TEXTUALISM AND ANOTHER BROKEN PROMISE: RETROACTIVITY AND *MCGIRT V. OKLAHOMA*

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ABSTRACT

On July 9, 2020, the United States Supreme Court handed down McGirt v. Oklahoma*, one of the Court's most consequential decisions concerning Indian law and tribal sovereignty. Employing an expressly textualist approach to interpret the applicable federal treaties and statutes, Justice Neil Gorsuch's eloquent majority opinion found that Congress has not disestablished the Muscogee (Creek) Reservation in Eastern Oklahoma and*

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that under federal law, Oklahoma has no power to prosecute Indians who commit crimes on the reservation. Oklahoma responded to McGirt *with resistance and outrage. Soon, this landmark decision faced contentious litigation in state and federal court, much of it instigated by the State of Oklahoma. Less than two years after* McGirt*, the Supreme Court denied certiorari review in* Parish v. Oklahoma *and granted review in* Oklahoma v. Castro-Huerta*. Then a newly configured Supreme Court majority limited* McGirt *and the scope of tribal sovereignty.*

This article focuses on the issue that was raised in the certiorari petition in Parish v. Oklahoma*: whether* McGirt *applies to all defendants who were convicted and sentenced by state courts that lacked subject matter jurisdiction or applies only to a small subset of defendants whose unlawful convictions and sentences were not final at the time the Supreme Court issued* McGirt *in July of 2020. Clifton Parish, a defendant who was convicted in a state court lacking subject matter jurisdiction, raised this issue in a certiorari petition to the U.S. Supreme Court. However, unlike Oklahoma's request for certiorari review in* Castro-Huerta*, the Supreme Court denied certiorari review to Mr. Parish. The Court's refusal to hear Parish's petition and the issue of the retroactive scope of McGirt is relevant not only for those defendants seeking the benefit of* McGirt*, but also it is relevant to assessing the Court's commitment to textualism, the role of stare decisis, and the values the Court purported to set out in* McGirt*.*

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"On the far end of the Trail of Tears was a promise"[2] made by the United States government to respect and recognize the sovereignty of the Muscogee (Creek) Nation.[3] In 1832 and 1833, the United States ratified treaties that would establish "a permanent home" to the Nation in what is now part of Eastern Oklahoma.[4] Later, an 1856 treaty "promised that 'no portion' of the Creek Reservation 'shall ever be embraced or included within, or annexed to, any Territory or State.'"[5] The Muscogee Nation's sovereignty was further recognized in an 1866 treaty, which described these lands as the "Creek Reservation."[6] The most recent recognition and acknowledgement of the Nation's sovereignty came in the form of a Supreme Court decision. On July 9, 2020, *McGirt v. Oklahoma*,[7] held that the Muscogee (Creek) Reservation established by these treaties "remains an

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[1] Joy Harjo, *After a Trail of Tears, Justice for 'Indian County'*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/opinion/mcgirt-oklahoma-muscogee-creek-nation.html []

[2] McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

[3] On May 5, 2021, the Muscogee Nation announced that it would no longer use the parenthetical (Creek) in its name; instead, it would use Muscogee Nation. Tribal leaders stated that the official name would remain Muscogee (Creek) Nation. Michael Overall, *The Muscogee Nation is Dropping 'Creek' from its Name. Here's Why*, TULSA WORLD, http://tulsaworld.com/news/local/themuscogee-nation-is-droppingcreek-from-its-name-hereswhy/article_3bf78738-adcc-11eb823d-438cbdefaf21.html [https://perma.cc/HZ84-ZV4H] (last updated June 10, 2022).

[4] *McGirt*, 140 S. Ct at 2459.

[5] *Id.* at 2461.

[6] *Id.* at 2460; *see generally* ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (Princeton Univ. Press 1973); GRANT FOREMAN, THE FIVE CIVILIZED TRIBES (Univ. of Okla. 1971); ANGIE DEBO, THE FIVE CIVILIZED TRIBES OF OKLAHOMA: REPORT ON SOCIAL AND ECONOMIC CONDITIONS (Indian Rights Ass'n, 1951); Sara E. Hill, *Restoring Oklahoma: Justice and the Rule of Law Post-McGirt*, 57 TULSA L. REV. 553 (2022); Robert J. Miller & Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma*, 101 B. U. L. REV. 2049 (2021); Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future Reservation Boundaries*, 169 U. PA. L. REV. 250 (2021); Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300 (2021).

[7] McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

Indian reservation for purposes of federal criminal law."[8] Indian law scholars celebrated the decision.[9] One writer described *McGirt* as "inspir[ing] more celebration, poetry, and tears than quite possibly any other U.S. Supreme Court case concerning tribal nations."[10] Former United States Poet Laureate Joy Harjo called it: "a decision of integrity."[11]

Asserting his self-described allegiance to textualism,[12] Justice Neil Gorsuch,[13] writing for the five-justice *McGirt* majority, stated that to determine the scope of the Muscogee Reservation "there is only one place [where the Court] may look: the Acts of Congress."[14] Based on a textualist reading of the relevant federal treaties and statutes, the Court found that: (1)

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[8] *Id.*

[9] *See* Hedden-Nicely & Leeds, *supra* note 6, at 300; Mary Kathryn Nagle, *Introduction*, 56 TULSA L. REV. 363 (2021); Jonodev Chaudhuri, *The Past May Be Prologue, But It Does Not Dictate Our Future: This Is the Muscogee (Creek) Nation's Table*, 56 TULSA L. REV. 369 (2021); Riyaz Kanji, David Giampetroni & Philip Tinker, *Reflections on* McGirt v. Oklahoma: *A Case Team Perspective*, 56 TULSA L. REV. 387 (2021); Lauren King, *The Indian Treaty Canon and* McGirt v. Oklahoma: *Righting the Ship*, 56 TULSA L. REV. 401 (2021); Stacy Leeds & Lonnie Beard, *A Wealth of Sovereign Choices: Tax Implications* of McGirt v. Oklahoma *and the Promise of Tribal Economic Development*, 56 TULSA L. REV. 417 (2021); Clint Summers, *The Sky Will Not Fall in Oklahoma*, 56 TULSA L. REV. 471 (2021); Julia Combs, *A Coherent Ethic of Lawyering in Post-*McGirt *Oklahoma,* 56 TULSA L. REV. 501 (2021); Sarah Deer, *Reclaiming Our Reservation: Mvskoke Tvstnvke Hoktvke Tuccenet (Etem) Opunayakes*, 56 TULSA L. REV. 519 (2021); Hill, *supra* note 6, at 553; Stephen H. Greetham, *Lessons Learned, Lessons Forgotten: A Tribal Practitioner's Reading of* McGirt *and Thoughts on the Road Ahead*, 57 TULSA L. REV. 613 (2022); Robert Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2459 (2021); Ann Tweedy, *Has Federal Indian Law Finally Arrived at "The Far End of the Trail of Tears?"*, 37 GA. ST. L. REV. 739 (2021).

[10] Nagle, *supra* note 9, at 363 (providing an introduction to Tulsa Law Review issue 26, which was devoted to *McGirt*).

[11] Harjo, *supra* note 1.

[12] *McGirt*, 140 S. Ct. 2452, 2462-63, 2468-69, 2478, 2481-82, 2574 (2020). As Justice Gorsuch stated in his majority opinion in *Bostock v. Clayton Cnty*., in construing Title VII and its application to persons who are homosexual or transsexual, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty*., 140 S. Ct. 1731, 1737 (2020); *see* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 128-144 (Crown Forum 2019); Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. 185 (2017); Caleb Nelson, *What is Textualism?*, 91 UNIV. VA. L. REV. 347 (2005). *But see* Josh Blackman, *Justice Gorsuch's Legal Philosophy has a Precedent Problem*, THE ATLANTIC (July 24, 2020), https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461/ [https://perma.cc/XXA7-9LP6].

[13] Prior to serving as an associate justice on the United States Supreme Court, Justice Gorsuch, who was born in Colorado, served as judge on the United States Tenth Circuit Court of Appeals. *About the Court: Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/MHB7-EZEH] (last visited Oct. 10, 2022).

[14] *McGirt,* 140 S. Ct. at 2462.

in the years following the 1866 treaty, Congress did not disestablish the Muscogee reservation;[15] and (2) the federal Major Crimes Act (MCA),[16] which confers exclusive federal jurisdiction over major crimes committed in Indian country by Indians, applies to the Muscogee Nation's reservation.[17] Accordingly, an Indian who commits a crime on the Muscogee Reservation falls under the exclusive jurisdiction of federal courts for certain enumerated offenses,[18] or under the jurisdiction of tribal courts.[19] Oklahoma, however, has no jurisdiction or power to prosecute or punish these individuals in state court for crimes committed on the Muscogee Reservation.[20]

The same day that the Court decided *McGirt*, it granted relief to Patrick DeWayne Murphy in *Sharp v. Murphy*,[21] affirming the decision of the Tenth Circuit Court of Appeals in which the Circuit Court granted Murphy federal habeas corpus relief on the grounds that his state conviction and death sentence was invalid due to the state court's lack of jurisdiction over Indian

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[15] *Id.* at 2459.

[16] The Major Crimes Act provides, in pertinent part:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, 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 within the Indian country, 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.

18 U.S.C. § 1153.

[17] *McGirt*, 140 S. Ct. at 2484-85 (Roberts, J., dissenting). In *Nebraska v. Parker*, 577 U.S. 481, 487-88 (2016) (citations omitted). Justice Thomas, writing for a unanimous Court stated: "'[O]nly Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear. To assess whether an Act of Congress diminished a reservation, we start with the statutory text, for '[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands.'" *Id.* Notably, the Tenth Circuit in *Murphy v. Royal* concluded under the pre-*McGirt* precedent of *Solem v. Bartlett* that the Muscogee Reservation had not been disestablished and Oklahoma lacked jurisdiction to prosecute Murphy. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017); *Solem v. Bartlett*, 465 U.S. 463 (1984).

[18] *McGirt*, 140 S. Ct. 2452, 2459 (2020).

[19] *Id.* at 2460, 2467.

[20] Indian law scholars agree that the Muscogee Reservation was not disestablished and federal law deprives Oklahoma of subject matter jurisdiction to prosecute and try Indians for crimes committed by Indians on Indian lands. *See* Nagle, *supra* note 9; Chaudhuri, *supra* note 9; Kanji et al., *supra* note 9; King, *supra* note 9; Leeds & Beard, *supra* note 9; Summers, *supra* note 9; Combs, *supra* note 9; Deer, *supra* note 9; Hill, *supra* note 6; Greetham, *supra* note 9; Berger, *supra* note 6; Miller & Dolan, *supra* note 6; Hedden-Nicely & Leeds, *supra* note 6; Tweedy, *supra* note 9.

[21] Sharp v. Murphy, 140 S. Ct. 2412 (2020).

defendants who commit crimes on the Muscogee Reservation.[22] In its per curium, the Supreme Court stated "[t]he judgment of the United States Court of Appeals for the Tenth Circuit is affirmed for the reasons stated in *McGirt* v. *Oklahoma*."[23] The Supreme Court also vacated the convictions and sentences in *Johnson v. Oklahoma*,[24] *Terry v. Oklahoma*,[25] *Davis v. Oklahoma*,[26] *Bentley v. Oklahoma*,[27] and *Wilson v. Oklahoma*.[28] The Court remanded the cases to the Oklahoma Court of Criminal Appeals for further consideration in light of *McGirt*.[29] At the time of the *McGirt* decision, there were multiple cases pending trial, in the midst of trial, on direct review, or in collateral review that potentially suffered from the same subject matter jurisdiction defect.

To put it mildly, Oklahoma Governor Kevin Stitt and his administration were very unhappy with the Supreme Court decision in *McGirt.*[30] The governor has made multiple statements critical of *McGirt*, and he has appeared on Fox News' *Tucker Carlson Tonight* expressing outrage and hostility towards the decision.[31] Oklahoma officials also

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[22] *Id*.; Murphy v. Royal, 875 F.3d at 966.

[23] *Sharp v. Murphy*, 140 S. Ct. at 2412.

[24] Johnson v. Oklahoma, 141 S. Ct. 192 (2020); *see* Johnson v. Oklahoma, No. PC-2018-343 (Okla. Crim. App. Aug. 25, 2021) (on collateral review, court refused to apply *McGirt* retroactively to grant relief).

[25] Terry v. Oklahoma, 141 S. Ct. 191 (2020); Terry v. Oklahoma, No. PC-2018-1076 (Okla. Crim. App. Oct. 6, 2021) (on collateral review, court refused to apply *McGirt* retroactively to grant relief).

[26] Davis v. Oklahoma, 141 S. Ct. 193 (2020); Davis v. Oklahoma, No. F-2019-420 (Okla. Crim. App. Mar. 18, 2021) (on direct appeal, vacating and remanding with instructions to dismiss for lack of subject matter jurisdiction under *McGirt*).

[27] Bentley v. Oklahoma, 141 S. Ct. 191 (2020); Bentley v. Oklahoma, No. PC-2018-743 (Okla. Crim. App. Oct. 1, 2021) (on collateral review, court refused to apply *McGirt* retroactively to grant relief).

[28] Wilson v. Oklahoma, 141 S. Ct. 224 (2020); Wilson v. Oklahoma, No. PC-2019-670 (Okla. Crim. App. Oct. 1, 2021) (on collateral review, court refused to apply *McGirt* retroactively to grant relief).

[29] *See Bentley*, 141 S. Ct. 191; *Johnson*, 141 S. Ct. 192; *Davis*, 141 S. Ct. 193; *Wilson*, 141 S. Ct. 224.

[30] Interestingly, Governor Stitt's brother, Keith Stitt, asserted in 2021 that *McGirt* prohibited the State from prosecuting him in an Oklahoma municipal court for a traffic violation. Randy Krehbiel, *Citing McGirt Court Decision, Gov. Kevin Stitt's Brother Fights City Hall*, TULSA WORLD (Feb. 3, 2022) https://tulsaworld.com/news/local/govt-and-politics/citing-mcgirt-court-decision-gov-kevin-stitts-brother-fights-city-hall/article_15e3b9a6-675b-11ec-a2d5-9f1b1ada7f08.html [https://perma.cc/LQ2B-Z233]. Both Governor Stitt and his brother are members of the Cherokee Nation because they trace at least one ancestor to the final Dawes Commission rolls. *Id.*

[31] *See Stitt Blasts McGirt Decision on Tucker Carlson Show, Drawing Complaints From Tribes*, KOCO 5 NEWS, (Mar. 31, 2022, 6:37 PM), https://www.koco.com/article/oklahoma-stitt-mcgirt-fox-news-tribes/39603339 [https://perma.cc/FC34-GLH9]; *Tribes Blast Stitt's Comments on*

seemed cognizant that the current Supreme Court appears receptive to some states' efforts to flex their power,[32] and that the current Court welcomes efforts to upend its precedent.[33] Perhaps responding to the current Court's aggressive activism, Oklahoma filed more than thirty petitions for writs of certiorari[34] asking the U.S. Supreme Court, *inter alia*, to overturn *McGirt*, a precedent barely two years old.[35] On January 21, 2022, the Supreme Court granted certiorari review in *Oklahoma v. Castro-Huerta*,[36] which is the petition that the state designated as its lead petition among the multiple certiorari petitions it had filed.[37]

Oklahoma raised two questions in its *Castro-Huerta* certiorari petition: (1) whether a State has authority to prosecute non-Indians who commit

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Tucker Carlson Show on Fox News, OKLA. NEWS (Mar. 31, 2022, 11:37 AM), https://darik.news/oklahoma/tribes-bl ast-stitts-comments-on-the-tucker-carlson-show-on-fox-news/552973.html [https://perma.cc/UH45-LDL2]; Ray Carter, *Stitt: McGirt Decision 'Jeopardizes Justice' in Oklahoma*, OCPA, (Feb. 7, 2022), https://www.ocpathink.org/post/stitt-mcgirt-decision-jeopardizes-justice-in-oklahoma [https://perma.cc/2JLH-MZMK]; *Governor Stitt Laments Further Fallout From McGirt Ruling*, STATE OF OKLA., (Oct. 21, 2021), https://oklahoma.gov/governor/newsr oom/newsroom/2021/october/governor-stitt-laments-further-fallout-from-m cgirt-ruling.html [https://perma.cc/Z83J-4SMH]. *See* Hill, *supra* note 9, at 554 (discussing Gov. Stitt's view that *McGirt* is an existential threat to the state); Greetham, *supra* note 9 (discussing Gov. Stitt's hostile reaction to *McGirt* as well as discussing false portrayals and overblown descriptions of the decision's impact by the media and political action groups).

[32] *See, e.g.*, *In re* Whole Woman's Health, 142 U.S. 701 (2022) (refusing to interfere with Texas statute that violated *Roe v. Wade*, a long-standing precedent that Supreme Court had slated to overturn).

[33] *See, e.g.*, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade*, a well-known precedent from 1973); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (*overturning Lemon v. Kurtzman*, a well-known precedent from 1971); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (overturning a hundred-year-old New York gun regulation).

[34] Amy Howe, *Justices will review scope of McGirt decision, but won't consider whether to overturn it*, SCOTUSBLOG (Jan. 21, 2022, 3:22 PM), https://www.scotusblog.com/2022/01/justices-will-review-scope-of-mcgirt-decision-but-wont-consider-whether-to-overturn-it/ [perma.cc/U965-UEJA].

[35] In this context, it is particularly important to note that eminent Indian law scholar, Stacy Leeds, wrote, "McGirt has been characterized as the most important reservation boundary case in the history of the United States Supreme Court and the most significant Federal Indian law case of the century. Without doubt, the case is the most important decision for the Five Tribes since *Worcester v. Georgia*." Hedden-Nicely & Leeds, *supra* note 6, at 337.

[36] Oklahoma v. Castro-Huerta, 142 S. Ct. 877 (2022) (petition for certiorari granted as to question 1 of the petition).

[37] John Elwood, *Blockbuster Watch: Affirmative Action, Same-Sex Weddings, and Other Big Relists*, SCOTUSBLOG (Jan. 12, 2022, 3:35 PM), https://www.scotusblog.com/2022/01/blockbuster-watch-affirmative-action-same-sex-weddings-and-other-big-relists/[perma.cc/S7X2-6DEL].

crimes against Indians in Indian country; and (2) whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), should be overruled.[38]

The Court granted review as to the first question only.[39] On June 29, 2022, in a five-to-four decision authored by Justice Kavanaugh, who joined the dissent in *McGirt*, the Court held that the state and federal government share concurrent jurisdiction over non-Indians who commit crimes against Indians in Indian country, thus reversing a long-standing presumption against state jurisdiction.[40] Justice Gorsuch wrote a passionate dissent in which three other justices joined.[41] Notably, in July 2020, Justice Ginsburg joined Justice Gorsuch's five-justice majority in *McGirt*; in October 2020, Justice Barrett replaced Justice Ginsburg on the Court; and in June 2022, Justice Barrett joined Justice Kavanaugh's five-justice majority in *Castro-Huerta*.

Oklahoma did not limit its aggressive campaign against *McGirt* to the Supreme Court—it also sought to curb *McGirt* in state court by limiting the retroactive scope of the decision. Initially, the Oklahoma Court of Criminal Appeals granted relief under *McGirt* to all applicable defendants regardless of when their convictions and sentences became final.[42] This initial approach conformed with the state's long-standing procedural rule that defects in subject matter jurisdiction are never waived,[43] and may be raised

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[38] *Oklahoma v. Castro-Huerta*, 142 S. Ct. 877 (2022) (Oklahoma petition for writ of certiorari).

[39] *Id.*

[40] *Id.; see* Matthew L.M. Fletcher, *In 5-4 Ruling, Court Dramatically Expands the Power of States to Prosecute Crimes on Reservations*, SCOTUSBLOG (June 29, 2022, 12:35 PM), https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/ [perma.cc/AX4N-VZ8W].

[41] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

[42] As the Tenth Circuit noted in *Murphy v. Royal*, in a case raising the same jurisdictional issue as *McGirt*, "[i]n Oklahoma, 'issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal.'" Murphy v. Royal, 875 F.3d 896, 907, n.5 (10th Cir. 2017) (citing Wallace v. State, 935 P.2d 366, 372 (Okla. Crim. App. 1997)).

[43] One of the basic principles of jurisdiction and justiciability is that a court cannot act if it lacks subject matter jurisdiction. As generations of first-year law students have learned, "[a] court is without authority to adjudicate a matter over which it has no [subject matter] jurisdiction even though the court possesses jurisdiction over the parties to the litigation; *e.g.,* a court of limited jurisdiction has no power to try a murder indictment and its judgment therein would be void and of no effect because it lacks subject matter jurisdiction." HENRY C. BLACK, BLACK'S LAW DICTIONARY 767 (5th ed. 1979). In *Royal*, the Circuit Court cited the following cases where the Oklahoma Court of Criminal Appeals held that subject matter jurisdiction can never be waived and may be raised in collateral proceedings: "*Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997); *see also Triplet v. Franklin*, 365 Fed. Appx. 86, 95 (10th Cir. 2010) (unpublished) (recognizing that, in Oklahoma, issues of subject matter jurisdiction are not waivable and can be raised for the first time in collateral proceedings); *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010) (considering jurisdictional claim that crime occurred on federal land raised in prisoner's second application for post-conviction relief); *Magnan v. State*, 207 P.3d 397, 402

at any time in collateral proceedings.[44] The convictions and sentences of the defendants McGirt and Murphy became final in 1998 and 2002, respectively; McGirt and Murphy raised the subject matter jurisdiction claim in collateral proceedings; and both cases were pending in collateral review on remand from the U.S. Supreme Court when Oklahoma courts granted them relief.[45]

However, on August 12, 2021, the Oklahoma Court of Criminal Appeals, in response to newly-devised arguments raised by the Oklahoma Attorney General's Office, abruptly reversed course and abandoned its longstanding procedural rules regarding defects in subject matter jurisdiction, at least with respect to *McGirt* claims.[46] Instead, the state court relied on *Teague v. Lane*,[47] and its adoption of *Teague* in state proceedings,[48] to decide that *McGirt* was a new rule of constitutional

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(Okla. Crim. App. 2009) (considering Indian country jurisdictional challenge and explaining subject matter jurisdiction may be challenged at any time)." Royal, 875 F.3d at 907, n.5.

[44] *Id.* Initially, the Oklahoma Court of Criminal Appeals applied *McGirt* retroactively to all applicable defendants regardless of when their convictions and sentences became final. *See* Bosse v. State, 484 P.3d 286 (Okla. Crim. App. 2021); Cole v. State, 492 P.3d 11 (Okla. Crim. App. 2021); Ryder v. State, 489 P.3d 528 (Okla. Crim. App. 2021); Bench v. State, 492 P.3d 19 (Okla. Crim. App. 2021). These cases have since been overturned. State *ex rel.* Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021).

[45] McGirt v. Oklahoma, No. PC-2018-1057 (Okla. Crim. App. Feb. 25, 2019); Murphy v. State, 54 P.3d 556 (Okla. Crim. App 2002); McGirt v. Oklahoma, No. PC-2018-1057 (Okla. Crim. App. Sept. 2, 2020); Oklahoma v. Murphy, No. CF-1999-164A (Sept. 4, 2020). *See infra* p. 205-211. In his dissent in *McGirt*, Justice Thomas argued that the Court should have dismissed McGirt's case because he had not raised his claim on direct appeal. McGirt v. Oklahoma, 140 S. Ct. 2452, 2503 (2020). The majority, however, rejected this argument. *Id.* at 2479, n.15. Also, under then-existing Oklahoma law, defects in subject matter jurisdiction could not be waived and could be raised at any time. *See infra* n. 186.

[46] *Matloff*, 497 P.3d 686. The defendant in *Matloff* is Clifton Parish, whose certiorari petition was denied by the U.S. Supreme Court in early 2022. Parish v. Oklahoma, 142 U.S. 757 (2022). In *Matloff*, the Court of Criminal Appeals overturned its prior decisions and held *McGirt* did not apply retroactively to convictions and sentences that became final before the Supreme Court handed down *McGirt* in 2020. Notably, McGirt's conviction and sentence became final in 1998; likewise, Murphy's conviction and death sentence became final in 2002. The U.S. Supreme Court applied its *McGirt* jurisdictional ruling to both McGirt and Murphy even though their convictions and sentences become final before the Court ruled in *McGirt*.

[47] Teague v. Lane, 489 U.S. 288 (1989) (holding new U.S. Supreme Court rules of constitutional criminal procedure should not be applied retroactively to defendants whose conviction and sentences were final at the time the new decision issued except under certain limited circumstances).

[48] In *Matloff*, the Oklahoma Court of Criminal Appeals stated:

> In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus—to bar the application of new procedural rules to convictions that were final when the rule was announced.

criminal procedure that did not apply retroactively to defendants whose convictions and sentences were final on July 9, 2020, the date on which the Supreme Court handed down *McGirt*.[49] Now, except for McGirt and Murphy, defendants whose cases were final on July 9, 2020 can no longer object to the *McGirt* jurisdictional defect in state collateral review. The Court of Criminal Appeals then reversed state post-conviction orders where it initially vacated convictions and sentences based on *McGirt*; [50] those convictions and sentences have been reinstated.[51] The Court of Criminal Appeals also denied relief in the five cases that the Supreme Court remanded to be reconsidered in light of *McGirt*.[52]

On September 27, 2021, Clifton Parish, whose state court conviction and twenty-five year prison sentence became final on June 4, 2014, filed a petition for a writ of certiorari in the United States Supreme Court arguing that the Oklahoma Court of Criminal Appeals erred when it did not apply *McGirt* retroactively to the jurisdictional claim raised in his application for state post-conviction relief.[53] Parish's petition asked the Court, *inter alia*, to apply *McGirt* retroactively to all defendants regardless of the date on which

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Matloff, 497 P.3d at 688-89; *see Ferrell v. State*, 1995 OK CR 54, ¶¶ 5-9, 902 P.2d 1113, 1114-15 (citing *Teague* 489 U.S. 288) (finding new rule governing admissibility of recorded interview was not retroactive on collateral review); *Baxter v. State*, 2010 OK CR 20, ¶ 11, 238 P.3d 934, 937 (noting our adoption of *Teague* non-retroactivity analysis for new rules in state post-conviction review); and *Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002) (noting incorporation "into state law the Supreme Court's *Teague* approach to analyzing whether a new rule of law should have retroactive effect," citing *Ferrell*, 1995 OK CR 54) .

[49] *Matloff*, 497 P.3d at 686; *see* Caspari v. Bohlen, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."); Danforth v. Minnesota, 522 U.S. 264, 267 (2008); *Teague*, 489 U.S. 288; Griffith v. Kentucky, 479 U.S. 314 (1987).

[50] Curtis Killman, *McGirt Fallout: State Appeals Court Vacates Earlier Rulings That Dropped State Convictions, Prison Terms*, TULSA WORLD (Sept. 1, 2021), https://tulsaworld.com/news/local/crime-and-courts/mcgirt-fallout-state-appeals-courts-vacates-earlier-rulings-that-dropped-state-convictions-prison-terms/article_bcf02dee-0a8e-11ec-a181-7b8aadfff78f.html [https://perma.cc/7D3J-XSF5]; Samantha Vicent, *Past Convictions Stand Despite McGirt Ruling, Oklahoma Court Says in New Interpretation of SCOTUS Decision*, TULSA WORLD (Aug. 13, 2021), https://tulsaworld.com/news/state-and-regional/crime-and-courts/past-convictions-stand-despite-mcgirt-ruling-oklahoma-court-says-in-new-interpretation-of-scotus-decision/article_3aa957d8-fb85-11eb-aa7f-6fc25dac2c0e.html [https://perma.cc/4L3G-BHMK].

[51] Killman, *supra* note 50.

[52] Wilson v. Oklahoma, No. PC-2019-670 (Okla. Ct. Crim. App. Oct. 1, 2021) (order denying post-conviction relief based on *McGirt*) (unpublished).

[53] Parish v. Oklahoma, No. 21-467, 2021 WL 4480391 (filed Sept. 27, 2021 in U.S. Supreme Court).

their conviction and sentence became final.[54] On January, 10, 2022, the Supreme Court denied Parish's certiorari petition.[55]

In *McGirt*, Justice Gorsuch stated that "the magnitude of a legal wrong is no reason to perpetuate it."[56] However, the certiorari denial in *Parish* sanctions Oklahoma's jurisdictional "wrong" for defendants whose convictions and sentences were final as of July 9, 2020. The *Parish* certiorari denial also means that defendants, whose cases are in the same procedural posture as McGirt and Murphy, will be treated differently in order to limit a long-standing "statutory promise" to the Muscogee Nation and similarly situated tribal nations.[57] These promises date back to the 1800s.[58] Contrary to the textualist approach of *McGirt*, the *Parish* certiorari denial gives at least partial effect to the extratextual analysis advocated by Oklahoma and the *McGirt* dissenters who predicted dire consequences and criminal justice uncertainties due to the majority decision.[59] The Court's choice to deny certiorari in *Parish*, but to grant it *Castro-Huerta*, mirrors the Court's new configuration and priorities.

The importance of *McGirt* cannot be overstated, particularly with regard to tribal sovereignty.[60] Indian law experts have written moving expositions about the meaning and impact of this case.[61] Yet, the certiorari denial in *Parish* and the holding in *Castro-Huerta* reflect the judiciary's willingness to pull back from *McGirt*, ignore the controlling text of federal statutes, and employ an extratextual analysis to deliver Oklahoma's desired outcome.

This article focuses on the certiorari denial in *Parish v. Oklahoma,* and the retroactive scope of *McGirt* in collateral proceedings. The article begins by examining the complex and lengthy procedural histories in *McGirt*, and

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[54] *Id.* (petition for certiorari filed Sept. 27, 2021).

[55] Parish v. Oklahoma, 142 S. Ct. 757 (2022) (petition for certiorari denied).

[56] McGirt v. Oklahoma, 140 U.S. 2452, 2480.

[57] *See id.*

[58] *Id.* at 2477.

[59] *Id.* at 2482 (Roberts, J., dissenting) (". . . [T]he State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.").

[60] Berger, *supra* note 6, at 250 ("McGirt v. Oklahoma, the most important reservation boundary case in the history of the United States Supreme Court").

[61] *See* Nagle, *supra* note 9; Chaudhuri, *supra* note 9; Kanji et al., *supra* note 9; King, *supra* note 10; Leeds & Beard, *supra* note 9; Summers, *supra* note 9; Combs, *supra* note 9; Deer, *supra* note 9; Hill, *supra* note 9; Greetham, *supra* note 9, at 613; Berger, *supra* note 6, at 250; Miller & Dolan, *supra* note 9, at 2459; Hedden-Nicely & Leeds, *supra* note 6; Tweedy, *supra* note 9.

the related 10th Circuit decision of *Murphy v. Sharp*,[62] as well as the procedural history in Parish's state post-conviction case.[63] All three of these cases arise out of collateral proceedings occurring after the defendants' convictions and sentences became final. The article then lays out the Court's textualist approach to the resolution of the territorial boundaries of the Muscogee Reservation. Next, the article examines the Supreme Court's current retroactivity doctrine in criminal cases and application of that doctrine where a defendant raises a *McGirt* claim in a collateral proceeding. Finally, the article reflects on the implications of the *Parish* certiorari denial and the Court's purported commitment to textualism, stare decisis, and the promise of *McGirt*.

II. CRIMES AND PROCEDURAL HISTORIES: MCGIRT V. OKLAHOMA; SHARP V. MURPHY; AND PARISH V. OKLAHOMA

A. MCGIRT V. OKLAHOMA

Early in its recitation of the underlying facts of *McGirt*, the Supreme Court stated "[y]ears ago, an Oklahoma state court convicted [McGirt] of three serious sexual offenses."[64] Specifically, on June 24, 1997, a state jury convicted Jimcy McGirt of multiple sex crimes[65] in state district court in Wagoner County, Oklahoma.[66] The Wagoner County District Court sentenced McGirt to consecutive 500 year sentences on two counts, and a sentence of life without the possibility of parole on the third count.[67] McGirt filed a direct appeal with Oklahoma Court of Criminal Appeals.[68] On August 26, 1998, the Court of Criminal Appeals affirmed McGirt's

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[62] Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017).

[63] State *ex rel.* Matloff v. Wallace, 497 P.3d 686, 688-93 (Okla. Crim. App. 2021).

[64] McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

[65] The jury convicted McGirt of: Rape First Degree After Former Conviction of a Felony; Lewd Molestation After Former Conviction of a Felony; and Forcible Sodomy After Former Conviction of a Felony. McGirt v. Oklahoma, No. F-97-0967 (Okla. Crim. App. 1998) (unpublished); Docket Sheet, Oklahoma v. McGirt, No. CF-1996-355.

[66] McGirt v. Oklahoma, No. PC-2018- 1057 (Okla. Crim. App. Sept. 2, 2020); McGirt v. Oklahoma, No. F-97- 0967 (Okla. Crim. App. 1998) (unpublished); Docket Sheet, Oklahoma v. McGirt, CF-1996-355.

[67] McGirt v. Oklahoma, No. PC-2018-1057 (Okla. Crim. App. Sept. 2, 2020).

[68] McGirt v. Oklahoma, No. F-97-0967 (Okla. Crim. App. 1998) (unpublished).

conviction and sentences.[69] The Oklahoma Court of Criminal Appeals issued its mandate on September 18, 1998.[70]

Nearly twenty years after McGirt's direct appeal ended and his conviction and sentence became final,[71] McGirt filed an application for state post-conviction relief.[72] In his application for post-conviction relief, McGirt asserted that he is a citizen of the Seminole Nation and the offenses for which he was convicted and sentenced in Oklahoma state court occurred within the boundaries of the Muscogee Reservation.[73] The Wagoner County District Court denied McGirt's application for post-conviction relief.[74] On February 19, 2019, the Court of Criminal Appeals affirmed the district court's denial of post-conviction relief stating: (1) McGirt had not shown that Oklahoma courts lacked jurisdiction under Article VII of the Oklahoma Constitution; (2) *Sharp v. Murphy*, which at that time was styled *Carpenter v. Murphy* and which raised the same jurisdictional issue, was pending in the U.S. Supreme Court awaiting a decision; and (3) McGirt had "cited no other authority to refute the jurisdictional provision of the Oklahoma Constitution."[75]

On April 17, 2019, McGirt filed a petition for a writ of certiorari with the United States Supreme Court appealing the Oklahoma Court of Criminal Appeals denial of his application for post-conviction relief.[76] In his certiorari petition to the U.S. Supreme Court, McGirt presented the following question: "whether Oklahoma courts can continue to unlawfully exercise, under state law, criminal jurisdiction as 'justiciable matter' in Indian country over Indians accused of major crimes enumerated under the Indian Major Crimes Act-which are under exclusive federal jurisdiction."[77]

The U.S. Supreme Court granted certiorari review on December 13, 2019 and allowed McGirt to proceed in forma pauperis.[78] Oral argument

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[69] McGirt v. Oklahoma, No. PC-2018-1057 (Okla. Crim. App. Feb. 19, 2019).
[70] McGirt v. Oklahoma, No. F-97-0967 (Okla. Crim. App. 1998) (docket).
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] McGirt v. Oklahoma, No. PC-2018-1057 (Okla. Crim. App. Sept. 2, 2020).
[76] Petition for Writ of Certiorari, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).
[77] *Id.*
[78] McGirt v. Oklahoma, 140 S. Ct. 659 (2019), *rev'd*, 140 S. Ct. 2452 (2020).

was originally scheduled for April 21, 2020,[79] but due to the Covid-19 pandemic the argument was rescheduled for May 11, 2020.[80]

On July 9, 2020, the U.S. Supreme Court handed down its decision concluding that Congress had not disestablished the Muscogee Reservation and that reservation remains a reservation for the purposes of the MCA.[81] Accordingly, Oklahoma courts lacked jurisdiction to prosecute and sentence McGirt in 1997.[82] The Supreme Court reversed the Oklahoma Court of Criminal Appeals' judgment denying McGirt's post-conviction application,[83] and remanded the case to the Court of Criminal Appeals to provide relief accordingly.[84] On September 2, 2020, the Oklahoma Court of Criminal Appeals issued an order granting McGirt's application for post-conviction relief and vacating his state conviction and sentences.[85] At the same time, the Oklahoma Court of Criminal Appeals issued a mandate giving effect to its order and decision.[86]

Following the vacation of McGirt's state conviction and sentence, the federal prosecutor brought criminal charges against McGirt in the United States District Court for the Eastern District of Oklahoma alleging two counts of Aggravated Sexual Abuse in Indian Country, and one count of Abusive Sexual Contact in Indian Country.[87] A federal jury convicted McGirt on November 6, 2020. On August 25, 2021, McGirt was sentenced to three life sentences to run concurrently and five years of supervised release.[88] McGirt will serve his sentences in federal prison.[89] He was seventy-two at the time of federal sentencing.[90]

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[79] *McGirt v. Oklahoma*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/mcgirt-v-oklahoma [https://perma.cc/7XFA-58QD] (last visited Oct. 7, 2022).

[80] *Id.* Ian H. Gershengorn argued on behalf of McGirt and Riyaz A. Kanji argued as amicus curiae on behalf of the Muscogee Nation. Mithun Mansinghani, former Solicitor General for the State of Oklahoma, argued on behalf of the State and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. argued as amicus curiae for the United States. *Id.*

[81] McGirt v. Oklahoma, 140 S. Ct. 2452 (2020). For a description of the Court's decision and reaction to the decision, *see* Schriro v. Summerlin, 542 U.S. 348 (2004); Bousley v. United States, 523 U.S. 614 (1998).

[82] 140 S. Ct. 2452.

[83] *Id.*

[84] *Id.*

[85] Ord. Granting Petitioner's Application for Post-Conviction Relief and Vacating His Judgment and Sentence, McGirt v. Oklahoma, No. PC-2018-1057 (Okla. Crim. App. 2019).

[86] *Id.*

[87] Morgan Taylor, *McGirt Sentenced to Life in Federal Prison,* MVSKOKE MEDIA (Sept. 10, 2021), https://www.mvskokemedia.com/mcgirt-sentenced-to-life-in-federal-prison [https://perma.cc/D4T6-36YR].

[88] *Id.*

[89] *Id.*

[90] *Id.*

B. SHARP V. MURPHY

On April 14, 2000, a state jury convicted Patrick DeWayne Murphy of murder and sentenced him to death in the state district court of McIntosh County, Oklahoma.[91] Murphy filed the direct appeal of his conviction and death sentence to the Oklahoma Court of Criminal Appeals. On May 22, 2002, the Court of Criminal Appeals affirmed his conviction and death sentence on direct appeal.[92]

On February 2, 2002, Murphy filed his first state post-conviction application in McIntosh County District Court raising multiple claims, including the claim that his mild intellectual impairment precluded the imposition of the death penalty on him.[93] This first application was filed while his state direct appeal was still pending, which is allowed under Oklahoma procedural law in capital cases.[94] The Court denied relief on several claims and remanded the case to the district court for a hearing on the intellectual disability claim in light of *Atkins v. Virginia*,[95] wherein the U.S. Supreme Court held that the execution of mentally retarded criminal defendants violates the Eighth and Fourteenth Amendments of the U.S. Constitution.[96] On remand, the district court denied Murphy's claim that he was entitled to relief based on *Atkins*.[97] On March 21, 2003, the Court of Criminal Appeals affirmed the lower court and denied Murphy's *Atkins* claim.[98]

In the spring of 2004, Murphy filed an application for federal habeas corpus relief in the U.S. District Court for the Eastern District of Oklahoma.[99] This habeas application included claims that Murphy had not exhausted in state court.[100] Pursuant to the district court's instruction, Murphy dropped his unexhausted claims, amended his habeas application, and then pursued relief on the unexhausted claims in state court.[101] Murphy's second application for post-conviction relief was filed in state district court on March 29, 2004, raising, *inter alia*, that Oklahoma lacked

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[91] Murphy v. State, 47 P.3d 876, 879 (Okla. Crim. App. 2002).

[92] *Id.* at 888.

[93] Murphy v. State, 54 P.3d 556 (Okla. Crim. App. 2002).

[94] Murphy v. Royal, 875 F.3d 896, 906 (10th Cir. 2017); OKLA. STAT. ANN. tit. 22, § 1089 (West 2022) (post-conviction process in capital cases).

[95] *Murphy v. State*, 54 P.3d at 570.

[96] Atkins v. Virginia, 536 U.S. 304 (2002).

[97] Murphy v. State, 66 P.3d 456, 457 (Okla. Crim. App. 2003).

[98] *Id.* at 461.

[99] *Murphy v. Royal*, 875 F.3d at 906.

[100] *Id.*

[101] *Id.*

jurisdiction to try him under the MCA since he was Indian, the victim was Indian, and the murder was committed in Indian country.[102] The state district court conducted an evidentiary hearing on the jurisdictional issue, but determined that the murder occurred on state land and denied Murphy relief on this issue.[103] Murphy appealed his second post-conviction application to the Oklahoma Court of Criminal Appeals. The Court of Criminal Appeals found that the state had jurisdiction over Murphy's case and denied relief on this ground;[104] however, the Court of Criminal Appeals remanded the case to the state district court for another limited review of Murphy's *Atkins* claim.[105]

While Murphy's *Atkins* claim was pending in McIntosh County District Court, Murphy amended his habeas petition to include his jurisdictional claim as well as an Eighth Amendment claim.[106] On August 1, 2007, the federal district court issued an opinion denying all of Murphy's claims, including the jurisdictional claim.[107] Murphy appealed to the Tenth Circuit Court of Appeals, which held the case in abeyance until the state courts ruled on the *Atkins* claim.[108] The McIntosh County District Court ultimately denied relief on the *Atkins* claim, and Murphy again appealed to the Oklahoma Court of Criminal Appeals.[109] The Court of Criminal Appeals denied Murphy's *Atkins* claim.[110] After the Court of Criminal Appeals denied the *Atkins* claim, Murphy raised the issue in the federal district court, which also denied his *Atkins* claim.[111] Murphy then appealed to the Tenth Circuit. The Tenth Circuit consolidated all of Murphy's claims, including the jurisdictional claim.[112]

In its opinion addressing Murphy's habeas petition, the Tenth Circuit only considered the subject matter jurisdiction issue, which it found dispositive.[113] Specifically, the Tenth Circuit found that: Murphy was Indian; the Muscogee Reservation remained intact; Murphy's crime occurred on the Muscogee Reservation; Oklahoma had no authority to prosecute, convict or sentence Murphy; and under federal law, Murphy

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[102] *Id.* at 907.
[103] *Id.* at 908.
[104] Murphy v. State, 124 P.3d 1198 (Okla. Crim. App. 2005).
[105] *Murphy v. Royal*, 875 P.3d at 909.
[106] *Id.* at 910.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 909-10; *Murphy v. State*, 124 P.3d. 1198.
[110] *Murphy v. State*, 124 P.3d. 1198.
[111] Murphy v. Royal, 875 P.3d 896, 910-11 (10th Cir. 2017).
[112] *Id.* at 911.
[113] *Id.* at 904, 966.

should have been prosecuted and tried in federal court.[114] Accordingly, the Circuit Court found Murphy's state conviction and death sentence invalid and remanded his case with instructions to grant Murphy habeas relief.[115]

In his concurring opinion denying rehearing en banc, Chief Judge Timothy Tymkovich opined that "this challenging and interesting case makes a good case for Supreme Court review."[116] The Supreme Court apparently agreed and granted the Oklahoma's certiorari petition to review Murphy's case. Justice Gorsuch took no part in granting the certiorari petition or in the case otherwise since he previously served on the Tenth Circuit and participated in *Murphy* at the Circuit level.[117]

Murphy's case was argued before the Supreme Court on November 27, 2018;[118] shortly thereafter, the Court ordered the parties to submit supplemental briefings.[119] However, the eight Justices hearing the case appeared unable to reach a conclusion, and at the end of the 2018 Term, the Court held the case over for re-argument.[120]

The Court then granted certiorari review in McGirt's case, which, as discussed above, arose out of a state post-conviction proceeding and in which Justice Gorsuch appropriately could participate. On the same day that the Supreme Court reversed McGirt's conviction and sentence due to lack of state court jurisdiction, the Court, in a per curiam opinion, affirmed the Tenth Circuit Court of Appeals decision in *Murphy* based on the Supreme Court's holding in *McGirt*.[121] Justice Gorsuch took no part in the per curiam decision; Justices Thomas and Alito dissented.[122] On September 4, 2020,

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[114] *Id.* at 904, 966.

[115] *Id.* at 966.

[116] *Id.* at 968.

[117] Ronald Mann, *Argument Preview: Justices to Hear Second Set of Arguments on Reservation Status of Eastern Oklahoma*, SCOTUSBLOG (Apr. 30 2020, 11:30 AM), https://www.scotusblog.com/2020/04/argument-preview-justices-to-hear-second-set-of-arguments-on-reservation-status-of-eastern-oklahoma/ [https://perma.cc/FD9H-TCLP].

[118] *Docket for No. 17-1107*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1107.html [https://perma.cc/GD6Q-3FXS].

[119] Carpenter v. Murphy, 139 S. Ct. 626 (2018) (directing parties to file supplemental briefs); *Docket for No. 17-1107*, *supra* note 118.

[120] *Docket for No. 17-1107*, *supra* note 119.

[121] Sharp v. Murphy, 140 S. Ct. 2412 (July 9, 2020) (affirming 10th Circuit's reversal and conviction of Patrick Dwayne Murphy for reasons stated in *McGirt*). For a discussion on which justices may have formed the five-justice majority in the *Murphy* per curiam, *see* Josh Blackman, *Invisible Majorities: Counting to Nine Votes in Per Curiam Cases,* SCOTUSBLOG (July 23, 2020, 3:23 PM) https://www.scotusblog.com/2020/07/invisible-majorities-counting-to-nine-votes-in-per-curiam-cases/ [https://perma.cc/D6CL-QMDV].

[122] *Sharp v. Murphy*, 140 S. Ct. 2412.

the McIntosh County District dismissed Murphy's case due to lack of subject matter jurisdiction.[123]

Subsequently, the federal prosecutor for the Eastern District of Oklahoma charged Murphy with multiple offenses, including Second Degree Murder.[124] On August 5, 2021, a federal jury found Murphy guilty on two counts, including murder.[125] Murphy will face up to life in federal prison based on these federal convictions.[126]

C. PARISH V. OKLAHOMA

On April 9, 2010, the State of Oklahoma charged Clifton Merrill Parish in Pushmataha County District Court with second-degree murder.[127] A state jury convicted Parish of second-degree murder on April 12, 2012, and the Pushmataha District Court sentenced Parish to twenty-five years imprisonment.[128] On April 13, 2012, Parish filed a direct appeal with the Oklahoma Court of Criminal Appeals.[129] On direct appeal, Parish raised six claims for relief;[130] he did not raise a jurisdictional claim on direct appeal.[131] On March 6, 2014, in an unpublished decision, the Court of Criminal Appeals upheld Parish's conviction and sentence.[132]

On August 17, 2020, after the Supreme Court handed down *McGirt*, Parish filed an application for state post-conviction relief in Pushmataha County District Court asserting that Oklahoma lacked authority to prosecute and convict him due to lack of subject matter jurisdiction in accordance with *McGirt*.[133] Parish is a member of the Choctaw Nation and Parish asserted that the crime for which he was convicted occurred in Indian country,

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[123] Oklahoma v. Murphy, No. CF-1999-164A (docket sheet) (district court order dated Sept. 4, 2020).

[124] Press Release, *Patrick Dwayne Murphy Found Guilty by Federal Jury*, U.S. Dep't of Justice, (Aug. 5, 2021), https://www.justice.gov/usao-edok/pr/patrick-dwayne-murphy-found-guilty-federal-jury [https://perma.cc/7ECZ-MX9M].

[125] *Id.*

[126] *Id.*

[127] State v. Parish, No. CF-2010-26 (Pushmataha County District Court docket).

[128] *Id.*

[129] Parish v. State, No. F-2012-335 (Okla. Crim. App. docket).

[130] Parish v. State**,** F-2012-335 (Okla. Crim. App. Mar. 7, 2014) (unpublished decision).

[131] *Id.*

[132] *Id.*

[133] State v. Parish, No. CF-2010-26 (Pushmataha County District Court docket) (application for post-conviction relief filed Aug. 17, 2020).

specifically the Choctaw Reservation.[134] While *McGirt* dealt with the status of the Muscogee Reservation, other tribal nations in Oklahoma have similar treaties and reservations that Congress never disestablished.[135] Following *McGirt*, the Oklahoma Court of Criminal Appeals found that, like the Muscogee Reservation, Congress had not disestablished the following reservations in Oklahoma: Choctaw Reservation;[136] the Cherokee Reservation;[137] the Chickasaw Reservation;[138] the Seminole Reservation;[139] and the Quapaw Reservation.[140] Accordingly, under the MCA, federal courts have exclusive jurisdiction over major crimes committed on these reservations by Indians.

On April 28, 2021, the state district court considered Parish's post-conviction application and found: (1) *McGirt* applied to Parish; (2) the state court lacked jurisdiction when it tried and convicted him in 2012; (3) subject matter is never waived; and (4) lack of subject matter jurisdiction can be raised at any time. [141] Based on these findings, the district court dismissed Parish's conviction and sentence for lack of subject matter jurisdiction.[142] In response to the district court order, Oklahoma filed a writ of prohibition to stay the execution of the order of dismissal.[143] On August 12, 2021, the Oklahoma Court of Criminal Appeals granted the state's writ of prohibition

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[134] *Id.;* State *ex rel.* Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021) (Oklahoma writ of prohibition requesting Court of Criminal Appeals prevent Judge Wallace's post-conviction relief order in Parish's application for post-conviction relief).

[135] *See* State v. Parish, CF-2010-26 (Pushmataha County District Court docket) (application for post-conviction relief filed Aug. 17, 2020).

[136] Sizemore v. Oklahoma, 485 P.3d 867, 869-70 (Okla. Crim. App 2021); Wadkins v. State, 504 P.3d 605 (Okla. Crim. App. 2022).

[137] Spears v. State, 485 P.3d 873, 877 (Okla. Crim. App. 2021); Hogner v. Oklahoma, 500 P.3d 629, 635 (Okla. Crim. App. 2021).

[138] McClain v. Oklahoma, 501 P.3d 1009, 1011-12 (Okla. Crim. App. 2021).

[139] Grayson v. Oklahoma, 485 P.3d 250, 254 (Okla. Crim. App. 2021).

[140] State v. Lawhorn, 499 P.3d 777, 779 (Okla. Crim. App. 2021). Like *McGirt*, the treaties establishing these reservations date back to the 1800s. *Sizemore*, 485 P.3d at 869 (the Choctaw Reservation was established in mid-1800s and Congress never disestablished the reservation.); *Spears*, 485 P.3d at 877 (the treaties establishing Cherokee Reservation date from mid-1800s and Congress never disestablished the reservation.); *McClain*, 501 P.3d at 1011 (the Chickasaw Reservation established in 1830 and Congress never disestablished the reservation.); *Grayson*, 485 P.3d at 251-52 (the Seminole Reservation was established by treaties from mid-1800s and Congress never disestablished the reservation.); *Lawhorn*, 485 P.3d at 778-79 (treaties from the 1800s establish Quapaw Reservation and Congress never disestablished it.).

[141] State v. Parish, CF-2010-26 (Pushmataha County District Court docket) (district court unpublished order dated Apr. 29, 2021).

[142] *Id.*

[143] Matloff v. Wallace, No. PR-2021-366 (Okla. Crim. App. Apr. 27, 2021) (Oklahoma writ of prohibition requesting Court of Criminal Appeals prevent Judge Wallace's post-conviction relief order in Parish's application for post-conviction relief).

finding that *McGirt* did not apply retroactively to cases that were final at the time of the *McGirt* decision on July 9, 2020.[144] Accordingly, Parish, whose conviction and sentence became final in 2014, would not receive the benefit of *McGirt*'s jurisdictional holding. Likewise, Oklahoma would not be bound by *McGirt* with respect to any criminal defendant, except for McGirt and Murphy, whose conviction and sentence became final before July 9, 2020.

On September 27, 2021, Parish filed a petition for a writ of certiorari in the United States Supreme Court arguing that the Oklahoma Court of Criminal Appeals erred when it did not apply *McGirt* retroactively to the jurisdictional claim raised in his application for state post-conviction relief.[145] On January 10, 2022, the Supreme Court denied Parish's certiorari petition.[146]

The Oklahoma Court of Criminal Appeals' decision in Parish's case notwithstanding, McGirt, whose conviction and sentence became final in 1998, and Murphy, whose conviction and sentence became final in 2002, have received the benefit of the 2020 *McGirt* decision. In accord with the U.S. Supreme Court's decisions in *McGirt* and *Murphy*, and in contrast to *Parish*, the Oklahoma Court of Criminal Appeals vacated McGirt and Murphy's convictions and sentences. As discussed above, McGirt and Murphy have now been tried and convicted in federal court. They are currently incarcerated in the federal prison system.

III. A FULL-THROATED APPLICATION OF TEXTUALISM TO DETERMINE THE BOUNDARIES OF THE MUSCOGEE (CREEK) RESERVATION

Justice Gorsuch, the author of the majority opinion in *McGirt*, is a well-known and outspoken advocate for a textualist approach to statutory interpretation that gives effect to the original meaning of the statutory text. In his book, A Republic, If You Can Keep It, Justice Gorsuch stated that "[w]hen interpreting statutes, [textualism] tasks judges with discerning (only) what an ordinary English speaker familiar with the law's usages would have understood the statutory text to mean at the time of its enactment."[147] Offering advice to other judges, Justice Gorsuch cautioned

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[144] State *ex. rel.* Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021); State v. Parish, No. CF-2010-26 (Pushmataha County District Court docket).

[145] Parish v. Oklahoma, No. 21-467, 2021 WL 4480391 (certiorari petition filed Sept. 27, 2021 in U.S. Supreme Court).

[146] Parish v. Oklahoma, 142 S. Ct. 757 (2022) (petition for certiorari denied).

[147] GORSUCH ET. AL., *supra* note 12, at 131.

"[t]here's no doubt that inventing a new law instead of applying the written one can be tempting,"[148] but rewriting statues to fit a particular context or to advance an agenda is not the proper role of the courts. In Justice Gorsuch's view, the value of textualism in statutory interpretation is fairly simple and straightforward: "textualism is about ensuring that our written law is our actual law."[149]

Justice Gorsuch is not alone in his commitment to textualism, Justice Scalia also famously advocated for a judicial interpretative approach that is grounded in textualism.[150] For example, in *Parker v. Nebraska*, Justice Thomas, writing for a unanimous Court stated, "[a]s with any other question of statutory interpretation, we begin with the text of the [congressional] Act. . . ."[151] Likewise, other justices, including the conservative justices on the current Court, have professed a textualist approach to statutory construction.[152] Justice Barrett stated in her confirmation hearing that her approach to statutory construction was "'textualism … [meaning] the judge approaches the text as it was written, with the meaning it had at the time and doesn't infuse her own meaning into it.'"[153] In his confirmation hearings, Justice Kavanaugh asserted his commitment to textualism and stated that the Court's interpretation of a statute is based on "what is written in the text of the statute."[154] He further testified:

> [W]hen we depart from the words that are specified in the text of the statute, we are potentially upsetting the compromise that you all [Congress] carefully negotiated in the legislative negotiations that you might have had with each other. And so, that is a danger that I try to point out when we are having oral argument in a case or we are

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[148] *Id.* at 144. In the context of *McGirt*, Professors Hedden-Nicely and Leeds further write that "Justice Gorsuch's reasoning [in *McGirt*] called upon his broader judicial philosophy that Congress is charged under our Constitution to make the policy of the United States, while the Court's role is to give effect to that policy." Hedden-Nicely & Leeds, *supra* note 6, at 337.

[149] GORSUCH ET. AL., *supra* note 12, at 144.

[150] Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent: Judge Gorsuch's Approach to Textualism and Originalism*, 182 STAN. ONLINE L. REV. 217 (2017).

[151] Nebraska v. Parker, 577 U.S. 481, 488 (2016). *See* Judge H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 REGENT U. L. REV. 365 (2000).

[152] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755-84 (2020) (Alito, J., dissenting); *Id.* at 1822-37 (Kavanaugh, J., dissenting).

[153] Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time [https://perma.cc/BW9Z-6LTQ].

[154] *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 115th Cong. 194 (2018).

> deciding cases, that if we deviate from what Congress wrote, we are potentially upsetting this careful compromise. Even if we think we would have struck the compromise in a different place as judges, that is not really our role. So, I think both as a formal and functional matter, it is important to stick to the text.[155]

Justice Alito in his confirmation hearing testified, "[w]hen I interpret statutes, and that's something that I do with some frequency on the Court of Appeals, where I start and often where I end is with the text of the statute."[156]

Gorsuch's self-described commitment to and application of statutory textualism was on full display in his majority opinion in *McGirt*. The majority looked strictly at the text of the relevant federal treaties and statutes to determine whether Congress had disestablished the Muscogee Reservation.[157] Holding true to the Court's well-settled doctrine that the power to abrogate treaties or diminish a reservation "belongs to Congress alone,"[158] Justice Gorsuch remonstrated those advocating an extratextualist approach saying "we have said time and again, once a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'"[159] *McGirt* also made clear that "[u]nder our Constitution, States have no authority to reduce federal reservations lying within their borders."[160] Again, that power resides solely in the hands of Congress. [161] This focus on textualism and the constitutional authority of Congress enabled the Court to properly apply federal law to determine the scope of the Muscogee Reservation. It also comported with the Court's unanimous decision in *Nebraska v. Parker*,[162] where the Court stated that the "most probative evidence" that Congress has diminished a reservation is the text of the federal statute.

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[155] *Id.* at 195.

[156] *Confirmation Hearing on the Nomination of Hon. Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 109th Cong. 350 (2006).

[157] McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

[158] *Id.; see also* Nebraska v. Parker, 577 U.S. 481, 487–88 (2016) ("Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear."); *see* Miller & Dolan, *supra* note 9, at 2070-2075; Berger, *supra* note 20, at 250; Hedden-Nicely & Leeds, *supra* note 6; Tweedy, *supra* note 9.

[159] *See McGirt*, 140 S. Ct. at 2469.

[160] *See McGirt*, 140 S. Ct. at 2462.

[161] *Id.*

[162] Nebraska v. Parker, 577 U.S. 481, 488 (2016).

Applying these principles, the *McGirt* Court found that federal treaties established the Muscogee Reservation in the mid-1800s and Congress never disestablish the reservation.[163] Under federal law, federal courts have exclusive jurisdiction over major crimes committed by Indians on Indian land, which, as *McGirt* held, includes the Muscogee Reservation.[164]

In contrast to the textualist approach of the majority, Chief Justice Roberts stated in his dissent that a "highly contextual inquiry" into "congressional 'purpose' or 'intent'" was called for based on Supreme Court precedent on the disestablishment of treaties.[165] Justices Alito and Kavanaugh, and Justice Thomas in part, joined the Chief Justice's dissent. Generally, Justices Alito, Kavanaugh, and Thomas assert an allegiance to conservative judicial principles and purport to adhere to a textualist and/or originalist approach to statutory and constitutional construction.[166] However, despite these claims, these three conservative justices agreed with the Chief Justice that the Court should look beyond the text of the treaties and statutes in discerning the boundaries of the Muscogee Reservation. This approach conflicts with *Nebraska v. Parker*,[167] where Justice Thomas writing for a unanimous Court stated:

> "[O]nly Congress can divest a reservation of its land and diminish its boundaries," and its intent to do so must be clear. To assess whether an Act of Congress diminished a reservation, we start with the statutory text, for "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands."

The *McGirt* dissenters, however, declined to apply textualism to an unambiguous federal statute and declined to adhere to the precedent of their unanimous decision in *Parker*.

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[163] *See McGirt*, 140 S. Ct. at 2459.

[164] *See Id*. at 2459, 2481. Likewise, federal treaties established the Choctaw, Seminole, Cherokee, Chickasaw, and Quapaw Reservations in the 1800s and Congress has never disestablished these reservations. Sizemore v. Oklahoma, 485 P.3d 867, 869 (Okla. Crim. App. 2021) (Choctaw Reservation established in mid-1800s and Congress never disestablished reservation); Spears v. Oklahoma, 485 P.2d 873, 877 (Okla. Crim. App. 2021) (treaties establishing Cherokee Reservation date from mid-1800s and Congress never disestablished reservation); McClain v. Oklahoma, 501 P.3d 1009, 1011 (Okla. Crim. App. 2021) (Chickasaw Reservation established in 1830 and Congress never disestablished the reservation.); Grayson v. Oklahoma, 485 P.3d 250, 251-52 (Okla. Crim. App. 2021) (Seminole Reservation established by treaties from the mid-1800s and Congress never disestablished the reservation.); State v. Lawhorn, 485 P.3d 777, 778-79 (Okla. Crim. App. 2021) (treaties from 1800s established the Quapaw Reservation and Congress never disestablished).

[165] *McGirt*, 140 S. Ct at 2484-85 (Roberts, J., dissenting).

[166] *Id.* at 2482.

[167] Nebraska v. Parker, 577 U.S. 481, 487-88 (2016).

Under federal law, Oklahoma does not have and has never had jurisdiction or power to prosecute or punish Indians in state court for crimes committed in Indian county.[168] This jurisdictional prohibition includes the Muscogee Reservation, the Cherokee Reservation, the Choctaw Reservation, the Seminole Reservation, the Chickasaw Reservation, and the Quapaw Reservation.[169] The fact that Oklahoma wrongfully prosecuted Indians on these reservations for many years does not change the state's lack of subject matter jurisdiction during those prosecutions. As the majority in *McGirt* stated:

> The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. 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. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.[170]

Indian law authorities have written extensively about *McGirt*. Indian law experts Robert Miller and Torey Dolan observed that "[t]he *McGirt* majority began and ended its analysis with the relevant congressional language."[171] Cherokee Nation Attorney General Sara Hill stated "it was

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[168] Indian law scholars agree that the Muscogee Reservation was not disestablished and federal law deprives Oklahoma of subject matter jurisdiction to prosecute and try Indians for crimes committed by Indians on Indian lands. *See* Nagle, *supra* note 9; Chaudhuri, *supra* note 9; Kanji, Giampetroni & Tinker, *supra* note 9; King, *supra* note 9; Leeds & Beard, *supra* note 9; Summers, *supra* note 9; Combs, *supra* note 9; Deer, *supra* note 9; Hill, *supra* note 6; Greetham, *supra* note 9; Berger, *supra* note 20; Miller & Dolan, supra note 6; Hedden-Nicely & Leeds, *supra* note 6; Tweedy, supra note 9.

[169] *See* Spears v. State, 485 P.3d 873 (Okla. Crim. App. 2021); Hogner v. Oklahoma, 500 P.3d 629 (Okla. Crim. App. 2021); McClain v. Oklahoma, 501 P.3d 1009 (Okla. Crim. App. 2021); Grayson v. Oklahoma, 485 P.3d 250 (Okla. Crim. App. 2021); State v. Lawhorn, 499 P.3d 777 (Okla. Crim. App. 2021); State v. Parish, CF-2010-26 (Pushmataha County District Court docket) (district court unpublished order dated Apr. 29, 2021).

[170] *McGirth*, 140 S. Ct. at 2482. *See also* Berger, *supra* note 20, at 281.

[171] Miller & Dolan, *supra* note 9, at 2076.

particularly satisfying to see an opinion from the United States Supreme Court that eschewed politics and embraced a straightforward analysis of the facts and the law."[172] Professor Bethany Berger agreed that Justice Gorsuch's opinion was "an application of textualism to federal Indian affairs,"[173] and further opined that *McGirt* showed "that it was not just improper but unjust for courts to undermine tribal rights when they became inconvenient."[174]

Gorsuch's textualist approach, moreover, accords with the foundational principles of construction in Indian law that "treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."[175] Professor Ann Tweedy found that *McGirt* "hews closely to both traditional federal Indian law principles and general statutory interpretation principles."[176] Likewise, Professors Hedden-Nicely and Leeds noted, "Justice Gorsuch's decision, adopted by five of the nine justices, represents a return to foundational Indian law principles. Foremost, the Court reaffirmed the core principle that it is Congress, not the Court, that retains the legal power to limit tribal sovereignty."[177] Professors Hedden-Nicely and Leeds also called attention to the portion of *McGirt* that reaffirmed that the federal government, not the states, determines Indian policy, tribal rights, and the boundaries of tribal lands.[178]

Indian law experts herald *McGirt*'s re-affirmance of the federal government's long-standing promise to the Muscogee Nation. Mary Kathryn Nagle, an attorney specializing in tribal sovereignty and a citizen of the Cherokee Nation, stated the "historic" *McGirt* decision "was guided by *the law*,"[179] and further opined that "[m]ake no mistake about it, *McGirt* is our *Brown v. Board of Education*."[180] Lauren King, a citizen of the Muscogee (Creek) Nation who was confirmed in 2021 as a United States district judge of the United States District Court for the Western District of Washington and formerly chaired the Native American law practice group at Foster Garvey, P.C., wrote "*McGirt v. Oklahoma* corrected [the] unequal

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[172] Hill, *supra* note 6, at 555.

[173] Berger, *supra* note 6, at 267.

[174] *Id.* at 268.

[175] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 4.02 (Nell Jessup Newton ed., 2012); s*ee* Hedden-Nicely & Leeds, *supra* note 6, at 321.

[176] Tweedy, *supra* note 9, at 743.

[177] Hedden-Nicely & Leeds, *supra* note 6, at 337.

[178] *Id.* at 338.

[179] Nagle, *supra* note 9, at 364 (emphasis in original).

[180] *Id.*

treatment of [Indian] treaty rights by jettisoning consideration of extratextual factors in determining whether Congress abrogated a tribe's treaty right to a homeland, absent ambiguity in the statutory language."[181] And current Muscogee Nation Ambassador Jonodev Chaudhuri, advised that the "[Muscogee] Nation's victory in the Supreme Court presents an incredible opportunity to discard the dysfunctional policies and practices of the past and replace them a framework of intergovernmental partnership—between the Muscogee (Creek) Nation, the State, and the United States—that allows all, Indian and non-Indian alike, to prosper."[182]

IV. THE SCOPE OF THE REMEDY: OKLAHOMA APPLIES *MCGIRT* TO ONLY SOME INDIAN DEFENDANTS WHO COMMITTED CRIMES IN INDIAN COUNTRY

As most law students learn during their first semester of law, subject matter jurisdiction, meaning the power of a court to hear a case, can never be waived. Until recently, Oklahoma was in accord with this canon of law. In fact, Oklahoma long recognized that "some constitutional rights . . . are never finally waived. Lack of jurisdiction, for instance, can be raised at any time."[183] Yet, with respect to defendants raising *McGirt* jurisdiction claims, the Oklahoma Court of Criminal Appeals threw this long-standing rule out the window and created an ad hoc rule for *McGirt* cases that invoked the *Teague v. Lane* judicial doctrine of retroactivity. Specifically, the Oklahoma court found that *McGirt* only applied to those criminal defendants whose convictions and sentences were not final on July 9, 2020, the date on which the Supreme Court handed down *McGirt*. The court would not consider the claims of any defendant whose conviction became final before that date. By using the retroactivity doctrine in this manner, the State nullifies *McGirt* for many criminal defendants who the state tried and convicted in state courts that lacked subject matter jurisdiction.[184] In other words, Oklahoma is applying the *Teague* retroactivity doctrine so that it will not be bound by federal law or Supreme Court precedent for defendants whose convictions and sentences were final on July 9, 2020.

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[181] King, *supra* note 9, at 402.

[182] Chaudhuri, *supra* note 9, at 370-71.

[183] Johnson v. State, 611 P.2d 1137, 1145 (Okla. Crim. App. 1980).

[184] As all law students learn in their first year of education, subject matter jurisdiction, which is what is at issue in these cases, is never waived and can normally be raised at any time. *See e.g.*, *id*. Indeed, subject matter jurisdiction concerns the very power of the court to act at all.

A. APPLICATION OF THE TEAGUE V. LANE RETROACTIVITY DOCTRINE IN DETERMINING THE SCOPE OF THE MCGIRT DECISION

In 1989, in *Teague v. Lane*, the Supreme Court established the current retroactivity doctrine applicable to new rules of constitutional criminal procedure.[185] In that case, four justices agreed that unless new rules of criminal procedure fall within two limited exceptions, new constitutional procedural rules will not apply to criminal defendants whose convictions and sentences are final at the time of the Court decision establishing the new rule.[186] In the context of the criminal procedure retroactivity doctrine, a state conviction and sentence becomes final "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."[187] Although the retroactivity analysis garnered only four votes in *Teague*, a majority of the Court signed on to its methodology in *Penry v. Lynaugh*,[188] and it is now a well-accepted and entrenched aspect of criminal procedure and federal habeas law.[189]

Teague's first exception provides that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[190] An example of a new rule that fits within this exception is the Court's decision in *Atkins v. Virginia*, where the Court found that the government could not impose the death penalty on an individual with an intellectual disability, previously referred to as mental retardation.[191] The second *Teague* exception would allow retroactive application of new rules of constitutional criminal procedure if the new rule constituted a "watershed" rule of criminal procedure.[192] That said, the Court has never

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[185] Teague v. Lane, 489 U.S. 288 (1989); *see* CHEMERINSKY, FEDERAL COURTS 1014-1026 (Aspen Pub. 2021) (summarizing current retroactivity doctrine); *see* Lyn Entzeroth, *Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161 (2005).

[186] *Teague*, 489 U.S. at 310.

[187] Caspari v. Bohlen, 510 U.S. 383, 390 (1994); *see* Danforth v. Minnesota, 552 U.S. 265, 267 (2008); *Teague*, 489 U.S. at 288; Griffith v. Kentucky, 479 U.S. 314 (1987).

[188] Penry v. Lynaugh, 492 U.S. 302 (1989).

[189] CHEMERINSKY, supra note 188, at 1015-1026.

[190] *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States,* 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

[191] Atkins v. Virginia, 536 U.S. 304 (2002).

[192] 489 U.S. at 311.

found any new rule to fall within the second exception,[193] and the Court has now declared the second exception a nullity.[194]

The Court also has clarified that "*Teague* by its terms applies only to procedural rules. . . ."[195] "New *substantive* rules generally apply retroactively."[196] For example, *Teague* does not apply to decisions where the "Court decides the meaning of a criminal statute enacted by Congress."[197] Likewise, *Teague* does not apply to the Court's "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish."[198] These types of decisions apply retroactively "because they 'necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him."[199]

Oklahoma has adopted and applies the *Teague* doctrine to new rules of constitutional criminal procedure that are raised by defendants in state post-conviction proceedings.[200] In accord with *Teague*, the Oklahoma Court of Criminal Appeals has stated that with respect to state post-conviction proceedings, the *Teague* retroactivity doctrine "bar[s] the application of new procedural rules to convictions that were final when the rule was announced."[201] The Court of Criminal Appeals also provides the two exceptions to the retroactivity doctrine that were articulated in *Teague*.[202] Consistent with *Teague*, the Court of Criminal Appeals has stated "[f]ollowing *Teague* and its progeny, we would apply a new *substantive* rule to final convictions if it placed certain primary (private) conduct beyond the power of the Legislature to punish, or categorically barred certain punishments for classes of persons because of their status."[203]

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[193] Edwards v. Vannoy, 141 S. Ct. 1547, 1559-1562 (2021).

[194] *Id.*; *see* Richard M. Re, *Reason and Rhetoric in Edwards v. Vannoy*, 17 DUKE J. CONST L. & PUB. POL'Y 63 (2022) (discussing the elimination of the watershed exception and the justices' disagreements about this action).

[195] *See* Bousley v. United States, 523 U.S. 614, 620 (1998)**;** *see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 1016, n. 14 (Rachel E. Barkow et. al., 8th ed. 2021).

[196] Schriro v. Summerlin, 542 U.S. 348, 351 (2004) (emphasis in original).

[197] *See Bousley*, 523 U.S. at 620.

[198] *Schriro*, 542 U.S. at 352 (citations omitted).

[199] *Id.*

[200] Ferrell v. State, 902 P.2d 1113, 1114 (Okla. Crim. App. 1995); Thomas v. State, 888 P.2d 522, 527 (Okla. Crim. App. 1994).

[201] State *ex rel.* Matloff v. Wallace, 497 P.3d 686, 688–89 (Okla. Crim. App. 2021), cert. denied, 142 S. Ct. 757 (2022).

[202] *Ferrell*, 902 P.2d at 1115.

[203] *Matloff*, 497 P.3d at 689.

In 1996, Congress incorporated *Teague* into the Anti-Terrorism and Effective Death Penalty Act (AEDPA) that governs federal habeas review. 28 U.S.C. § 2254(d)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in 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.

Essentially, under § 2254(d)(1) only rights that the U.S. Supreme Court clearly established before a habeas petitioner's conviction and sentence became final will be applied to their case.[204] Rights that the Court established after the conviction and sentence became final will not be given effect in a habeas proceeding.[205]

i. Retroactivity is a threshold question that a court must determine before it may consider the merits of the claim.

The *Teague* Court recognized that "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[206] Section 2254 of the United States Code also requires that before a federal court can review a claim in a federal habeas proceeding, the court must determine if the applicable rule was "established" at the time the petitioner's conviction and sentence became final.[207] Noting that the *Teague* analysis is distinct from AEDPA statutory obligations, the Court has stated a *Teague* analysis is a threshold issue that must be addressed if raised by the respondent or raised *sua sponte* by the lower court.[208]

The threshold requirement of *Teague* arose out of the Court's debate about the retroactive scope of new or expanded rules of criminal procedure

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[204] CHEMERINSKY, *supra* note 198, at 1025.

[205] *Id.*

[206] Teague v. Lane, 489 U.S. 288, 300 (1989) (referencing, in support of the threshold nature of the retroactivity question, Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 64 (1965)).

[207] 28 U.S.C. § 2254(d)(1).

[208] Horn v. Banks, 536 U.S. 266, 272 (2002) (per curiam).

issued by the Warren Court beginning in the 1950s.[209] The issues in play included procedural fairness, federal judicial power, state interests, and finality of judgments. The justices discussed these competing interests in a number of decisions in the 1960s and 1970s, including *Linkletter v. Walker*,[210] *Stovall v. Denno*,[211] and *Desist v. United States*.[212] As Justice Harlan articulated in his dissent in *Desist*:

> Matters of basic principle are at stake. In the classical view of constitutional adjudication, which I share, criminal defendants cannot come before this Court simply to request largesse. This Court is entitled to decide constitutional issues only when the facts of a particular case require their resolution for a just adjudication on the merits. *See Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.[213]

As he wrote in his concurrence in *Mackey v. United States*,[214] Justice Harlan "believe[d] that whether a new constitutional rule is to be given retroactive or simply prospective effect must be determined upon principles that comport with the judicial function, and not upon considerations that are appropriate enough for a legislative body."[215] In accord with his view, Justice Harlan asserted that "[a]bsent unusual circumstances, a new rule [is] not cognizable on habeas . . . ." [216] In contrast, rules established at the time a conviction and sentence become final should be given effect.[217]

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[209] *See* Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J. concurring).

[210] Linkletter v. Walker, 381 U.S. 618 (1965).

[211] Stovall v. Denno, 388 U.S. 293 (1967), *overruled by* Griffith v. Kentucky, 479 U.S. 314 (1987).

[212] Desist v. United States, 394 U.S. 244, 258 (1969). *See* Entzeroth, *supra* note 188.

[213] *Desist*, 394 U.S. at 259.

[214] Mackey v. U.S., 401 U.S. 667 (1971).

[215] *Id.* at 667.

[216] *Id.* at 684.

[217] *Id.* at 693.

In crafting the retroactivity model in *Teague*, Justice O'Connor relied on Justice Harlan's articulation of the limitations of federal courts reviewing state court criminal convictions and his articulation of the important fairness concern in treating like-situated defendants alike.[218] Under the Court's current retroactivity doctrine, if the Court grants relief to a defendant in habeas or collateral review, then all defendants in habeas or collateral review must receive the same type of review and relief. [219] As Dean Erwin Chemerinsky explains, "in *Teague*, the Supreme Court ruled that retroactivity must be determined first; federal courts may not hear habeas petitions asking the Court to recognize new rights unless such rights applied retroactively in all cases."[220]

As detailed above, McGirt's conviction and sentence became final in 1998.[221] In 2018, he initiated a collateral proceeding—state post-conviction.[222] The Supreme Court granted certiorari in 2019, and granted him relief on his jurisdictional claim on July 9, 2020.[223] The Court was well aware of the timeline in McGirt's case, and the Court was well aware that his state convictions and sentences were final when it accepted review and issued its decision. [224] At no point did the Court suggest that *Teague* or an Oklahoma *Teague* equivalent precluded review of McGirt's claim. While the Court did mention that defendants raising *McGirt* claims "may face significant procedural obstacles,"[225] the *Teague* retroactivity doctrine was not mentioned as one of those obstacles.

Murphy's conviction and sentence became final in 2002.[226] His case then proceeded through state post-conviction and federal habeas review.[227] On federal habeas review, Oklahoma did not raise *Teague* as a defense,[228] and the Tenth Circuit specifically found that *Teague* retroactivity did not

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[218] Teague v. Lane, 489 U.S. 288, 300 (1989).

[219] CHEMERINSKY, *supra* note 198, at 1015.

[220] *Id.*

[221] *See id.*

[222] *See id.*

[223] *See id.* For an interesting discussion of the Supreme Court's recent trend of reviewing constitutional claims on state collateral review, *see* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 158 (2021).

[224] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754-84 (2020) (Alito, J., dissenting).

[225] McGirt v. Oklahoma, 140 S. Ct. 2452, 2479 (2020).

[226] McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[227] *Id.*

[228] Murphy v. Royal, 875 F.3d 896, 929 n.36 (10th Cir. 2017) (". . . [T]he State does not argue that *Teague* should preclude relief. In such circumstances, 'a federal court may... decline to apply *Teague*.' *Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S. Ct. 948, 127 L.Ed.2d 236 (1994). Even if we were to raise *Teague* on the State's behalf, it would not affect our analysis.").

apply to Murphy.[229] The Supreme Court granted review on Murphy's habeas petition in 2018 and granted him relief on July 9, 2020. The Court did not find that either *Teague* or Section 2254 precluded review of Murphy's subject matter claim, or that it barred the Court from granting relief to Murphy.

The Supreme Court remanded both Murphy and McGirt to the Oklahoma Court of Criminal Appeals. In accord with the Supreme Court's orders, the Court of Criminal Appeals vacated their convictions and sentences. Initially, the state court treated similarly situated defendants the same.[230] Then, in response to the state's entreaties, the Court of Criminal Appeals cordoned off McGirt and Murphy and treated the remaining similarly situated defendants differently. This differential treatment is precisely the selective treatment and judicial activism condemned by Justice Harlan in *Desist* and *Murphy*. Such differential treatment runs afoul of a properly functioning judiciary, confounds the principles underlying *Teague*, and reflects judicial action that is more akin to a legislative body than a judicial body.[231]

ii. *McGirt* is not a "new" rule, but rather a long-standing federal jurisdictional rule.

The retroactivity limits of *Teague* apply only to *new* rules of constitutional criminal procedure.[232] As the Court established in *Teague*:

> It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction become final.[233]

As the majority in *McGirt* stated: "When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us."[234] The relevant treaties

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[229] *Id.*
[230] *See id.*
[231] *See id.*
[232] Teague v. Lane, 489 U.S. 288, 301 (1989).
[233] *Id.* (citations omitted).
[234] McGirt v. Oklahoma, 140 U.S. 2452, 2468 (2020).

and statutes in *McGirt* date from the 1800s and control resolution of the case. As Justice Gorsuch made clear: by these treaties and acts, Congress established a reservation for the Muscogee Nation;[235] only Congress can disestablish the Reservation;[236] Congress has not done so.[237] Under the MCA, Congress confers exclusive federal jurisdiction over the commission of certain crimes by Indians in Indian country, which includes reservations in Oklahoma.[238] The plain language of long-standing federal law dictated that Oklahoma "has no right to prosecute Indians for crimes" committed on the Muscogee Reservation.[239] The State did not have that right when it prosecuted and convicted McGirt and Murphy in 1998 and 2002, respectively. Nor did it have that right when it prosecuted Parish in 2012. These principals apply with equal force to the Choctaw, Cherokee, Seminole, Chickasaw and Quapaw reservations.[240]

The *McGirt* Court interpreted and applied established federal law; it did not create a new rule of constitutional criminal procedure.[241] In accord, the United States District Court of Eastern Oklahoma, in an unpublished decision, found that *McGirt* "did not break any new ground or recognize any new rights."[242] Likewise, the Northern District of Oklahoma, in an unpublished decision found:

> The Supreme Court did not newly recognize any constitutional rights in *McGirt*. Instead, the *McGirt* Court relied on established precedent to determine that Congress did not disestablish the historical boundaries of the Muscogee (Creek) Nation Reservation, that the reservation thus remains "Indian country" as defined in 18 U.S.C. § 1151(a), and that, as a result, certain crimes committed by or against Native Americans within the boundaries of that reservation must be prosecuted in federal court.[243]

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[235] *Id.* at 2459.

[236] *Id.*

[237] *Id.*

[238] 18 U.S.C. § 1153.

[239] 140 S. Ct. at 2460.

[240] *See id.*

[241] For a discussion of the principles that undergird *Teague*, *see* Mackey v. United States, 401 U.S. 667 (1971).

[242] Sanders v. Pettigrew, No. CIV 20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021) (issue arose in the context of finding that 28 U.S.C. § 2244(d)(1) did not provide a later commencement for the statute of limitations). The federal courts that have heard *McGirt* claims in cases that were final before *McGirt* was decided have declined habeas review on other statutory grounds.

[243] Littlejohn v. Crow, No. 18-CV-0477-CVE-JFJ, 2021 WL 3074171, at *5 (N.D. Okla. July 20, 2021), *cert. of appeal denied*, No. 21-5060, 2021 WL 5072980 (10th Cir. Nov. 2, 2021).

Consistent with the other federal district courts in Oklahoma, the United States District Court for the Western District of Oklahoma, in an unpublished decision, stated "the *McGirt* decision did not recognize a new constitutional right."[244] Likewise, the Tenth Circuit in *Murphy v. Royal*,[245] found that Congress had not disestablished Muscogee reservation and that the Oklahoma Court of Criminal Appeals wrongly applied established federal law when it found Oklahoma had jurisdiction to try Murphy in 2000.[246]

Despite these holdings, the Oklahoma Court of Criminal Appeals declared that *McGirt* is new, and then created an ad hoc retroactivity rule to limit its reach. In *State* ex rel. *Matloff*,[247] the Court of Criminal Appeals described *McGirt* as "recogniz[ing] a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation."[248] The Oklahoma Court derided the Supreme Court's decision as one that "arguably involved controversial innovations upon, Supreme Court precedent,"[249] and claimed that it imposes new obligations on the State not dictated by U.S. Supreme Court precedent.[250]

The state court's hyperbole in *Matloff* cannot be reconciled with Justice Gorsuch straightforward textualism in *McGirt*. Federal law dating back more than 100 years is established federal law. Yet, the state court takes a different approach. Using the provocative descriptor "controversial innovations," [251] the Court of Criminal Appeals contended *McGirt* must be new because four justices dissented.[252] Under this theory, all U.S. Supreme Court decisions impacting criminal procedural law would have to be unanimous in order to not be "new" under *Teague*. The Supreme Court has never endorsed such a radical approach. Moreover, and to state the obvious,

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[244] Hill v. Nunn, No. CIV-21-1208-SLP, 2022 WL 597274, at *1 (W.D. Okla. Feb. 28, 2022).

[245] Murphy v. Royal, 875 F.3d 896, 927 (10th Cir. 2017), *aff'd*, Sharp v. Murphy, 140 S. Ct. 2412 (2020) (affirmed for reasons state in McGirt v, Oklahoma, 140 U.S. 2452 (2000)).

[246] 875 F.3d at 927.

[247] State *ex rel.* Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021), *cert. denied*, 142 S. Ct. 757 (2022).

[248] *Id.* at 691.

[249] *Id.* at 692.

[250] *Id*.

[251] *Id.*

[252] *Id.* at 692 ("With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be 'reasonable jurists' in the required sense, certainly did *not* view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014.").

it takes only five Supreme Court justices to decide a case.[253] In *McGirt*, five justices found that federal treaties established the Muscogee Reservation, and these same five justices found that Congress has not disestablished this treaty obligation.[254] The *McGirt* majority opinion is binding Supreme Court precedent; the *McGirt* dissents do not make the decision less binding.

Likewise, although the Court of Criminal Appeals had previously, and erroneously, declined to recognize the boundaries Muscogee Reservation,[255] the state court's past decisions do not limit the authority or supremacy of *McGirt*. In cases as notable as *Marbury v. Madison*,[256] *Martin v. Hunter's Lessee*,[257] and *Cooper v. Aaron*,[258] the U.S. Supreme Court has made explicit that its determinations of federal law are the supreme law of the land and that state jurists, legislators, and executive officials are obligated to follow those decisions.[259] *McGirt* stated that Congress has never disestablished the Muscogee Reservation and the MCA precludes Oklahoma jurisdiction over Indians who commit criminal acts on reservations. To put it simply, the Oklahoma Court of Criminal Appeals has erroneously applied federal law and has been doing so for many years. However, Oklahoma' repeated errors do not render the Supreme Court's holding in *McGirt* new.[260]

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[253] For a discussion of Justice Brennan and the Rule of Five, *see* Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151 (2013).

[254] McGirth v. Oklahoma, 140 S. Ct. 2452 (2020).

[255] *Matloff*, 497 P.3d at 692.

[256] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[257] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[258] Cooper v. Aaron, 358 U.S. 1 (1958).

[259] Art. VI, cl. 2 of the U.S. Constitution provides:

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

See also Cooper v. Aaron, 358 U.S. 1 (1958).

[260] McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) ("Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.").

iii. Teague applies to new rules of "constitutional criminal procedure" as opposed to statutory interpretations of federal statutes or treaties.

The *Teague* retroactivity doctrine applies only to new rules of *constitutional criminal procedure*.[261] *Teague* is not applicable to substantive law or statutory interpretation of federal law.[262] *McGirt* is not a decision of constitutional law; it is a decision interpreting long-standing federal treaties and statutes that impose a limitation on the reach of the Oklahoma's criminal jurisdiction. Specifically, Oklahoma criminal statutes and Oklahoma's enforcement of those state statutes do not extend to Indians who commit certain crimes in Indian country.

The Supreme Court has stated that its interpretations of federal law, as opposed to constitutional criminal procedure law, apply retroactively. For example, in *Bousley v. United States*,[263] the Court considered the retroactive application of *Bailey v. United States*,[264] a decision in which the Supreme Court held "that [18 U.S.C.] § 924(c)(1)'s 'use' prong requires the Government to show 'active employment of the firearm.'"[265] The question in *Bousley* was whether the *Bailey* Court's interpretation of "use" in section 924(c)(1) applied to federal criminal defendants whose convictions and sentences became final before the Court decided *Bailey*. The Court affirmed that it did.[266] "*Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress."[267]

Bousley is consistent with the competing principles and purposes underlying the Court's modern retroactivity doctrine. In deciding to limit the retroactive reach of new rules of constitutional criminal procedure, *Teague* balanced the government's interest in finality against the defendant's interest in a fair process. The Court found that "[i]f a new rule regulates only the procedures for determining culpability, the *Teague* balance generally tips in favor of finality. The chance of a more accurate outcome under the new procedure normally does not justify the cost of

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[261] *See* Ben Gibson, *Lessons from* McGirt v. Oklahoma*'s Aftermath*, 99 DENV. L. REV. 253 (2022) (discussing procedural obstacles, including Court of Criminal Appeals *Teague* assertion, in habeas petitions raising *McGirt* claims).

[262] Teague v. Lane, 489 U.S. 288, 310 (1989); CHEMERINSKY, *supra* note 198, at 1016.

[263] Bousley v. United States, 523 U.S. 614 (1998).

[264] Bailey v. United States, 516 U.S. 137 (1995), *superseded by statute*, Criminal Use of Guns Act, Pub. L. No. 105-386, 112 Stat. 3469 (codified as amended at 18 U.S.C. § 924(c)) (1998).

[265] *Bousley*, 523 U.S. at 616.

[266] *Id.* at 620.

[267] *Id.*

vacating a conviction whose only flaw is that its procedures "'conformed to then-existing constitutional standards.'"[268]

Substantive rules or interpretations of federal statutory law invoke a different balancing assessment. As Justice Harlan famously observed, "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[269] "[W]here the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest."[270] In the context of substantive law or interpretations of federal law, "the countervailing imperative [is] to ensure that criminal punishment is imposed only when authorized by law."[271] In keeping with this doctrine, the *Bousely* Court stated:

> [D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe,' necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'[272]

Likewise, in *Welch v. United States*,[273] the Court retroactively applied *Johnson v. United States*,[274] a decision in which the Court held the residual clause in the Armed Career Criminal Act of 1984 void for vagueness. Applying *Johnson* retroactively, the *Welch* Court stated that "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."[275] "Procedural rules, by contrast, 'regulate only the *manner of determining* the defendant's culpability' . . . . 'They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.'"[276] The Court found that *Johnson* limited the reach of a federal statute and the federal government could "no longer mandate or authorize any sentence" under the residual provision on the statute. [277] Where a

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[268] Welch v. United States, 578 U.S. 120, 131 (2016) (quoting Teague v. Lane, 489 U.S. 288, 310 (1989)).

[269] *See* Mackey v. U.S., 401 U.S. 667, 693 (1971) (Harlan, J., concurring).

[270] 578 U.S. 120, 131.

[271] *Id*.

[272] Bousley v. United States, 523 U.S. 614, 620 (1998) (citations omitted).

[273] Welsh v. United States, 578 U.S. 120 (2016).

[274] Prieto v. Clarke, 576 U.S. 1096 (2015).

[275] 578 U.S. at 129 (quoting Schriro v. Summerlin*,* 542 U.S. 348, 353 (2004)).

[276] *Id.*

[277] *Id.* at 130.

Court's decision further "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied,"[278] then "'even the use of impeccable factfinding procedures could not legitimate' a sentence based on that clause."[279]

In applying *Teague* to *McGirt* claims, the Court of Criminal Appeals declared that *McGirt* to be a procedural rule and set out two reasons to support its declaration. First, the court stated that *McGirt* "did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status."[280] Second, the court claimed that *McGirt* only decided which sovereign would try the case and that *McGirt* "affected 'only the *manner of determining* the defendant's culpability.'" [281]

In determining whether a rule is procedural or substantive, the Supreme Court decision in *Welch* is instructive. There the Court explained that where its decision alters the reach of a federal statute, it "alters 'the range of conduct or the class of persons that the [Act] punishes.'"[282] In *McGirt*, the Court clarified the reach of federal treaties and the MCA by finding that (1) Congress established the Muscogee Reservation in the mid-1800s; (2) Congress had never disestablished the reservation; (3) the MCA confers jurisdiction over Indians committing crimes on Indian land to the federal government; and (4) the MCA applies to the Muscogee Reservation. This binding federal law, which relies on federal treaties and the MCA, places Indians who commit crimes on Indian land outside the reach of Oklahoma criminal statutes and outside the reach of the state to punish. Simply put, Indians who commit crimes on the reservations discussed herein constitute a class of persons whom Oklahoma may not punish. A procedural rule, in contrast, would address the methods for determining punishments, or the allocation of decision-making between a jury and a judge, or evidentiary rules impacting the scope of evidence the fact-finder may consider.[283] A decision interpreting federal law that precludes the power of the state and the application of the state law to the defendant is more squarely considered substantive rather procedural.[284]

McGirt enforced long-standing substantive federal law that provides that Oklahoma lacks the judicial power to impose and enforce its state criminal laws on Indians who commit crimes on Indian land. Specifically,

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[278] *Id.*

[279] *Id*.

[280] State *ex rel* Matloff v. Wallace, 497 P.3d 686, 691 (Okla. Crim. App. 2021).

[281] *Id*.

[282] 578 U.S. at 129.

[283] *Id.* at 129-31.

[284] *Id*.

McGirt made clear that under federal law Indians committing crimes on Indian land constitute a class of individuals and an area of conduct that is beyond the reach of Oklahoma. *McGirt* was never about a procedural issue; it was always about a federal substantive law.

iv. Oklahoma's effort to work around its lack of subject matter jurisdiction and to excuse its use of judicial power that it lacked.

Oklahoma tries to wedge itself into *Teague*'s retroactivity limitations despite the fact that *McGirt* is not a new rule of constitutional criminal procedure. Although Oklahoma now claims that *McGirt* does not apply retroactively, Oklahoma did not raise the *Teague* retroactivity defense in *Murphy v. Royal*,[285] and the Tenth Circuit found that *Teague* did not restrict its habeas review. Likewise, the Court of Criminal Appeals initially applied *McGirt* retroactively under well-established Oklahoma law that subject matter jurisdiction can never be waived and may be raised at any time, including on collateral review.[286] Rather than abide by these standards, Oklahoma in *State* ex rel. *Matloff* v. *Wallace*,[287] created an ad hoc retroactivity doctrine applicable in *McGirt* cases.

Judge Lumpkin's concurring opinion in *Matloff* pulled back the curtain on what really undergirds the state court's ad hoc retroactivity rule: the state court prefers Chief Justice Roberts' extratextualist dissent in *McGirt*. Judge Lumpkin opined that the *McGirt* majority "disregarded the precedent set out by Chief Justice Roberts in his dissent to *McGirt,* and for the first time in history determined the existence of a reservation in Oklahoma based on 'magic words' rather than historical context."[288] While Judge Lumpkin and his brethren may prefer the Chief Justice's dissent, the majority in *McGirt* rejected the Chief Justice's call for extratextualism and instead adhered to textualist analysis that comported with the unanimous Supreme Court decision in *Parker v. Nebraska*,[289] and traditional rules of construction in Indian law.

As discussed above, the Tenth Circuit found that "*Teague* does not impose a barrier to Mr. Murphy."[290] Likewise, all the district courts that have considered *McGirt* habeas claims have concluded that *McGirt* is not a

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[285] Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017).

[286] Gibson, *supra* note 264 (discussing procedural obstacles, including Court of Criminal Appeals *Teague* assertion, in habeas petitions raising *McGirt* claims).

[287] State *ex rel* Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021).

[288] *Id.* at 695.

[289] Nebraska v. Parker, 577 U.S. 481 (2016).

[290] Murphy v. Royal, 875 F.3d at 929, n.36. (10th Cir. 2017).

new rule of criminal procedure.[291] Consistent with these federal court decisions, the U.S. Supreme Court did not raise or find *Teague* to be a barrier to collateral review of McGirt and Murphy's jurisdictional claim. [292]

The Court of Criminal Appeals, however, turned to the Tenth Circuit decision in *United States v. Cuch*.[293] In *Cuch*,[294] the Tenth Circuit looked at the retroactive scope of *Hagen v. Utah*,[295] a case in which the U.S. Supreme Court found that in the early 1900s, Congress had disestablished certain parts of Uintah Reservation in Utah. As a result of this congressional action, these lands fell under the jurisdiction of the state not the federal government for purposes of prosecuting alleged criminal conduct.[296] The defendants in *Cuch* asserted that under *Hagen* their federal convictions and sentences should be vacated because, at the time of their trials, Utah held exclusive jurisdiction over the land where the crimes occurred.[297] The Tenth Circuit disagreed declaring: "The Supreme Court, and by extension this court, has the undoubted power to declare that its jurisdictional and other decisions shall be limited to prospective application; and neither controlling precedent, policy considerations, nor questions of fundamental fairness require a different result here."[298] In support of its power to limit the retroactive scope of subject matter jurisdiction, the Tenth Circuit cited several U.S. Supreme Court decisions, all of which predate *Teague*, where the Supreme Court limited the reach of federal subject matter jurisdiction in the military,[299] bankruptcy law,[300] and the Federal Election Commission[301] so that the jurisdiction in those cases only applied prospectively.

In supporting its decision in *Cuch*, the Tenth Circuit also cited *Teague*, and stated that *Hagen* announced a new rule that "should not provide the basis for collateral attack."[302] In *Hagen*, the Supreme Court determined that

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[291] *See id.*

[292] *See id.*

[293] United States v. Cuch, 79 F.3d 987 (10th Cir. 1996).

[294] *Id.*

[295] Hagen v. Utah, 510 U.S. 399 (1994).

[296] *Cuch*, 79 F.3d at 988. U.S. Supreme Court decision in *Hagen v. Utah* determined that "the state of Utah, not the federal government, had jurisdiction over crimes committed in the disputed area." *Id.* (citing Hagen v. Utah, 510 U.S. 399 (1994)).

[297] *Id.*

[298] *Id.*

[299] Gosa v. Mayden, 413 U.S. 665 (1973).

[300] Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S 371 (1940).

[301] Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

[302] 79 F.3d at 991.

Congress had disestablished the reservation in the early 1900s. The Tenth Circuit found that law new because *Hagen* overturned contrary Tenth Circuit precedent on the boundaries of the Uintah reservation.[303] The Tenth Circuit also distinguished *Hagen* from substantive non-constitutional decisions that apply retroactively claiming that "*Hagen* did not purport to narrow the scope of the federal criminal statutes under which the movants pled guilty so as to exclude the conduct—homicide and abusive sexual acts—underlying their criminal judgments. To the contrary, Congress clearly intended that such conduct be made criminal and be punished in federal court whenever state court jurisdiction was lacking."[304] Based on this analysis, the *Cuch* court asserted that (1) *Hagen* "redefined" the relevant reservation boundaries,[305] (2) the decision was not dictated by precedent,[306] (3) the interests of finality outweighed fairness considerations,[307] and (4) the countervailing *Teague* exceptions did not apply to the case.[308]

The Court of Criminal Appeals' reliance on *Cuch* is misplaced. First, the Tenth Circuit in *Murphy* found that *Teague* does not apply to jurisdiction claims related to the Muscogee Reservation. Second, the U.S. Supreme Court applied the jurisdictional limitation to both McGirt and Murphy, each of whom had final convictions and sentences. And third, *Cuch*'s reasoning cannot be reconciled with the textualist approach to statutory construction used in *McGirt*.

The problems with *Cuch* are well laid out in *Covey v. United States*,[309] a case in which the U.S. District Court in South Dakota explicitly rejected *Cuch*'s analysis and conclusion. In *Covey v. United States*,[310] after the defendant had been convicted in federal court, the U.S. Supreme Court decided *South Dakota v. Yankton Sioux Tribe*.[311] In *Yankton*, the Supreme Court held that an 1894 federal statute had diminished certain unallotted lands of the Yankton Sioux Reservation and that the state now had primary jurisdiction over those lands.[312] Subsequently, the Eighth Circuit applied the Supreme Court *Yankton* decision and ruled "that the Yankton Sioux

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[303] *Id.*

[304] *Id.* at 994.

[305] *Id.* at 989.

[306] *Id.* at 991.

[307] *Id.*

[308] United States v. Cuch, 79 F.3d 987, 991 (10th Cir. 1996).

[309] Covey v. United States, 109 F.Supp.2d 1135 (D.S.D. 2000).

[310] *Id.*

[311] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

[312] *Covey*, 109 F. Supp. 2d at 1137 (citing *Yankton Sioux Tribe*, 522 U.S. 329 (1998)).

Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country. . . ."[313] The question for the district court in *Covey* was whether the Supreme Court and Eighth should be applied retroactively to vacate the defendant's federal conviction on the grounds that the federal government lacked jurisdiction over criminal acts committed by Covey.[314]

At the outset of its analysis, the *Covey* Court observed that federal courts are courts of limited jurisdiction and that federal jurisdiction can only be conferred by the Constitution or by Congress.[315] The district court concluded that the appellate courts' decisions on diminishment of the allotted lands were not new rules of criminal procedure. [316] "Rather, the claims in this case relate to the jurisdiction of the Court, pursuant to treaties between the United States and the Yankton Sioux and subsequent legislation as interpreted by the federal courts, to impose criminal penalties."[317] Simply put, under the relevant federal treaties and legislation, the federal court lacked federal jurisdiction to impose Covey's conviction.[318]

Unlike the Tenth Circuit in *Cuch*, the South Dakota District Court found that the Supreme Court and Eighth Circuit decisions applied retroactively. [319] While recognizing the temptation to follow *Cuch* and uphold Covey's conviction, the district court rejected the "result-driven"[320] approach of the Tenth Circuit stating "[e]xigencies of a situation are no basis for a court to confer jurisdiction upon itself for past cases where it recognizes it has no jurisdiction for similarly situated pending or future cases." [321] The *Covey* court's analysis accords with the principles of textualism. It also comports with Justice Gorsuch admonition that the court's obligation is to interpret the statute as it is written, not as the judge wishes it was written.[322]

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[313] Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1030 (8th Cir. 1999).
[314] *Covey*, 109 F.Supp.2d at 1137.
[315] *Id.* at 1137-38.
[316] *See id.* at 1142.
[317] *Id.* at 1142.
[318] *Id.* at 1141-42.
[319] *Id.*
[320] Covey v. United States, 109 F. Supp. 2d 1135, 1140 (D.S.D. 2000).
[321] *Id.*
[322] GORSUCH ET. AL., *supra* note 12, at 130-131.

Surely, in its decision in *Murphy*, the Tenth Circuit was well aware of *Cuch*, yet the Circuit Court found that *Teague* was not applicable in Murphy's habeas petition. Likewise, the U.S. Supreme Court surely was cognizant of *Teague v. Lane*, but the Court did not apply to it in *McGirt* or *Murphy*. Moreover, the post-*McGirt* federal district courts considering this issue have concluded that *McGirt* is not a new rule of criminal procedure.[323]

Judge Lumpkin admitted in his *Matloff* concurrence that he

> [D]iverge[s] from the [*Matloff*] court in labeling the *McGirt* ruling as procedural. When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered.[324]

However, Judge Lumpkin asserted that both the Tenth Circuit and the Supreme Court gave the Court of Criminal Appeals "[the] option other than the legal one in cases of this type and that is the application of legal policy."[325] Judge Lumpkin offered that *Cuch* gives the Court of Criminal Appeals a "legal policy" option that can override the law:

> In a later case involving the same land area, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Tenth Circuit found that although the federal district court lacked jurisdiction to try the subject cases, there was no need to vacate the judgments for lack of jurisdiction because of the harm it would cause and because those defendants were given a fair trial and made no complaints regarding the fairness. Thus the court applied policy rather than the law which would have rendered the judgments void due to lack of subject matter jurisdiction.
>
> The legal effect of the *McGirt* decision, finding Oklahoma lacked jurisdiction to try cases by or against Indians in Indian Country due to federal preemption through the Major Crimes Act, would be to declare the associated judgments void. However, we now adopt the federal policy and established precedent of selective retroactive application in these type of cases due to the ramifications retroactive application would have on the criminal justice

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[323] *See id.*

[324] State *ex rel.* Matloff v. Wallace, 497 P.3d 686, 695 (Okla. Crim. App. 2021), *cert. denied,* 142 S. Ct. 757 (2022).

[325] *Id.* at 696.

> system and victims. This is hard to explain in an objective legal context but provides a just and pragmatic resolution to the *McGirt* dilemma.[326]

The "legal policy" option cannot be reconciled with the principles of textualism or federal law. Congress, not the courts and not the states, decides Indian legal policy and the scope of reservations. Federal treaties from the 1800s established the Muscogee, Choctaw, Seminole, Cherokee, Chickasaw, and Quapaw reservations. Congress has not disestablished these reservations. The Court of Criminal Appeals cannot overturn that federal law in favor of preferred legal policy.

V. YET, THE SUPREME COURT DENIED CERTIORARI REVIEW IN PARISH V. OKLAHOMA

Congress set out the U.S. Supreme Court's statutory authority to review state court decisions in 28 U.S.C. § 1257(a). Section 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

It is this procedural vehicle by which Mr. Parish sought Supreme Court review of the Oklahoma Court of Criminal Appeals decision refusing to apply *McGirt* to his case. As noted earlier, Parish's case became final in 2014.[327]

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[326] *Id.*

[327] Petition for Writ of Certiorari, Parish v. Oklahoma, (No. 21-467), 2021 WL 4480391, at *11 (2021).

The Supreme Court has complete discretion to grant certiorari review.[328] The Court exercises that discretion when four justices vote to grant certiorari review.[329] A denial of certiorari does not constitute an affirmance of a lower court opinion, and it is not considered precedent.[330] It simply reflects that the Court did not have four justices who wished to hear the case.[331]

In *State* ex rel. *Matloff*,[332] the Oklahoma Court of Criminal Appeals attacked *McGirt*, rejected textualism in favor of "legal policy," ignored precedent, questioned the Supreme Court's authority to decide *McGirt* as it did, and then nullified the Court's decision in cases where the state court had no jurisdiction to act. The Oklahoma court asserted that it was:

> [E]xercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, [by] hold[ing] that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Any statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled.[333]

As Judge Lumpkin revealed in his *Matloff* concurrence, the court was applying extratextual legal policy rather than the law to blunt a Supreme Court decision it did not like and to limit federal law with which the State disagreed.

There are multiple questions raised by the state court's declaration that it does not have to apply federal law in Parish's case. First, *Matloff* is inconsistent with the textualism that Justice Gorsuch applied to resolve *McGirt*. In fact, in *Matloff*, the state explicitly used extratextualist considerations to limit the application of federal law. In the concluding words of the majority opinion in *McGirt*, Justice Gorsuch proclaimed,

> The federal government promised the Creek [Muscogee] a reservation in perpetuity. . . . Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the

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[328] CHEMERINSKY, *supra* note 198, at 742–46.
[329] *Id.*
[330] *Id.* at 744.
[331] *Id.*
[332] State *ex rel.* Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021).
[333] *Id.* at 689.

> most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.[334]

Did the Court mean it when it made this declaration to protect Indian rights in Oklahoma? After all, the Court had the power to hear Parish's certiorari petition and chose not to do so. In contrast, the Court granted certiorari in *Castro-Huerta* and then used that case to limit *McGirt* and reverse a long-standing presumption against state jurisdiction in similar cases.[335]

Under the explicit direction of the U.S. Supreme Court, the state court applied *McGirt* to two defendants (McGirt and Murphy) whose convictions were final, but since August of 2021, the Oklahoma Court of Criminal Appeals has refused to apply *McGirt* to other similarly situated defendants. This inconsistent treatment of like-situated defendants is glaring, yet the State fails to acknowledge, let alone justify, its differential treatment of defendants. In *Desist*, Justice Harlan found:

> [W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.[336]

Does this principled rule of fairness in judicial function not apply to the Oklahoma Court of Criminal Appeals? Is the U.S. Supreme Court too busy to respond to this affront to its authority? Or did the change in the Court's personnel usher in a new area of textualism that allows for extratextualist considerations when a court does not like the textualist outcome?

McGirt indicated that some "defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction [sic] review in criminal proceedings."[337] However, at the time that the Court decided *McGirt*, the long-standing, well-known Oklahoma state court rule in state post-conviction was that challenges to subject matter jurisdiction were never waived and could be raised on collateral appeal at any time. The Court of Criminal Appeals then created an ad hoc rule allowing it to get around the Court's holding in *McGirt.* Did the Supreme Court intend to allow states

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[334] McGirt v. Oklahoma, 140 U.S. 2452, 2482 (2020).

[335] Fletcher, *supra* note 40.

[336] Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting).

[337] *McGirt*, 140 S. Ct. at 2479.

to change long-standing procedural rules so that the state court could blunt the application of federal law? Apparently, the Supreme Court does not have four justices interested in this misuse of state judicial power.

Chickasaw Nation Senior Counsel, Stephen Greetham, put it simply: *McGirt* "should be celebrated by all of us who prefer the 'rule of law' to 'the rule of the strong.'"[338] Justice Gorsuch proclaimed that "unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to hold the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."[339] Oklahoma's limitation of *McGirt* directly challenges that rule of law. By denying certiorari review in *Parish* the Supreme Court chose to allow lower courts to flout binding precedent and federal statutes when the lower court finds a "legal policy" it deems preferable to the actual law.

Justice Kagan recently stated in her dissenting opinion in *West Virginia v. EPA*, "Some years ago, I remarked that '[w]e're all textualists now.' . . . It seems I was wrong. The current Court is textualist only when being so suits it."[340] The certiorari denial in *Parish v. Oklahoma* is one more example of the current Court's eagerness to abandon text and precedent in order to advance other agendas.

VI. CONCLUSION

McGirt makes manifest the purpose of textualism, the importance of the canons of Indian law, and the supremacy of federal law. *McGirt* meant to enforce a promise that the United States made to certain tribes in Oklahoma well over a hundred years ago. The certiorari denial in *Parish* allows Oklahoma a way to slip out of its obligations to comply with federal law and its obligations to respect tribal sovereignty. While the Supreme Court does not serve the role of correcting every state court error, this error emboldens lower state and federal judges to engage in policy law as opposed to actual law so as to escape the rule of law. With all the dramatic decisions in the 2021-22 Supreme Court term, including the use of its shadow docket, *Parish v. Oklahoma* has flown under the radar. Unfortunately, it is yet another harbinger of the dissolution of principled

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[338] Greetham, *supra* note 9, at 637.

[339] *McGirt*, 140 S. Ct. at 2482.

[340] West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (quoting Elena Kagan, Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015)).

judicial decision-making in favor of a judicial process unmoored by either law or precedent.