerous cases as a result of the State of Oklahoma's lack of subject matter jurisdiction under the MCA as announced in the *McGirt* ruling.<sup>78</sup> The cases appealed to the Court of Criminal Appeals only represent those *remanded* as a result of the *McGirt* ruling. Oklahoma's Post-Conviction Procedure Act allows those convicted of crimes to apply for relief in the court in which judgment was imposed, including in cases involving jurisdictional defect.<sup>79</sup> There were certainly cases vacated through the post-conviction relief process, as well, meaning many cases were likely resolved without ever making it to the docket of the Court of Criminal Appeals.

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73. *Id.* ¶¶ 21–22, 497 P.3d at 690–91.

74. *Id.* ¶ 25, 497 P.3d at 691.

75. *Id.* ¶ 26, 497 P.3d at 691.

76. *Id.* ¶ 28, 497 P.3d at 691–92 (emphasis added).

77. *Ferrell v. State*, 1995 OK CR 54, ¶ 7, 902 P.2d 1113, 1115 (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

78. *See Hogner v. State*, 2021 OK CR 4, 500 P.3d 629; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867; *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250; *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 (withdrawn).

79. 22 OKLA. STAT. ANN. § 1080 (West, Westlaw through 58th Legis. Sess.).

In holding *McGirt* as applicable only prospectively, the Court of Criminal Appeals handed down a jurisprudential about-face with consequences similar to those which the court sought to mitigate. The finality which the court sought to preserve in refusing to apply *McGirt* retroactively found itself promptly uprooted in cases such as *Bosse v. State* where the court vacated and set aside an opinion granting post-conviction relief.<sup>80</sup> Certainly, the interest in the finality of the defendant was left unpreserved in *Bosse*, thanks only to a stay of mandate issued with the initial order granting relief.<sup>81</sup>

While the court could have reversed a grant of post-conviction relief in some cases, others were beyond the reach of the *Matloff* decision. As the Court of Criminal Appeals made clear, a court may apply new procedural rules when a case is on direct appeal at the time of announcing of the new rule.<sup>82</sup> Due to the lapse in time between the *McGirt* decision and several cases dismissed and finalized following the decision, *Matloff* could not claw back dismissals that had already become final.

The time that elapsed between *McGirt* and *Matloff* created a scenario in which a body of doctrine in flux left different litigants with different applications of law. Certainly, there are those happy with the result. But for those not happy with the result—those viewing the scenario from the post-*Matloff* side of the law—it would seem the court neglected its interest in promoting justice. The questions presented by the *McGirt* ruling certainly demonstrate the adversarial system’s ability to illuminate different degrees, constructions, and balances of justice in the American court system.

#### IV. The Case

##### A. The Primary Holding

The *Matloff* court relied on two important categorizations in determining the appropriate test and how to apply it to the *McGirt* rule. The court held that “*McGirt v. Oklahoma* announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction.”<sup>83</sup> Thus, the entire opinion hinges on the rule being both (1) procedural and (2) new.

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80. 2021 OK CR 23, 495 P.3d 669 (withdrawn).

81. *Id.*

82. *Matloff*, ¶ 8, 492 P.3d at 689.

83. *Id.* ¶ 6, 497 P.3d at 688.

By categorizing the *McGirt* rule as procedural, the court retains greater discretion in how and when to apply the rule to final convictions. A *new* rule, particularly when categorized as procedural, allows the court to establish a clear date prior to which courts should not apply it, foreclosing the possibility of any reversals that the new rule may otherwise have allowed. Due to the implications of a rule being categorized as new and procedural, we must analyze the decision at each prong of the test to determine whether the court's determinations accurately reflect the nature of the *McGirt* rule in the context of its legal history.

Under *Teague*, the case through which the Court of Criminal Appeals chose to analyze the *McGirt* rule, the Supreme Court provided only two exceptions allowing for retroactive application of a new rule.<sup>84</sup> The first exception is when a new rule places individual conduct outside the scope of legislative authority to proscribe—pointing to rules of a substantive nature.<sup>85</sup> The second exception includes rules which require a court to observe “those procedures” implicit in ordered liberty—clearly identifying procedural rules.<sup>86</sup> However, The Court of Criminal Appeals notes the second exception (applying to rules of procedure) is no longer incorporated into a *Teague* analysis following *Edwards v. Vannoy*.<sup>87</sup> This change essentially forecloses the possibility that the court would apply a new rule of a procedural nature retroactively under *Teague*.

If the *McGirt* rule is not, in fact, procedural, it would align more closely with the excepted category of substantive rules which allow for retroactive application. Thus, we must look to the court's reasoning to determine whether the *McGirt* rule can be so easily dismissed as procedural and thus applied only prospectively.

#### *B. McGirt as a Procedural Ruling*

Because jurisdictional defects may be raised in post-conviction relief and federal habeas petitions, we must first look to these avenues of relief as the framework through which the *McGirt* rule will be applied. *Matloff*'s categorization of *McGirt* as procedural calls into question the role of subject matter jurisdiction in American courts. Every first-year law student becomes intimately familiar with the fact that subject matter jurisdiction is

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84. *Teague v. Lane*, 489 U.S. 288, 311 (1989).

85. *Id.*

86. *Id.*

87. *Matloff*, 2021 OK CR ¶ 10, 497 P.3d at 689 (citing *Edwards v. Vannoy*, 141 S. Ct. 1547, 1561 (2021)).

the most basic requirement a court must meet to exercise any degree of power over an individual.<sup>88</sup> Subject matter jurisdiction is a fundamental aspect of all litigation, an aspect that “can never be forfeited or waived.”<sup>89</sup> The question arises out of the fact that an objection which may be raised at any time is effectively given an expiration date in post-conviction relief and habeas corpus proceedings.

As *Matloff* and cases therein demonstrate, there is an interest in finality promoted by a statutory expiration date as part of the judicial process. Placing limitations on when a case can be appealed or is eligible for post-conviction relief equally serves judicial efficiency. However, in *Matloff*, the issue was one of the state courts’ misinterpretation of the law as opposed to delay on the part of the convicted. It is important to consider the habeas and post-conviction statutes on their own, as well as in the light of the constitutional safeguards upon which they may impinge.

#### *1. Federal Habeas and State Post-Conviction Relief*

Applicants for the writ of habeas corpus must meet certain requirements when applying.<sup>90</sup> These requirements are applicable regardless of the grounds on which the applicant is petitioning the court and list no exempting complaints (such as a defect in subject matter jurisdiction at the trial court level).<sup>91</sup> Many grounds for an application for writ of habeas corpus flow from the United States Constitution, demonstrating the weight of this writ. But even when it relates to a constitutional question, a court will nearly always deny an application not timely filed.

The United States Code provides guidelines, including a timeline, requiring filing of an application for the writ of habeas corpus be filed within one year of: (1) the judgment becoming final at conclusion of direct review, (2) the window for direct review closing, (3) prevention of filing by state action being removed, (4) recognition of the constitutional right being asserted by the Supreme Court and made retroactive, or (5) the date upon which the grounds for application could have been discovered.<sup>92</sup> These guidelines provide a clear and navigable procedural framework under which a prisoner may petition the court for the writ of habeas corpus. On

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88. *United States v. Cotton*, 535 U.S. 625, 630 (2002).

89. *Id.*

90. *See* 28 U.S.C. § 2242.

91. *Id.*

92. 28 U.S.C. § 2244(d)(1)(A)–(D).

their face, they show a logical framework for promoting finality in the court system and show little room for confusion.

In *Matloff*, the interested party—Parish—sought post-conviction relief at the state level.<sup>93</sup> Similar to the writ of habeas corpus which played into several post-*McGirt* cases, there are state statutes governing the process of applying for post-conviction relief. Because Parish sought relief in the State of Oklahoma, this Note will focus on those statutes.

Other than for capital cases, the Oklahoma Post-Conviction Procedure Act does not come with a deadline for filing of an application.<sup>94</sup> This allowed for filing of an application for post-conviction relief in the *Parish* case nearly four years after a final conviction.<sup>95</sup> The statute includes a deadline for capital cases due to their necessarily limited time for adjudication of post-conviction applications.<sup>96</sup> Applications for post-conviction relief in capital cases must be filed within ninety days of the appellee's direct appeal brief or ninety days of the reply brief.<sup>97</sup> Similar to habeas corpus, applicants for post-conviction relief may file for any number of reasons including those that arise under the Oklahoma or United States Constitution.<sup>98</sup> Also, as with habeas corpus, the claims included in the application do not materially alter the guidelines for filing.<sup>99</sup>

In both habeas and state post-conviction relief circumstances, the limitations upon the convicted do not implicate any fundamental rights. The guidelines make no mention of subject matter jurisdiction as waivable, nor do they preclude application on that basis. Clearly, neither statute dismisses the necessity of subject matter jurisdiction in and of itself. However, each statute provides a time limitation on an aspect of the legal system held as raisable at any time.

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93. Petitioner's Application for Post-Conviction Relief, *Parish v. Oklahoma*, 142 S. Ct. 757 (2022) (cert. denied) (No. CF-2010-26).

94. Oklahoma Post-Conviction Procedure Act, 22 OKLA. STAT. ANN. §§ 1080–1089 (West, Westlaw through 58th Legis. Sess.).

95. Petitioner's Application for Post-Conviction Relief, *supra* note 93.

96. 22 OKLA. STAT. ANN. § 1089.

97. *Id.*

98. *Id.*

99. *Id.*

*2. Habeas and Post-Conviction Relief in Light of Subject Matter Jurisdiction*

Having found the existing habeas and post-conviction statutes to be clearly procedural, we look to subject matter jurisdiction as applied within this statutory framework to determine their effect on subject matter jurisdiction. The deadlines in the federal habeas statute, as well as the Oklahoma post-conviction statute as applied to capital cases, pose a unique challenge when applied to subject matter jurisdiction. If subject matter jurisdiction defects may give rise to an objection at any time, how can they be excluded through other procedural guidelines? Further, how can the very conviction necessitating post-conviction relief be ineligible for that relief if the court handing it down lacked the power to do so in the first place? In this scenario, a defendant is required to abide by rules governing a conviction which has no actual legal weight.

The *Matloff* court provides a legally sound analysis of post-conviction relief statutes as procedural guidelines. Their interpretation was not only that *McGirt* was procedural, but that it established a new rule.<sup>100</sup> The court cites the Supreme Court's *Teague* retroactivity analysis, applied in *Ferrell*, as the necessary test to determine whether *McGirt*'s ruling should be applied retroactively.<sup>101</sup> Assuming, *arguendo*, that the *McGirt* ruling announced what may be considered a new rule, the case law is in favor of the *Matloff* outcome.<sup>102</sup> To allow any new rule handed down from the Supreme Court to open the proverbial flood gates for post-conviction relief applications, many of which may only tenuously relate to the rule, places a great burden on the courts, law enforcement, and victims of the crimes. This burden would reduce *Matloff*'s recurring finality theme to a mere afterthought.

Certainly, habeas and post-conviction relief statutes which have the capacity to limit claims based upon new jurisdictional defects fit nicely into the procedural category. By establishing a firm boundary as to when a new rule may be applied to a criminal case, in conjunction with a defined point of finality for convictions, the state provides a definite endpoint that protects courts in considering new rules of criminal law and procedure.

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100. State *ex rel.* *Matloff v. Wallace*, 2021 OK CR 21, ¶ 6, 497 P.3d 686, 688, *cert. denied sub nom.* *Parish v. Oklahoma*, 142 S. Ct. 757 (2022).

101. *Id.* ¶ 8, 497 P.3d at 689.

102. See *Teague v. Lane*, 489 U.S. 288 (1989); *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113.

Courts need not consider every final conviction in determining the effects of a new rule and its impact on the criminal justice system. Thus, the system may reap the benefits of the new rule without the need for finality weighing against them. Even when viewed in the light of subject matter jurisdiction, habeas and post-conviction relief statutes provide the finality and definite boundaries necessary for justice.

### 3. *Is McGirt's Rule Truly Procedural?*

While the statutes providing an avenue for relief in cases involving a subject matter jurisdictional defect are procedural, this does not extend the categorization to subject matter jurisdiction itself. In fact, Professor Bernard Gavit posited that subject matter jurisdiction is neither procedural nor substantive but “is simply a limitation on the power of a court to act *as a court*.”<sup>103</sup> This view recognizes subject matter jurisdiction’s ability to preempt the court’s authority to apply any other laws, whether procedural or substantive. Acknowledging the unsettled categorization of subject matter jurisdiction, particularly in the light of the *Matloff* court’s determination that subject matter jurisdiction is procedural, it becomes useful to look to the court’s chosen case for analysis.

In *Matloff*, the Oklahoma Court of Criminal Appeals used the guidelines established in *Teague* as applied in *Ferrell* to determine the proper way in which to apply new rules established by a higher court.<sup>104</sup> In their application of the *Teague* ruling, the court identified two scenarios in which to apply a new rule retroactively. First, a rule may be applied retroactively when it “place[s] certain primary (private) conduct beyond the power of the Legislature to punish.”<sup>105</sup> Second, retroactive application is appropriate when a rule “categorically bar[s] certain punishments for classes of persons because of their status.”<sup>106</sup> Notably, both scenarios involved rules of a substantive nature, as the court emphasized in its explanation.<sup>107</sup> This effectively eliminated any potential to retroactively apply a procedural rule—under this test—to final convictions.

The second scenario which would allow for retroactive application of the *McGirt* rule would require even an experienced appellate attorney to stretch

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103. Bernard C. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 UNIV. PA. L. REV. 386, 386 (1932).

104. *Matloff*, ¶¶ 8–10, 497 P.3d at 689.

105. *Id.* ¶ 9, 497 P.3d at 689.

106. *Id.*

107. *Id.*

to argue applicability. The scenario requires (1) barring a punishment for (2) a class of people due to their status.<sup>108</sup> A jurisdictional ruling does little to bar a certain punishment. In fact, as a state still executing prisoners, Oklahoma's potential punishments reflect those of the federal government accurately, at least in type. As a rule, recognizing federal jurisdiction and stripping state jurisdiction, the parallels in punishment do much to put the punishment exception to rest. Of course, those recognized as Indians fit into a class of people with a "Indian status" under the Major Crimes Act. However, the punishment exception remains inapplicable without a barred punishment.

In contrast, the court's first scenario seems to fit the facts of the *McGirt* decision relatively well. Here, the scenario requires (1) private conduct to be (2) placed "beyond the power of the Legislature to punish."<sup>109</sup> This—on its face—is a jurisdictional question. Without legislatively defined jurisdiction, a court has no power to punish any conduct—private or otherwise. By stripping state courts of jurisdiction, the *McGirt* rule places the conduct of Indians within Indian Country covered by the MCA beyond the power of the legislature to punish. If the *McGirt* rule meets each element of the second scenario so clearly, it calls into question the court's holding that the rule is a procedural one. If the rule meets the elements of the second scenario, it seems more appropriately categorized as substantive—and for the same reason is a persuasive argument for application of *McGirt* retroactively.

### C. *McGirt's* New Rule

#### 1. Need for "Newness"

The case for the *McGirt* rule as substantive and not procedural is a strong one, calling into question whether the *Teague* analysis as applied by the Court of Criminal Appeals was an accurate one. The *McGirt* rule places certain conduct beyond the reach of the state legislature to punish. If the rule *is* substantive, retroactive application would likely be the proper choice. Even then, the *Teague* case provided a framework for analysis which applied to *new* rules. After all, a question regarding an existing rule would implicate a court's judgment and not the law itself. Thus, we address whether the *McGirt* rule constitutes new law or merely a clarification of historical misinterpretation by Oklahoma courts.

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108. *Id.*

109. *Id.*

If the *McGirt* rule simply clarifies whether the territories in question constitute Indian Country, there is no foundation for calling the rule a new one. To call the reaffirmation of accurate law new would create a convenient scapegoat, removing blame from judges across the nation and allowing for interpretations of law which have the potential to become valid case law through mere repetition of application. This becomes particularly problematic when considering cases like *McGirt* in which the misinterpretation—in good faith or otherwise—vastly expands the jurisdiction of a state while ignoring treaties to which the entire nation is party.

## 2. *New Rule Applicability*

If the habeas and post-conviction relief statutes at play in the criminal justice system do not deny any rights on their face, how can they still result in outcomes which are seemingly violative of a foundational principle such as subject matter jurisdiction? One could argue the intent of subject matter jurisdiction is not, in fact, ignored in these statutes. Typically, a court determines subject matter jurisdiction through a simple analysis of the court in question's statutorily defined jurisdiction. If the parties meet the factors of the analysis, the court can establish jurisdiction. Absent a court's abuse of discretion or other error, there should be little need to complain of subject matter jurisdiction defects in any court above the trial level.

Even in cases where a trial court abuses discretion and acts without subject matter jurisdiction, an appeal likely clears up the problem. An appellant may again bring an unsuccessful case before courts under post-conviction and habeas statutes, so long as the appeal hinges upon jurisdictional rules applicable at the time of adjudication. Each step of the process acknowledges the weight of subject matter jurisdiction and establishes no bar to relief for jurisdictional defect.

The problem with post-conviction and habeas relief statutes arises when confronted with a change in jurisdiction flowing from a new rule. The Oklahoma Court of Criminal Appeals, as well as the United States Supreme Court, have established case law that provides the guidelines necessary to properly handle final convictions after announcement of a new rule.<sup>110</sup> By barring relief based upon entirely new rules of procedure for final convictions, the courts acknowledge the fact that changes in procedure are

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110. See *Teague v. Lane*, 489 U.S. 288 (1989); *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113.

unlikely to affect determination of innocence or guilt through the fact-finding function of the courts.

The question that goes unanswered in *Teague* and *Ferrell* is how a rule should be handled when it is not actually new but has merely been misinterpreted or misapplied over time. New rules do not come with any blame for courts, legislators, or the accused. They often reflect new interpretations of what justice means for citizens or acknowledge and seek to solve difficulties long recognized in the criminal justice system.<sup>111</sup> In contrast, misinterpretation of the law by judges has directly implicated their judgment. Whether through true misinterpretation or bad faith expansion of power, misinterpretation of the law by a court results in injustice for which judicial officials are entirely culpable. Correction of these misinterpretations should not be deemed to establish a new rule at the expense of innumerable defendants, but to correct prior jurisprudence in the area.

### 3. Defining a New Rule

The *Matloff* court predicates their analysis of *McGirt*'s retroactive applicability on *McGirt* announcing a *new* rule of procedure. Citing *Teague v. Lane*, the court applied an analysis determining whether the rule “breaks new ground or imposes a new obligation on the States or the Federal Government” or “if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>112</sup> Though providing the preceding definition, the Supreme Court notably does “not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes” in the *Teague* opinion.<sup>113</sup> Accepting the above analysis as the one applied in the *Matloff* opinion, new questions come to light.

#### a) Breaking New Ground

*Teague*'s first option includes rules which are deemed to break “new ground” or impose new obligations upon states or the federal government. In the broadest view of “new ground,” jurisdictional questions relating to Indian Country are far from new. In fact, the MCA, around which the *McGirt* question revolved, was passed in its first form in 1885<sup>114</sup> The previous point demonstrates not only a legislative interest in how the

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111. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

112. *Teague*, 489 U.S. at 301.

113. *Id.*

114. Ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153).

United States worked within a system, including sovereign Indian Nations, but goes further to indicate an interest in the very kind of jurisdictional question posed to the *McGirt* court. The history of the MCA alone puts the argument that *McGirt* breaks new ground to rest.

One can make the argument that this view of breaking new ground takes too broad an approach to the question. The MCA impacted state and federal jurisdiction, as a whole, not merely the lands in question in *McGirt* and *Matloff*. If the *McGirt* decision addressed Indian Territory within the State of Oklahoma specifically, one must look to jurisdictional questions between the State of Oklahoma and the several nations within its boundaries. This more specific scope of analysis yields similar results. In light of the exclusive federal jurisdiction over major crimes in Indian Country established by the MCA, Congress passed Public Law 280 to provide state jurisdictional exceptions. Public Law 280—passed in 1953—essentially exempted a list of specific states from the jurisdictional limitations in the MCA.<sup>115</sup>

Oklahoma is notably absent from the list of states for which the law extended state criminal jurisdiction.<sup>116</sup> While by no means dispositive as to the question of breaking new ground, this law demonstrates at least some consideration as to how and when it may be appropriate to extend jurisdiction to the states for criminal matters otherwise reserved for the federal court system. This reaffirms the federal recognition that there are questions of state jurisdiction when it comes to matters of criminal law. Further, it demonstrates a recognition of states in which exclusive federal jurisdiction under the MCA was problematic enough to warrant changes to the law.

The Oklahoma Court of Criminal Appeals has itself acknowledged the complexity arising at the intersection of criminal law, jurisdiction, and the MCA. In *Magnan v. State*, the court heard the case of an individual convicted on three counts of first-degree murder and one count of shooting with intent to kill.<sup>117</sup> Early in the opinion, the court indicated recognition of MCA limitations to Oklahoma's criminal jurisdiction, noting that it "consider[ed] whether this crime occurred in Indian Country and so is

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115. Act of Aug. 15, 1953 (Public Law 280), Pub. L. No. 83-280, § 2, 67 Stat. 588, 588–89 (codified as amended at 18 U.S.C. § 1162).

116. *Id.*

117. 2009 OK CR 16, ¶ 1, 207 P.3d 397, 401, *rev'd sub nom.* *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013).

beyond the jurisdiction of the State of Oklahoma.”<sup>118</sup> The court found that Magnan failed to prove the land on which the crime was committed qualified as Indian Country, though the Tenth Circuit Court of Appeals reversed.<sup>119</sup>

The *Magnan* decision indicates two things material to the current analysis. First, the case put the Oklahoma Court of Criminal Appeals on notice that there were questions of jurisdiction which require an answer under the MCA. Much of the court’s analysis surrounded the signing over of mineral rights to the Seminole Nation Housing Authority.<sup>120</sup> The court’s ruling relied on their interpretation of what did or did not include allotted lands, an interpretation the Tenth Circuit found unconvincing on appeal. This misinterpretation served as a warning that Indian Country determinations were a complex issue requiring close analysis.

Second, the Tenth Circuit’s overruling of the Court of Criminal Appeals’ decision indicated an underinclusive view of what constituted Indian Country on the part of the state. The ruling demonstrated precedential recognition of lands not previously recognized by the State of Oklahoma as constituting Indian Country for purposes of the MCA. Again, this decision serves to indicate the issue of Oklahoma’s underinclusive view of Indian Country is not a new issue or one which breaks new ground, even when viewed specifically within the lens of the Oklahoma Court of Criminal Appeals.

*b) Existing Precedent*

Under the *Teague* analysis, a court may also apply a rule retroactively “if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>121</sup> That is to say that prior cases showing similar results may indicate that a rule should be applied retroactively once reaffirmed by the United States Supreme Court. In the *Matloff* opinion, the court cites previous refusal to recognize the Muscogee Creek Reservation as applicable precedent with a distinguishing result to the *McGirt* rule.<sup>122</sup> However, the court makes only passing mention of the Tenth Circuit decision which followed.

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118. *Id.* ¶ 2, 207 P.3d at 401.

119. *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013).

120. *Magnan*, ¶¶ 21–25, 207 P.3d at 404–06.

121. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

122. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 31, 497 P.3d 686, 692, *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757 (2022).

In *Murphy v. State*, the Oklahoma Court of Criminal Appeals reviewed on appeal—amongst other questions—whether a crime was committed on land recognized as part of the Muscogee Creek Reservation for purposes of the MCA. The record indicated two witnesses who believed the boundaries of the Creek Nation remained, even after allotment processes.<sup>123</sup> The court cited the Tenth Circuit’s previous refusal to answer whether the lands in question constituted a reservation in 1866.<sup>124</sup> The Oklahoma Court of Criminal Appeals also refused to make a finding as to reservation status of those lands, citing the same Tenth Circuit decision.

On appeal to the Tenth Circuit, the court held that the land on which the crime occurred *did* constitute Indian Country under the MCA.<sup>125</sup> The court conducted an analysis similar to that of the Supreme Court in the *McGirt* case, finding no statutory language which definitively disestablished the Creek Reservation.<sup>126</sup> Following statutory analysis, the court looked to modern evidence of disestablishment and found that there was no unequivocal revelation of congressional intent to disestablish the reservation.<sup>127</sup> Accordingly, the Tenth Circuit concluded that the petitioner’s conviction and death sentence were invalid.<sup>128</sup>

Though the facts do not resemble those of the *Matloff* case entirely, the question answered by the Tenth Circuit still applies. Having determined the Muscogee Creek Nation boundaries to be still intact, the decision clearly applies as precedent to the *McGirt* rule. This supports the *Teague* test’s requirement that a rule be dictated by precedent to retroactively apply.<sup>129</sup> In fact, *Murphy* serves as far stronger precedent than *United States v. Cuch*, which the court cites as guiding precedent for the *Matloff* decision.

The Supreme Court addressed the question of the continued existence of the Uintah Reservation in *Hagen v. Utah*.<sup>130</sup> The court held that the reservation had been intentionally diminished by Congress, essentially

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123. *Murphy v. State*, 2005 OK CR 25, ¶ 50, 124 P.3d 1198, 1207, *cert. denied sub nom. Murphy v. Oklahoma*, 551 U.S. 1102 (2007).

124. *Id.* ¶ 51, 124 P.3d at 1207–08 (citing *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 975 n.3, 980 n.5 (10th Cir. 1987)).

125. *Murphy v. Royal*, 875 F.3d 896, 948 (10th Cir. 2017), *aff’d sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

130. 510 U.S. 399 (1994).

overruling prior Tenth Circuit cases holding otherwise.<sup>131</sup> In *Cuch*, the defendants filed motions to vacate their convictions, asserting claims of jurisdictional defects stemming from the prior Tenth Circuit holdings.<sup>132</sup> Although the defendants had been convicted in federal courts prior to the Supreme Court ruling which determined the Uintah Reservation to have been diminished, the Tenth Circuit upheld the convictions in part for having been decided upon a solid legal foundation at the time of adjudication.<sup>133</sup>

The distinguishing factor between *Cuch* and the cases following the *McGirt* decision comes when looking to the authority under which the courts applied the jurisdictional framework. In *Cuch*, the lower courts heard cases and handed down convictions based upon a Tenth Circuit Court of Appeals decision which held the Uintah Reservation remained within its historical boundaries.<sup>134</sup> These courts were acting under a higher court's precedent with good faith reliance on the legal validity thereof. Oklahoma, however, relied on only interpretation of reservation status and prior state court decisions to support prosecution and conviction of individuals otherwise excluded from state jurisdiction by the MCA.<sup>135</sup> No higher court had deemed the land in question to have been diminished from its status as Indian Country. A court's own interpretation of the law in prior cases hardly holds equivalent weight to the decisions of the United States Circuit Courts of Appeals, particularly regarding issues of Indian Law.

In consideration of *Murphy* and *Cuch*, it becomes clear that Oklahoma had access to applicable precedent prior to the *McGirt* ruling. In fact, *Murphy* gave an answer to whether the Creek Nation enjoyed continued existence in the eyes of federal courts. The *Cuch* cases resulted from courts' interpretation of binding precedent of a federal appellate court. The cases preceding *McGirt*, however, ignored Tenth Circuit precedent affirming the existence of the Muscogee-Creek Reservation and continued to encroach upon tribal sovereignty through reliance upon their own precedent. As a result, *Cuch* seems far more distinguishable from the *Matloff* scenario than it seems applicable, regardless of its outcome.

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131. . *Id.* at 401.

132. *United States v. Cuch*, 79 F.3d 987, 988 (10th Cir. 1996), *cert. denied*, *Appawoo v. United States*, 519 U.S. 963 (1996).

133. *Id.* at 988–89.

134. *Id.* at 989.

135. *Id.*

*D. Analysis*

Through application of the *Teague* analysis used previously in *Ferrell*, the Oklahoma Court of Criminal Appeals held the rule announced in the *McGirt* decision to be (1) procedural and (2) new. First, the court reasoned that it could not deem the rule to be substantive as, in the court's view, it did not place conduct outside the legislature's ability to punish or change punishment for a specific class of persons based upon status. Second, the rule broke new ground which had not previously been accounted for in precedent. As a new procedural rule, *McGirt* became applicable only prospectively, halting the line of cases prior to *Matloff* that applied the *McGirt* rule retroactively to void convictions.

The Court of Criminal Appeals' *Teague* analysis acknowledged two narrow exceptions under which a rule may be deemed to be substantive as opposed to procedural. First, a rule may be substantive if the rule removes the possibility of certain punishments for certain classes of persons based upon status. This exception yields little for the analysis of *McGirt* as substantive. The second, however, proves to be applicable.

Under the second exception, a new rule is substantive when it places certain conduct outside of the power of the legislature to punish. By stripping Oklahoma courts of the jurisdiction necessary to render judgment for major crimes, the *McGirt* rule places certain conduct (major crimes committed by Indians in Indian Country) outside the legislature's power to punish. The court failed to recognize this exception's applicability to the *McGirt* rule.

The above would seem to indicate the *McGirt* rule to be a substantive one, changing the applicability of *Teague*'s non-retroactivity. However, the Oklahoma Court of Criminal Appeals determined the rule to still be one of a procedural nature. The next prong of the analysis involves determining the "newness" of the rule announced in *McGirt*, as new rules are to be applied only prospectively. This analysis looks to whether the announced rule breaks new ground or contradicts precedent at the time it is announced.

The court cited its own case law's refusal to recognize Indian Country in the *McGirt* lands to support *McGirt* as a ruling breaking new ground. In so doing, the court failed to recognize decisions of the Tenth Circuit with holdings recognizing the lands in question as Indian Country. The *Teague* analysis could not reasonably be expected to simply consider any case law from any court, but, instead, should be construed as referring to *binding* case law. In that case, the Oklahoma Court of Criminal Appeals cases which refuse to recognize Indian Country in Northeast Oklahoma fail under

the weight of Tenth Circuit Rulings to the contrary. Thus, precedent shows the *McGirt* decision to break no new ground for purposes of the *Teague* analysis.

### 1. General Implications

The rule announced by the United States Supreme Court in *McGirt* constitutes a willingness to honor the treaties which the United States entered long before any Justice now sitting was born. The ruling signifies a willingness on the part of the United States to honor promises it has made in the past without regard for the difficulties that may arise in the modern judicial landscape. Notably, the rule merely reaffirmed the status of the lands in question as constituting Indian Country. There was no cession of land, authority, or jurisdiction. However, the rule certainly created a scenario in which the State of Oklahoma no longer had the same level of control over certain crimes, the tribes had a new and expanded set of responsibilities, and courts regardless of their sovereign were called upon to interpret treaties with a greater level of deference.

The State of Oklahoma quickly filed appeals in a number of cases with questions related to the *McGirt* decision, citing concern for state sovereignty. Following the Oklahoma Court of Criminal Appeals' holding that *McGirt* was only prospectively applicable, criminal defendants turned to the court with their own questions. By the beginning of 2022, the United States Supreme Court began responding to both the State of Oklahoma and criminal defendants alike. The first Supreme Court response came in *Parish v. Oklahoma*<sup>136</sup> following denial of an appeal to the Oklahoma Court of Criminal Appeals. The Court denied certiorari, essentially cementing the Oklahoma Court of Criminal Appeals holding in *Matloff*.

Following the denial of certiorari for the *Parish* case, the Court opted to take up one of Oklahoma's appeals to the *McGirt* decision. In *Castro-Huerta v. State*, the Oklahoma Court of Criminal Appeals instructed dismissal below for want of jurisdiction.<sup>137</sup> While refusing to take up the question of whether to overrule *McGirt*, the Court indicated it would hear oral arguments to determine the applicability of the *McGirt* decision to non-Indian criminal defendants accused of committing crimes against Indians in

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136. 142 S. Ct. 757 (2022), *denying cert. to sub nom.* State *ex rel.* Matloff v. Wallace, 2021 OK CR 21, 497 P.3d 686.

137. No. F-2017-1203, 2021 WL 8971915, at \*2 (Okla. Crim. App. Apr. 29, 2021), *rev'd*, 142 S. Ct. 2486 (2022).

Indian Country.<sup>138</sup> In denying certiorari on the question of overruling *McGirt*, the Court essentially cemented the validity of the decision, while demonstrating a willingness to examine its scope on the question of non-Indian defendants.<sup>139</sup>

## 2. Tribal Implications

At several points within the *Matloff* opinion, the court hinted at previous recognition of the Muscogee-Creek lands as Indian Country. At some points, the court referred to *McGirt* as reaffirming the boundaries or status of the Muscogee-Creek Nation. For these assertions to be true, the land must always have existed as Indian Country from the signing of the applicable treaties to the present. Questioning this status is little more than an attempt to justify jurisprudence wrongly holding otherwise.

The changing of demographics cannot alone disestablish a nation; neither can progress. To assume parties to the original treaties did not anticipate the progress and changes which the State of Oklahoma and the Indian Country therein has appreciated would ignore the very vision of the founding fathers of a nation which would grow and progress. Even if courts, legislators, and the public alike were to disregard the intent in the signing of treaties, changes to demographics, and progress of cities cannot be dispositive as to the validity of Indian treaties. If this were the case, it would create a world in which the tribes have every reason to fight diligently against progress and the expansion of trade on their lands.

In contrast, honoring treaties, regardless of the development of cities and changes to demographics, allows tribes to be secure in the protections afforded them through treaties and to welcome the kind of development, commercial and otherwise, which cities such as Tulsa demonstrate. This is not to say it would not be possible through tribes alone, but that the vast non-tribal population provides a greater pool of capital and consumers to facilitate this growth. Until the State of Oklahoma's largely negative response,<sup>140</sup> this kind of growth and development was not only accepted but assisted by the Oklahoma Indian Tribes.

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138. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 877 (2002) *cert. granted*, *Castro-Huerta v. State*, No. F-2017-1203, 2021 WL 8971915 (Okla. Crim. App. Apr. 29, 2021).

139. *Id.*

140. Randy Krehbiel, *Gov. Stitt Sues Federal Government over McGirt v. Oklahoma-Related Dispute*, TULSA WORLD (July 20, 2021), [https://tulsaworld.com/news/state-and-regional/govt-and-politics/gov-stitt-sues-federal-government-over-mcgirt-v-oklahoma-related-dispute/article\\_a83559ce-e8a1-11eb-b016-63fb5f1b1116.html](https://tulsaworld.com/news/state-and-regional/govt-and-politics/gov-stitt-sues-federal-government-over-mcgirt-v-oklahoma-related-dispute/article_a83559ce-e8a1-11eb-b016-63fb5f1b1116.html).

To demonstrate a markedly negative stance with regard to Tribal sovereignty has the potential to create a chilling effect in the advancement of state-tribal relations. It serves all parties far better to work toward a harmonious relationship with shared respect for systems of governance and justice. The tribes must be able to trust that the State of Oklahoma will no longer attempt to overstep federally established boundaries to enforce their own jurisdiction over Indians. Oklahoma must be able to trust tribes to enforce laws in a way that will allow for effective operation of government.

### *3. Judicial Implications*

State-tribal relations notwithstanding, the Oklahoma Court of Criminal Appeals holding in *Matloff* raises questions as to whether Oklahoma has been operating within the boundaries of applicable treaties in a good faith manner. The opinion itself cites several cases in which the State of Oklahoma refused to recognize the jurisdictional boundaries of Indian Country as applicable to the MCA. In refusing to acknowledge these boundaries, the state demonstrates, at best, a disregard for the weight of Indian treaties and the jurisdiction of federal courts. At worst, this failure to recognize jurisdiction demonstrates a bad faith effort to expand jurisdiction by simple repetition of bad case law.

In actuality, the Oklahoma Court of Criminal Appeals had little choice but to interpret the *McGirt* rule as anything other than new. The implications of any other determination are fairly straightforward. If *McGirt* “announced” a rule which should have already applied to cases of major crimes in the land in question in *McGirt*, it would mean that Oklahoma courts had long misinterpreted not only their own jurisdiction but the laws and treaties which established its limitations. This misinterpretation weakens not only the public faith in the courts but the subjective weight of a great deal of jurisprudence.

In deeming *McGirt* to announce a new rule, the Oklahoma Court of Criminal Appeals puts this parade of missteps to rest by simply holding the rule to be a new one which nobody could have anticipated previously. No court can be faulted for failure to divine future legal developments, and, thus, the reputation of Oklahoma Courts remains intact.

It seems most possible that neither the bad faith option nor pure failure of anticipation option is the complete cause for *McGirt* and its application after *Matloff*. Certainly, a court system’s goal is to serve justice. In many cases, justice constitutes a function of the individuals tasked with its service. Judges can be expected to determine just results differently based upon personal experiences, even in the absence of any political motivation.

Judges also look to their own interpretations of law in service of justice. In looking to legal interpretation and personal experiences, it seems many judges within the Oklahoma court system—and elsewhere—would be likely to take on a case that has historically been taken by similarly situated courts.

Further, it is unlikely the Court of Criminal Appeals acted in bad faith in interpreting *McGirt* as only prospectively applicable. While this Note has expanded upon several pitfalls in the court's reasoning leading to prospective application, it also notes the court's desire to ensure finality in the justice system. This finality serves victims and their families in allowing them to be secure that those convicted of crimes against them are held accountable. This demonstrates a judicial interpretation of justice as a foundation for the legal interpretation that applied *McGirt* only prospectively.

The *McGirt* and *Matloff* cases demonstrate the level to which the interests of tribal sovereignty, state court effectiveness, and public faith in systems of government permeate the Oklahoma geopolitical landscape. In this case, the *McGirt* decision's reaffirmation of the tribes' rightful status in Northeast Oklahoma served the interests of the tribes. The *Matloff* application of *McGirt* only prospectively served victims' interests, effectively keeping convictions final for many who were improperly prosecuted. Unfortunately, it would seem the interests of criminal defendants, wrongfully prosecuted in courts with no legal jurisdiction, lost out.

Had the boundaries of the Muscogee-Creek nation been consistently and accurately applied in jurisdictional decisions in criminal cases, there would have been no need for the kind of judicial balancing that produces the *Matloff* results. Heeding jurisdictional limitations would never have divested federal jurisdiction in Indian Country. Tribes would not be party to a scenario in which a state is fighting to disestablish the boundaries of their recognized reservations. Victims would never have feared their just results being overturned. Finally, the convicted would never have been deprived of their right to trial by a court with the appropriate jurisdiction to hear their case and never have received disparate levels of justice following the *McGirt* decision.

#### V. Conclusion

While the Oklahoma Court of Criminal Appeals determined the rule announced by the *McGirt* decision to be (1) new and (2) procedural to

support only prospective application, its analysis was flawed. Jurisdictional issues are far from new in the State of Oklahoma, and the Tenth Circuit previously addressed the issue in question in *McGirt*. This alone demonstrates *McGirt* as a reaffirmation of prior decisions. Prior Oklahoma cases that came after the Tenth Circuit decision held otherwise, but this does not mean they are binding. Instead, they merely represent a misinterpretation or misapplication of the law.

Further, a rule that places conduct beyond the reach of a legislature to punish—under the *Teague* analysis used by the court—applies as substantive and not as procedural. By establishing exclusive federal jurisdiction under the MCA, *McGirt* places major crimes committed by Indians in Indian Country beyond the Oklahoma State Legislature’s power to punish. Under the court’s own chosen analysis, this would mean the rule announced by *McGirt* should apply retroactively to all cases, not merely those that were on appeal at the time of the *McGirt* announcement.