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The Sky Will Not Fall in Oklahoma

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THE SKY WILL NOT FALL IN OKLAHOMA

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I. INTRODUCTION

"Day and night cannot dwell together."[1] The first sign of a rising sun appeared for Native Americans on July 9, 2020. In *McGirt v. Oklahoma*,[2] Natives around the country celebrated what turned out to be their biggest victory at the United States Supreme Court in decades.[3] Centuries of the federal government taking away Native lands stopped in its tracks.[4] Years of humiliation seemed at an end.[5] As Justice Neil Gorsuch said in his *McGirt v. Oklahoma* majority opinion: The federal government made a "promise" to Native Americans—specifically, the Mvskoke Nation[6]—the benefits of which would be obtained "[o]n the far end of the trail of tears."[7] The Supreme Court held in *McGirt* that Congress had kept that promise by never disestablishing the Mvskoke reservation.[8] Among other things, this means that the state of Oklahoma did not have criminal jurisdiction over certain Native defendants, because the State has no authority to prosecute Native offenders on Native lands. To say that *McGirt* was unexpected is an understatement. The Supreme Court had a long history of not just ruling against Natives but also demeaning them in the process. In 1913, for example, the Supreme Court declared that Natives were "a simple, uninformed, and inferior people."[9] Justice Gorsuch's opinion in 2020 struck a different note.

The holding means that Natives, like Mr. McGirt, may challenge their convictions

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1. *Native American Duwamish Proverbs*, INSPIRATIONAL PROVERBS, https://www.inspirationalstories.com/proverbs/t/native-american-duwamish/ (last visited Feb. 9, 2021).

2. 140 S. Ct. 2452 (2020).

3. *See* Elizabeth Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, 2020 U. CHI. L. REV. ONLINE 1, 1 (2020) (noting that on "[t]he morning of July 9th, American Indian tribal citizens and non-Indian residents of eastern Oklahoma woke up and experienced a similar shock"); *see also id.* (Natives "were able to win . . . without the indignities that have become the norm in the Supreme Court's Indian law opinions.") [hereinafter "Reese, *Welcome to the Maze*"].

4. *See* Johnson v. M'Intosh, 21 U.S. 543, 565 n.e (1823) (noting that "this Commonwealth hath the exclusive right of preemption from the Indians, of all the lands within the limits of its own chartered territory, as described by the act and constitution of government, in the year 1776"); *see also McGirt*, 140 S. Ct. 2452, 2462 ("History shows that Congress knows how to withdraw a reservation when it can muster the will."); *cf.* Oneida Indian Nation of New York v. State of N.Y., 691 F.2d 1070, 1078 (1982) (An Article of Confederation "separately empowered the federal government to protect Indian lands as part of its war and peace and treaty-making powers").

5. United States v. Sandoval, 231 U.S. 28, 39 (1913) (granting tribal members Native status because they were "chiefly governed according to the crude customs inherited from their ancestors, [and] they are essentially a simple, uninformed, and inferior people"); *see* Reese, *Welcome to the Maze*, *supra* note 3, at 3 ("Indian law opinions are filled with the rhetoric of savagery and discussion of how the uncivilized status of tribal governments warranted a lower status within the United States."); *see also, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637, 690 (2013) (Sotomayor, J., dissenting) (noting that "[t]he majority's repeated, analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee by ancestry do nothing . . . .").

6. The official, legal name for the tribe is "Muscogee (Creek) Nation." This was the name given to the tribe by the federal government. The proper name from the Creek language, however, is the Mvskoke Nation. This Article will utilize the proper name hereinafter. *See* Theodore Isham & Blue Clark, *Creek Mvskoke*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=CR006 (last visited Mar. 3, 2020).

7. *McGirt*, 140 S. Ct. at 2459.

8. *Id.*

9. *Sandoval*, 231 U.S. at 39.

in federal or state court through a writ of habeas corpus and have them overturned, and that Natives committing certain crimes on the Mvskoke reservation will be tried in federal court. This holding, however, is unlikely to be constrained for much longer. Indian country is a legal term applied in nearly every jurisdictional issue in Indian law—even in civil cases.[10] If the Mvskoke reservation is Indian country for purposes of the Major Crimes Act, it is not unreasonable to expect that the same will hold true for all purposes. Furthermore, it is very likely that the reservations of all of eastern Oklahoma—or at a minimum the reservations of the Five Civilized Tribes[11]—will soon be "Indian country."[12] Since the *McGirt* decision went into effect, and even before that, community stakeholders have worried about the implications of Native reservations, which encompass almost all of eastern Oklahoma.[13] Will the *McGirt* holding be extended to their lands? What are the criminal implications, including the jurisdiction of the State, tribe, and federal government?[14] Will Tulsa become a violent community, like other Native reservations?[15] What are Native prisoners' post-conviction rights—will hundreds if not thousands of decades-old convictions be overturned?[16] In fact, many have asked the author this very question: Will the sky fall, now that the majority of Eastern Oklahoma is likely five separate Native reservations? Should *McGirt*'s holding be extended to the other Five Civilized Tribes of Oklahoma, a map of the State's jurisdiction would look like this

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10. *See, e.g.*, Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1011 (9th Cir. 2007) (holding, in a tribal membership dispute, that the district court lacked subject matter jurisdiction over the dispute and applying 18 U.S.C. § 1151's "Indian country" definition to the dispute); United States v. Morgan, 614 F.2d 166, 168, 171 (8th Cir. 1980) (reversing district court's injunction against three non-Indian individuals from selling intoxicating beverages on the edge of the reservation without securing license from tribe and applying 18 U.S.C. § 1151); Warbelow's Air Ventures, Inc. v. C.I.R., 118 T.C. 37 (2002) (applying 18 U.S.C. § 1151 in a tax credit for wages paid to Indian tribal members case).

11. This commonly accepted term refers to the Cherokee, Creek, Seminole, Choctaw, and Chickasaw Nations.

12. The United States Supreme Court and Oklahoma Court of Criminal Appeals have remanded cases to lower courts to determine if these reservations are still in-tact. *See* Wilson v. Oklahoma, 141 S. Ct. 224 (2020) (Cherokee reservation); Johnson v. Oklahoma, 141 S. Ct. 192 (2020) (Seminole reservation); Davis v. Oklahoma, 141 S. Ct. 193 (2020) (Choctaw reservation); Terry v. Oklahoma, 141 S. Ct. 191 (2020) (Ottawa reservation); Bentley v. Oklahoma, 141 S. Ct. 191 (2020) (Citizen Potawatomi reservation); Boss v. State, 2021 OK CR 3, 2021 WL 958372 (Okla. Cr. App. Aug. 12, 2020) (Chickasaw reservation); Codynah v. Oklahoma, C-2019-293 (Okla. Cr. App. Sept. 29, 2020) (Kiowa-Comanche-Apache reservation). In addition, Native defendants in Oklahoma are appealing their convictions arguing that other tribe's reservation on which the crime was committed was never disestablished. *E.g.*, Oklahoma v. Lawhorn, S-2020-858 (Okla. Cr. App. Nov. 18, 2020) (State arguing on appeal that the Quapaw reservation was disestablished).

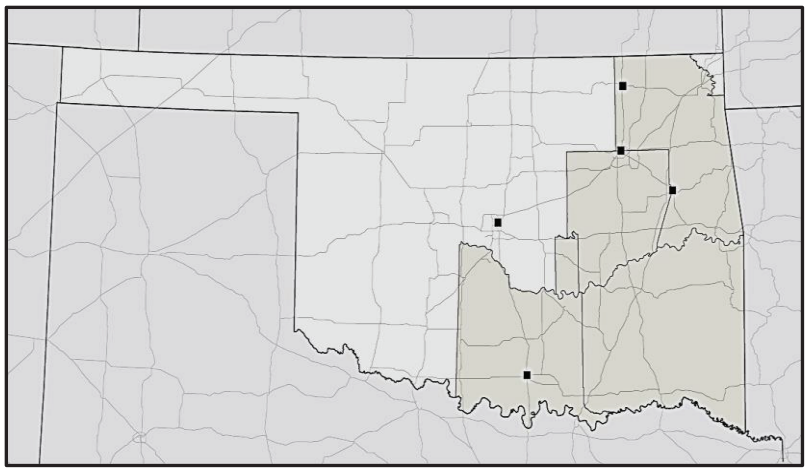
13. *See* Brief for Respondent at 46, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) (arguing that "adopting [McGirt's] theory would plunge the State into uncertainty for decades to come"). Immediately after the decision was announced, Governor Kevin Stitt issued Executive Order 2020-24, forming a task force to address the many uncertainties created by the *McGirt* opinion. *See* Press Release, Okla. Governor Kevin Stitt, Governor Stitt Forms Commission to Advise State of Oklahoma Following U.S. Supreme Court Ruling (July 20, 2020) (on file with author).

14. *See McGirt*, 140 S. Ct. at 2485–90 (Roberts, C.J., dissenting) (noting the pre-*McGirt* practice of the State assuming jurisdiction over Native offenders).

15. Native lands have historically been violent and void of law enforcement. *See generally infra* Part II.A.

16. *See, e.g.*, *McGirt*, 140 S. Ct. at 2479 ("Still, Oklahoma and the dissent fear, '[t]housands' of Native Americans like Mr. McGirt 'wait in the wings' to challenge the jurisdictional basis of their state court convictions. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver.") (citation to the record omitted).

(shaded areas denote Native lands over which the State has no jurisdiction):[17]



While many have undertaken to create a cursory overview of the criminal implications of the *McGirt* decision,[18] this is the first scholarly article to do so. Further, it is the first scholarly article to bring to light the post-conviction remedies and obstacles for Native prisoners.

To answer the question of whether the sky is falling, it is first necessary to understand what exactly *McGirt* decided.[19] In *McGirt*, a member of the Mvskoke Nation challenged his decades-old[20] rape conviction, contending that the state of Oklahoma had no jurisdiction over him because the offense was committed (1) by an "Indian,"[21] and (2) on a Native reservation that had never been "disestablished," meaning that Congress had never terminated the reservation.[22] The Supreme Court agreed, holding that the Mvskoke reservation is "Indian country" for purposes of the Major Crimes Act—a federal statute granting jurisdiction to the federal government for specific, serious crimes such as murder, arson, and robbery.[23]

The immediate effects of the *McGirt* decision are necessarily criminal in nature. As explained in this Article, the federal government now has jurisdiction, concurrent with the tribe's, to try all major crimes occurring on the Mvskoke reservation pursuant to the Major Crimes Act.[24] This means that the caseload in the Northern District of Oklahoma and

17. Jack Healy & Adam Liptak, *Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/us/supreme-court-oklahoma-mcgirt-creek-nation.html.

18. *See*, *e.g.*, Mary Kathryn Nagle & Sarah Deer, McGirt v. Oklahoma*: A Victory for Native Women*, GEO. WASH. L. REV. (July 20, 2020), https://www.gwlr.org/mcgirt-v-oklahoma-a-victory-for-native-women/.

19. For an in-depth discussion of *McGirt*'s facts and holding, see Comment, McGirt v. Oklahoma, 134 HARV. L. REV. 600 (2020).

20. This is significant for the fact that scholars and attorneys did not realize that the State had no jurisdiction over Native defendants in the in-tact lands of the Mvskoke Nation until recently.

21. This Article uses "Indian" to refer to legal definitions and "Native" to refer to the people group.

22. *McGirt*, 140 S. Ct. at 2456.

23. *See id.* at 2456; *see also* 18 U.S.C. § 1153.

24. *See infra* Part II.B.

Eastern District of Oklahoma will increase dramatically.[25] It also means that state court docket loads will decrease dramatically. Criminal jurisdiction is the most important effect of *McGirt*, and, for that reason, it is the focus of this Article.

Furthermore, the decision means that Native prisoners who were convicted in state court for crimes committed on the Mvskoke reservation may now challenge their convictions in state court first and then in federal court through a writ of habeas corpus and have them overturned.[26] The effect of these challenges is likely overstated. As explained below, the only prisoners who will be successful in challenging their convictions are those who (1) have exhausted post-conviction remedies, (2) have not waived their jurisdictional challenge, and (3) challenge their convictions within one year of them becoming final.[27] To alert readers to the dangers historically inherent on Native lands, Part II discusses the staggering numbers of violent crimes on Native lands and the inadequate jurisdictional scheme to address those crimes because of the *McGirt* decision. Part III distinguishes Oklahoma's jurisdiction from the tribe's jurisdiction. Part IV discusses police powers—including cross-deputization agreements and what happens when a suspect flees from the reservation or from off the reservation to the reservation. Part V analyzes the effects of the *McGirt* decision on post-conviction rights, concluding that most Native criminal defendants will not be able to challenge their convictions because they have not exhausted their state court remedies, they have waived their jurisdictional challenge, or the one-year statute of limitations has passed.

Finally, the Article concludes by stating the unknown: We do not yet know whether the criminal effects of *McGirt* will be positive or negative. There are factors indicating that it will be positive—such as certain prisoners being able to challenge their convictions and have them overturned (which provides them their deserved forum) and law enforcement cooperation through cross-deputization agreements. There are also potential negative effects from the *McGirt* decision, like victims having to go through emotional turmoil when their assailants are freed because of post-conviction challenges and the potential for a jurisdictional void due to a lack of resources and confusion over which entity—the State, federal government, or tribe—will investigate and prosecute crimes. In theory, it is possible that trials could result in acquittal for some guilty persons if key witnesses have died or evidence has been lost since the original trial. This confusion pales, however, in comparison to the major victory *McGirt* gave to Natives in recognizing their right to possess and govern their own territory. The federal, state, and tribal governments now have an opportunity to deal with this reckoning in a constructive and cooperative manner.

II. WHAT EVERY OKLAHOMAN NEEDS TO KNOW ABOUT NATIVE RESERVATIONS

The *McGirt* decision will have a variety of practical and jurisdictional effects. Most Oklahomans and Mvskoke members are likely asking themselves questions like, what happens if I get a ticket? Will I have to pay the ticket if I am pulled over by a tribal officer

25. *See* Lenzy Krehbiel-Burton, *Oklahomans adjust to Muscogee (Creek) Nation's judiciary system*, OSAGE NEWS (Aug. 17, 2020), http://osagenews.org/en/article/2020/08/17/oklahomans-adjust-muscogee-creek-nations-judiciary-system/.

26. *See infra* Part V.

27. *See infra* Part V.

(for non-Natives), or will I have to pay the ticket if I am pulled over by a State officer (for Natives)? What will the State police do about crime over which they have no jurisdiction? Does the Mvskoke Nation have the resources to investigate and prosecute violent crimes involving Natives? These questions and more are answered in this Part. But to begin, one must understand why criminal jurisdiction on Native lands is so important.

A. Lands of Violence

Violence is a major problem on Native lands. Native women and children, for instance, are subject to the highest rates of murder, sexual assault, and violence in the United States.[28] Most of these crimes are committed by non-Natives.[29] According to the Department of Justice, eighty-six percent of Native women who reported sexual assault or rape reported that the perpetrator was non-Native.[30] As of 2004, the Justice Department reported that Natives experienced a per capita rate of violence twice that of the United States' resident population.[31] According to a 2010 Report from the Department of Justice, 81.6 percent of Native men and 84.3 percent of Native women experience violence during their lifetimes.[32] One in three Natives reported violence committed against them in the last year alone.[33]

Intimate partner violence is even worse. The 2010 Report showed that ninety percent of Native women and eighty-five percent of Native men experienced violence stemming from an intimate relationship with a non-Native.[34] Additionally, 46.4 to 65.8 percent of Native women have reported that they have been victims of sexual violence in their lifetimes.[35] Nationwide, Native women are murdered at a rate of 4.3 percent, while white women are murdered at a rate of 1.5 percent.[36] Thus, Natives experience much more violence than other populations in the United States.[37]

Historical racism, lack of funding caused by antipathy to the concept of tribal sovereignty, and jurisdictional confusion are the main reasons for these disturbing statistics. Federal laws prevent tribes from asserting jurisdiction over non-Indians because

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28. Brief for Nat'l Indigenous Women's Resource Center, Tribal Nations and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault as *Amici Curiae* Supporting Petitioner at 11, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

29. *Id.* at 12.

30. 160 CONG. REC. 26, S941 (2014) (statement of Sen. Leahy).

32. STEVEN W. PERRY, U.S. DEP'T OF JUST., AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002 (2014), https://www.bjs.gov/content/pub/pdf/aic02.pdf.

32. ANDRÉ B. ROSAY, U.S. DEP'T OF JUST., NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKAN NATIVE WOMEN AND MEN 2 (2016), https://www.ojp.gov/pdffiles1/nij/249736.pdf.

33. *Id.*

34. *Id.* at 21.

35. *Id.* at 63.

36. Emiko Petrosky, et al., Ctrs. for Disease Control and Prevention, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014* (2017), *in* 66 MORBIDITY AND MORTALITY WKLY. REP. 741–42 (2017).

37. *See*, *e.g.*, ANDRÉ B. ROSAY, *supra* note 32, at 2; United States v. Bryant, 136 S. Ct. 1954, 1959 (2016); U.S. DEP'T OF JUST., FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, at iv (2000) ("American Indian/Alaska Native women and men report more violent victimization than do women and men of other racial backgrounds . . . .").

of stereotypes of inadequate tribal law enforcement and governments. In terms of funding, the United States Commission on Civil Rights has stated twice that insufficient funding has contributed to this violence.[38] However, there is a positive trend toward funding. In 2019, the President of the United States created a task force to address the crisis of murdered and missing Native women.[39] This trend is still inadequate, though.[40] State governments were and are unwilling to donate adequate resources to tribes or the federal government to enforce laws over which they have no jurisdiction to prosecute.[41] Federal resources, such as FBI support and U.S. Attorneys' prosecution, were and are limited.[42] Furthermore, tribes have very limited monetary and personnel resources.[43] So, many crimes go unpunished on Native lands, making them some of the most dangerous lands in America. With this background of violent statistics and the need for funding in mind, this Article proceeds to delineate criminal jurisdiction on Native lands.

B. An Inadequate System

Criminal jurisdiction on Native lands has been properly described as a "maze."[44] Indian country is defined by statute as meaning

> (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government . . ., (b) all dependent Indian communities within the borders of the United States . . ., and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . .[45]

After the United States Supreme Court's decision in *McGirt*, the lands belonging to the Mvskoke Nation stemming from the Treaty of 1832 are part of its reservation. The question remains whether this holding will soon apply to the other so-called Five Civilized Tribes.[46]

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38. *See* U.S. COMM'N ON CIVIL RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 51, 64 (2018); U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 67, 68–71 (2003).

39. *See* Exec. Order No. 13,898, 84 Fed. Reg. 66059 (Dec. 2, 2019).

40. In 1978, the Supreme Court held that Native tribes could not prosecute these crimes on tribal lands. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1987). However, Congress restored tribes' criminal jurisdiction over non-Natives for certain domestic violence crimes in 2013. *See* Violence Against Women Reauthorizations Act of 2013, Pub. L. No. 113-4, tit. IX, § 904, 127 Stat. 120 (2013) (codified at 25 U.S.C. § 1304).

41. *See, e.g.*, Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/ (noting that "[a] sheriff in a county that overlaps the reservation admitted that sometimes his deputies escort non-Indian drunk drivers home rather than arrest and deliver them to county jails, which are far away and often full" and "[i]f an incident requires a deputy, he could take hours to arrive, due to the volume of calls he receives and the reservation's enormity").

42. *Id*. (explaining that in 2011, the United States Justice Department did not prosecute sixty-five percent of rape cases reported on Native reservations).

43. *See* Leah Bartos, *Native American Tribes Have the Right, but Not the Resources, to Prosecute Abusers*, CAL. HEALTH REP. (Oct. 22, 2014), https://www.calhealthreport.org/2014/10/22/native-american-tribes-have-the-right-but-not-the-resources-to-prosecute-abusers/.

44. *See* Reese, *Welcome to the Maze*, *supra* note 3 (noting that "[t]he civil and criminal jurisdictional rules governing Indian Country are so complicated that they're commonly described as a 'maze'").

45. 18 U.S.C. § 1151.

46. *See, e.g.*, Chad Hunter, *Conviction Appeals Piling up Following McGirt Decision*, CHEROKEE PHOENIX (Sept. 8, 2020), https://www.cherokeephoenix.org/Article/index/155258.

All major crimes committed in Indian country where the perpetrator is an Indian—defined (1) as having "some Indian blood," and (2) being a member of or having an affiliation with a federally recognized tribe[47]—are tried in federal court.[48] Certain other crimes are tried in federal court under the General Crimes Act unless the perpetrator and victim are both Indians.[49] These crimes include, for example, arson, assault, maiming, theft, receiving stolen property, murder, manslaughter, and sexual offenses.[50] The Assimilative Crimes Act allows the federal government to borrow from state law when there is no applicable federal law.[51] If the crime is not covered by the Major Crimes Act and is committed by one Native against another Native, the crime is tried in tribal court.[52] All domestic violence cases against women and children when the perpetrator is Native or non-Native and has a sufficient tie to the Native community prosecuting him or her are tried in tribal court pursuant to the Violence Against Women Act, assuming the tribe has opted into that statute (it does not apply to Alaska Native tribes), or concurrently in federal court.[53] The tribe retains the right to prosecute Native offenders in tribal court, although there are statutory limitations on punishment pursuant to the Indian Civil Rights Act.[54] Therefore, most Indian defendants post-*McGirt* will be tried in federal court or tribal court. Most non-Native crimes will be tried in state court.

Determining jurisdiction therefore requires consideration of several factors in combination: the type of offense (major or minor crime), the identity of the victim and perpetrator (Native or non-Native), and the location of the offense (on- or off-reservation).[55] Here is a helpful chart simplifying the jurisdictional scheme.[56]

Victim Status	*Type of Crime*	*Jurisdiction*
	Native Offenders	
Native Victim	Major crimes[57]	Federal
	All remaining crimes in tribal	Tribal

47. United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005); United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); United States v. Rogers, 45 U.S. 567, 573 (1846).

48. 18 U.S.C. § 1153.

49. *See id.* § 1152.

50. *Id.* (providing crimes).

51. *See id.*

52. FELIX A. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.04 (2012).

53. 25 U.S.C. § 1304.

54. *Id.* § 1302; COHEN *supra* note 52, at § 9.04.

55. Judith V. Royster & Rory SnowArrowFausett, *Fresh Pursuit onto Native American Reservations: State Rights 'To Pursue Savage Hostile Indian Marauders Across the Border'*, 59 U. COLO. L. REV. 191, 193 (1988) [hereinafter "Royster, *Fresh Pursuit*"].

56. This chart is derived from a chart promulgated by Arvo Q. Mikkanen of the Department of Justice. *See Indian Country Criminal Jurisdiction Chart (Illustration)*, U.S. DEP'T JUST. (2020), https://www.justice.gov/usao-wdok/page/file/1049076/download.

57. *E.g.*, crimes defined in 18 U.S.C. § 1153.

	codes[58]	
Non-Native Victim	Major crimes[59] Other federal crimes[60] All remaining crimes in tribal codes[61]	Federal Federal Tribal
Victimless	Crimes in state code[62] Crimes in tribal code[63]	Federal Tribal
	Non-Native Offenders	
Native	Federal crimes[64] Crimes in state code[65] For tribes that elect to participate in the Violence Against Women Act, domestic violence, dating violence, or violation of protective order (when defendant (1) resides in "Indian country," (2) is employed in "Indian country," or (3) is a spouse, intimate partner, or dating partner of a member of a participating tribe or a Native residing in "Indian country"[66]	Federal Federal Tribal
Non-Native	Crimes in state code[67]	State

58. *E.g.*, crimes defined in tribal codes or 25 C.F.R. § 11.100 if a CFR Court of Indian Offenses.
59. *E.g.*, crimes defined in 18 U.S.C. § 1153.
60. *See* 18 U.S.C. §§ 1152 and 1153.
61. *E.g.*, crimes defined in tribal codes or 25 C.F.R. § 11.100 if a CFR Court of Indian Offenses.
62. *See* 18 U.S.C. §§ 1152 and 1153.
63. *E.g.*, crimes defined in tribal codes or 25 C.F.R. § 11.100 if a CFR Court of Indian Offenses.
64. *See* 18 U.S.C. § 1152.
65. *See* 18 U.S.C. §§ 1152 and 1153.
66. *See* tribal codes pursuant to authority of 25 U.S.C. § 1304.
67. *See generally* United States v. McBratney, 104 U.S. 621 (1881).

III. JURISDICTIONAL DIVIDE

Keeping these violent statistics and general jurisdictional concepts in mind, this Article proceeds to discuss the jurisdictional divide between the State of Oklahoma and the tribe, *i.e.*, the new status quo post-*McGirt*. Remember: The federal government still plays a large role in all of this. It has concurrent jurisdiction over interracial crimes[68]—those committed by a Native against a non-Native (concurrent with the tribe) or vice-versa (concurrent with the State)—and exclusive jurisdiction over major crimes committed by a Native.[69] But most of the concerns will now be stated as follows: In what areas does the State have jurisdiction and in what areas does the tribe have jurisdiction?

A. The State's Criminal Jurisdiction Powers

We begin with the State. Prior to *McGirt*, the State had jurisdiction over all crimes not committed by or against Natives on Native lands held in trust by a tribe. The following Sections explain the State's jurisdiction after *McGirt*.

i. Inside the Reservation

Oklahoma's jurisdiction within the Mvskoke reservation "is extremely limited."[70] As an overview, the State lacks jurisdiction over all Native defendants and victims.[71] The Tenth Circuit Court of Appeals has stated that "[t]he state of Oklahoma does not have jurisdiction over a criminal offense committed by one Creek Indian against another in Indian country."[72]

Although the federal government has authorized states to assume jurisdiction with the consent of the tribe on Mvskoke lands, the State has taken no such action nor has it obtained consent.[73] The exception to the rule that the State has no jurisdiction over Natives on the reservation is if there is a special grant of jurisdiction, such as a federal law like Public Law 280 or tribal agreement (there are no such agreements in Oklahoma).[74] The State has exclusive jurisdiction over non-Native defendants when the victim is also non-Native and the crime occurs on the reservation.[75] The State can thus hail non-Native suspects into state court when the victim is non-Native, and punish those suspects if

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68. 18 U.S.C. § 1152.

69. *Id.* § 1153.

70. Royster, *Fresh Pursuit*, *supra* note 55, at 220. As far as the legislature is concerned, it can regulate tribal members. *See* Washington v. Confederated Tribes of the Colville Indian Reservation. 447 U.S. 134, 151 (1980).

71. *See Bryant*, 136 S. Ct. at 1960, *as rev'd*, (July 7, 2016) ("Most states lack jurisdiction over crimes committed in Indian country against Indian victims.").

72. United States v. Sands, 968 F.2d 1058, 1062 (10th Cir. 1992).

73. *Id.*; *see also* Ross v. Neff, 905 F.2d 1349, 1352 (10th Cir. 1990); Indian Country, U.S.A. v. Okla. ex rel. Okla. Tax. Comm'n., 829 F.2d 967, 980 (10th Cir. 1987); State ex rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77, 87–88 (Okla. 1985).

74. *See* COHEN, *supra* note 52, at § 9.03[1].

75. *McBratney*, 104 U.S. at 624; Draper v. United States, 164 U.S. 240, 247 (1896) ("[I]n reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive [Montana] of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians."); New York *ex rel.* Ray v. Martin, 326 U.S. 496, 500 (1946) (As "to crimes between whites and whites which do not affect Indians, the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes.").

convicted.

When preparing to conduct her duties as officer of the peace, an officer can and should first look to federal law when determining which suspect she can arrest in the Mvskoke reservation. As Felix Cohen has stated, "[t]he literal language of the [federal Indian Country Crimes Act] encompasses all crimes committed by non-Indians in Indian country."[76] Thus, it would appear that a State officer has no authority even to arrest non-Natives in Tulsa and its surrounding areas. But the U.S. Supreme Court in *United States v. McBratney* held that a murder of a non-Native by another non-Native on a Colorado Native reservation was within the exclusive jurisdiction of the State of Colorado.[77] Courts interpreting this "*McBratney* rule" have extended the rule to any crime committed by a non-Native against a non-Native victim.[78] The Court has considered the *McBratney* rule as firm and unwavering precedent since that case was decided.[79]

Applying all of the above rules, suppose a Tulsa police officer receives a tip that a crime is being committed—say, that a suspect is intending to murder a victim. This example assumes that the officer has not been cross-deputized, which will be discussed further in Part IV *infra*. Prior to *McGirt*, the officer would only have to determine whether the crime is being committed on Native trust land, such as in a casino. If not, he or she had the ability to investigate and make an arrest. Post-*McGirt*, the officer should first determine whether the suspect is Native.[80] If the suspect is non-Native, the officer can and should investigate and arrest the suspect. If the suspect is Native, however, the officer should contact a Lighthorse officer (the tribe's law enforcement personnel) to conduct the investigation and arrest the suspect. The only hesitation the officer should have when the suspect is non-Native is if the crime clearly affects Natives or Native interests, such as the burning down of a tribal building or a mass shooting at a tribal event.[81]

A Tulsa police officer who has not been cross-deputized should hesitate when investigating a crime committed by a non-Native when the crime involves a Native and non-Native victim and the crime is committed in the Mvskoke reservation. For example, suppose a non-Native is suspected of murdering two victims, one a Native and the other a non-Native. This area of the law is "unsettled."[82] The State might have jurisdiction over the non-Native defendant with regard to the non-Native victim, and federal jurisdiction would be concurrent.[83] But the federal government has exclusive jurisdiction over the murder as it relates to the Native victim,[84] so an investigation by an officer who has not been cross-deputized is unwarranted. The officer in the example provided should contact an FBI agent to conduct the investigation and arrest the non-Native defendant.

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76. COHEN, *supra* note 52, at § 9.03[1].

77. 104 U.S. 621.

78. *See generally, e.g.*, *Ray*, 326 U.S. 496; *Draper*, 164 U.S. 240.

79. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 324, 332 n.21 (1978); *see also* H.R. REP. NO. 94-1038, at 2 (1976).

80. This is a difficult task. One possible way to tell is to ask if the suspect has a tribal card.

81. *See, e.g.*, Mem., Office of Legal Counsel, U.S. Dep't Just., *Jurisdiction Over "Victimless" Offenses Committed By Non-Indians*, 6 ILR K-1 (1979).

82. COHEN, *supra* note 52, at § 9.03[1].

83. *See, e.g.*, Abbate v. United States, 359 U.S. 187, 194 (1959) (noting that the general rule outside of Native affairs is that the state and federal government may each try and punish the same conduct separately).

84. *See* Donnelly v. United States, 228 U.S. 243, 253–54 (1913).

When deciding whether to prosecute a certain offense or exert jurisdiction over such a prosecution, an Oklahoma state court judge and prosecutor, or both, by contrast, should first analyze whether the crime was victimless, but the result of that analysis probably does not affect whether the State has jurisdiction over the offense.[85]

ii. Outside the Reservation

The State has exclusive jurisdiction over non-federal crimes outside the Mvskoke reservation, regardless of the defendant's and victim's identities.[86] The United States Supreme Court has stated that "[i]t has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country."[87] This power began when the State was admitted to the Union.[88] Thus, the State's jurisdiction over non-Natives and Natives off the reservation is the same.[89]

A State police officer should therefore not hesitate in performing all of his or her duties outside of the Mvskoke reservation. He or she need not determine whether the suspect or victim is Native or non-Native. Oklahoma state court judges and prosecutors should first determine whether the offense was committed in or off reservation, and if committed off reservation, they can prosecute.

B. The Mvskoke Nation's Criminal Jurisdiction Powers

The Mvskoke Nation's jurisdiction is a flip of the State's jurisdiction. Prior to *McGirt*, the tribe had jurisdiction only over certain offenses committed by or against Natives on Native trust lands or in certain circumstances outside of Native lands.[90] As explained below, it now has jurisdiction over Natives in the reservation. Like State officials, Lighthorse officers, tribal court judges, and tribal prosecutors should determine the status of the suspect and victim and where the crime was committed.

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85. *See* COHEN, *supra* note 52, at § 9.03[1]; *see also, e.g.*, State v. Sorkhabi, 46 P.3d 1071, 1073 (Ariz. Ct. App. 2002) (resisting arrest by tribal officer not victimless and therefore the state lacked jurisdiction); State v. Thomas, 760 P.2d 96 (Mont. 1988) (upholding state jurisdiction over non-Native's failure to report automobile accident on a Native reservation, striking cow owned by Native rancher, and concluding that the crime was victimless despite harm to property of Native because the action penalized by statute is failure to report, not injury to animal).

86. Royster, *Fresh Pursuit*, *supra* note 55, at 193.

87. Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962); *see also* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 428 n.2 (1975); Ward v. Race Horse, 163 U.S. 504, 514–15 (1896); Pablo v. People, 46 P. 636, 637 (Colo. 1896) (state law held applicable to Ute killing another Ute at off-reservation site); State v. Youpee, 61 P.2d 832, 836 (Mont. 1936) (state law applicable to Assiniboine accused of statutory rape of Assiniboine minor off-reservation).

88. *See, e.g.*, Sturdevant v. State, 251 N.W.2d 50, 54 (Wis. 1977) ("Whatever sovereign power the federal government had to try Indians for crimes committed off the reservation and on land ceded to the federal government by treaty was transferred to the state upon its admission to the Union."); *see also id.* at 52 n.1 (noting that this principle applies "only to state penal statutes not including fish and wildlife conservation laws").

89. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). The Supreme Court expressly noted in *Jones* that this principle is "as relevant to a State's tax laws as it is to *state criminal laws*." 411 U.S. at 149 (citations omitted) (emphasis added); *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 n.18 (1983).

90. *See, e.g.*, Kelsey v. Pope, 809 F.3d 849, 856 (6th Cir. 2016) (holding that the tribe had inherent authority to prosecute a Native outside of its reservation when offense substantially affected tribal self-governance interests).

i. Inside the Reservation

Within the Mvskoke reservation, tribal jurisdiction over Natives is inherent, meaning the tribe has jurisdiction unless a statute or the United States Constitution as interpreted by federal courts provides otherwise.[91] This jurisdiction stems from the tribe's sovereign status as a "'distinct, independent political communit[y] . . . .'"[92] Included in this sovereign status is the right "'to make [the tribe's] own laws and be ruled by them.'"[93]

The Mvskoke Nation has criminal jurisdiction over all Native members and nonmembers of the tribe inside the reservation.[94] It may also investigate crimes and arrest suspects whether Native or non-Native,[95] but non-Native suspects should be turned over to State or federal authorities absent an agreement because the tribe lacks jurisdiction in most cases over these suspects (with the exception of domestic violence cases, discussed in Part IV, *infra*).

The Mvskoke Nation is the only sovereign able to enforce its laws on the reservation absent a cross-deputization agreement.[96] Additionally, Oklahoma has given the tribe the authority to enforce state law on the reservation.[97] Without the State's authority, the Nation "lacks the power to arrest, charge, jail, or prosecute non-[Native] offenders for violations of state law on [the] reservation . . . ."[98] With such express authority, by contrast, a Lighthorse officer may conduct a warrantless seizure of a non-Native's property on the Mvskoke reservation when he or she has probable cause to do so.[99]

Tribal courts are bound by the Indian Civil Rights Act.[100] The Indian Civil Rights Act grants certain constitutional rights to and imposes restrictions on prosecutions of

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91. Royster, *Fresh Pursuit*, *supra* note 55, at 193–94.

92. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)); *see also Mescalero Apache Tribe*, 462 U.S. at 332; United States v. Mazurie, 419 U.S. 544, 557 (1975).

93. *Mescalero Apache Tribe*, 462 U.S. at 332 (citing Williams v. Lee, 358 U.S. 217, 220 (1959)); *see also Martinez*, 436 U.S. at 55–56; *Mazurie*, 419 U.S. at 557; *Wheeler*, 435 U.S. 313, 322 (Native tribes, vested with sovereign powers, have "the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.").

94. 25 U.S.C. § 1301(2) (2018); United States v. Lara, 541 U.S. 193, 207–09 (2004); United States v. Green, 140 F. App'x 798, 800 (10th Cir. 2005); *see also* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 557 n.281 (1976) (citing 4 NAT'L AM. INDIAN CT. JUDGES ASS'N, JUST. AND THE AM. INDIAN 40 (1974)).

95. Ortiz-Barraza v. United States, 512 F.2d 1176, 1181 (9th Cir. 1975); *see* State v. Ryder, 1981-NMCA-017, 98 N.M. 453, 649 P.2d 756, 758–59 (N.M. Ct. App. 1981) ("*Oliphant* does not prohibit an arrest of non-Indians. Indeed, *Oliphant* tacitly acknowledges that such an arrest may be made, so long as the Indian authorities 'promptly deliver up any non-Indian offender, rather than try and punish him themselves.'" "To hold that an Indian police officer may stop offenders but upon determining they are non-Indians must let them go, would be to subvert a substantial function of Indian police authorities and produce a ludicrous state of affairs which would permit non-Indians to act unlawfully, with impunity, on Indian lands.") (N.M. Ct. App. 1981), *aff'd*, 648 P.2d 774 (N.M. 1982).

96. Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65, 76 (2019) [hereinafter "Morrow, *Bridging the Jurisdictional Void*"].

97. OKLA. STAT. tit. 21 § 99 (2019); *see also* Mathew Lysakowski & Priya S. Jones, *Tribal Law Enforcement Authority to Enforce State Laws*, 18 POLICE PRAC. & RES. 49, 56 (2016).

98. Morrow, *Bridging the Jurisdictional Void*, *supra* note 96, at 76 (citing Duro v. Reina, 495 U.S. 676, 696–97 (1990).

99. *Green*, 140 F. App'x at 800, 801 (holding that a cross-deputized Lighthorse officer's warrantless seizure of a non-Native's gun at a casino (tribal land) was justified).

100. 25 U.S.C. § 1302 (2018); *see also id.* § 1301(2) (definition of "powers of self-government").

offenders.[101] On-reservation jurisdiction to try Native offenders is generally restricted to crimes where the maximum sentence is a term of imprisonment of up to three years or a fine of $15,000, or both, or nine years for multiple offenses.[102] A Native offender must also be provided counsel when tried for offenses subject to greater than one year of imprisonment.[103]

For example, suppose a Lighthorse officer who is not cross-deputized suspects that a person stole property from a warehouse. Prior to *McGirt*, the officer would have had to determine whether the crime was committed on Native trust lands, and if so, determine the "Indian" status of the offender or victim. Now, the officer has full authority to investigate and detain the suspect upon a determination of probable cause,[104] but a tribal court cannot try the suspect, nor can a tribal prosecutor indict unless the suspect is Native.[105]

The degree to which the Mvskoke Nation might use its criminal jurisdiction to control who is permitted within the reservation remains unclear. At least one tribe has adopted a statute banishing members from the reservation who violate the revised tribal controlled-substance laws,[106] and the Navajo Nation has attempted to banish non-Natives from its reservation for violations of Navajo law.[107] Should the Mvskoke legislature take this step, it remains undetermined whether the law will be upheld under the tribe's constitution. The Mvskoke Nation also has the power to exclude state police officers from its reservation in some instances, but it has never exercised this power.[108] Generally, the State lacks jurisdiction on state highways on the Mvskoke reservation.[109] But with the agreements in place,[110] a Lighthorse officer or State trooper can arrest a person for speeding on state highways.

Finally, the Mvskoke Nation may extradite its members from the reservation

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101. *Id.* § 1302.

102. *Id.* (providing that "[n]o Indian tribe in exercising powers of self-government shall . . . (7) (A) require excessive bail, impose excessive fines, inflict cruel and unusual punishments; . . . (C) in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or (D) impose on a person a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years").

103. *Id.* at § 1302(c)(1).

104. Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976).

105. *See McBratney*, 104 U.S. 621; *Draper*, 164 U.S. at 247 ("[I]n reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive [Montana] of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians."); *Ray*, 326 U.S. at 500 (As "to crimes between whites and whites which do not affect Indians, the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes.").

106. Menominee Nation, Menominee Tribal Legislature, Amendment to Ordinance 80-17, § 5 (Apr. 16, 1987).

107. *See* Preamble to Tribal Council Resolution CO-73-78, NAVAJO TRIB. CODE tit. 17, subch. 5 (Supp. 1984-85); *see also* NAVAJO TRIB. CODE tit. 17, § 1901(C)(1) (1977) (providing exclusion of non-members who are accused of conduct punishable under the laws of the tribe and who decline to consent in writing to the criminal jurisdiction of the Navajo courts).

108. *See, e.g.*, Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation, 862 F.3d 1236, 1244–45 (10th Cir. 2017); State v. Spotted Horse, 462 N.W.2d 463, 467 (S.D. 1990); *see also Duro*, 495 U.S. at 696, *superseded by statute*, Civil Rights Act of 1968, Pub. L. No. 90-284, § 201, 82 Stat. 73, 77, *as recognized in*, United States v. Lara, 541 U.S. 193 (2004).

109. Morrow, *Bridging the Jurisdictional Void*, *supra* note 96, at 75; *see also, e.g.*, Skokomish Indian Tribe v. Mosbarger, 7 NICS App. 90 (Skokomish Ct. App. 2006) (tribe maintained jurisdiction over nonmember for civil traffic enforcement); *Norton*, 862 F.3d at 1244–45; *Spotted Horse*, 462 N.W.2d at 467; *see also Duro*, 495 U.S. at 696, *superseded by statute*, Civil Rights Act of 1968, Pub. L. No. 90-284, § 201, 82 Stat. 73, 77.

110. *See* Part II.B *infra*.

pursuant to its sovereign powers.[111] This is so even when the member resists.[112] Illegal arrests, *i.e.*, an arrest in violation of a tribal extradition law, have also been validated.[113]

ii. Outside the Reservation

Outside of the reservation, the general rule is that the Mvskoke Nation has no criminal jurisdiction, even over its members.[114] One exception to this rule is that the Mvskoke Nation has jurisdiction to arrest and prosecute members only when the conduct implicates tribal self-government interests.[115] For example, in *Kelsey v. Pope*, the Sixth Circuit upheld a tribal conviction where the tribe prosecuted a member for sexual assault and the crime occurred outside of the reservation.[116] Another exception is if the crime is a violation of an off-reservation treaty for hunting and fishing rights.[117] But pursuant to agreements with the State, Lighthorse members may enforce state law even outside of the reservation.[118]

Pre-*McGirt*, a Lighthorse officer would determine whether the crime was committed on Native trust lands and if so, determine whether the offender or victim was Native. Only then could the officer make an arrest. A Lighthorse officer post-*McGirt* should first determine whether the suspect is a member of the tribe when investigating outside of the reservation. He or she should then determine whether the suspected crime implicates tribal interests or if it violates an off-reservation hunting and fishing treaty. If he or she determines that the suspect is a member and either of the two exceptions applies, he or she should proceed with the investigation The investigation should also proceed if the offense is one of state law, irrespective of the defendant's identity, but the officer should turn the suspect over to state authorities in the case of a violation of state law rather than turning

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111. Royster, *Fresh Pursuit*, *supra* note 55, at 228; *see also* Davis v. O'Keefe, 283 N.W.2d 73, 75 (N.D. 1979) (tribe has "governmental authority to prescribe procedures for the orderly extradition to state authorities of tribal members suspected of violating state law"); "Extradition of Indian Fugitives to Reservations Where Offense Was Committed," M-31194 (1941), 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917–1974*, at 1066, 1068 ("Indian tribes have complete legal authority to seek and grant extradition").

112. *See* Frisbie v. Collins, 342 U.S. 519, 522 (1952); *see also* United States v. Crews, 445 U.S. 463, 478–79 (1980) (White, J., concurring).

113. *See, e.g.*, Davis v. Muellar, 643 F.2d 521, 526–27 (8th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981) (upheld arrest in violation of tribal extradition law); Weddell v. Meirhenry, 636 F.2d 211, 214–15 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981) (denied suspect's claim that arrest was invalid because he was not extradited); High Pine v. Montana, 439 F.2d 1093, 1094 (9th Cir. 1971) (denying habeas corpus relief, even assuming petitioner was illegally arrested by tribal police and extradited from reservation).

114. *Oliphant*, 435 U.S. 191; *but see Wheeler*, 435 U.S. 313, 326 (calling *Oliphant*'s created doctrine "implicit divestiture"); *see also* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 427 n.2 (1975) ("If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State.").

115. *See* COHEN, *supra* note 52, at § 9.04.

116. 809 F.3d 849, 868 (6th Cir. 2016) (denying federal habeas corpus relief to a member convicted in tribal court for committing misdemeanor sexual assault by inappropriately touching a tribal employee at the tribe's off-reservation community center).

117. *E.g.*, Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974); United States v. Washington, 520 F.2d 676, 686 (9th Cir.), *cert. denied*, 423 U.S. 1086 (1975), *vacated on other grounds*, 443 U.S. 658 (1979) ("[R]egulatory interference by the state with treaty fishing is obnoxious to the treaty tribes. These tribes have the power to regulate their own members and to arrest violators of their regulations apprehended on their reservation or at [off reservation] 'usually and accustomed' fishing sites.").

118. Morrow, *Bridging the Jurisdictional Void*, *supra* note 96, at 73.

the suspect over to tribal authorities.

IV. AUTHORITIES OF POLICE

The Article now turns to the ability of State and tribal police to exercise authority outside of their jurisdictions through the use of cross-deputization agreements.

A. Multi-Jurisdictional Authority

Cross-deputization agreements provide Lighthorse officers and State police officers the authority to arrest and detain individuals suspected of criminal activity outside of their jurisdiction.[119] In other words, a tribal officer may arrest a non-Native on tribal or state lands and issue a citation pursuant to a cross-deputization agreement. And a state officer can arrest a Native on state or tribal lands and imprison them in a state- or privately-owned jail.

These agreements are a little known but very effective way to eliminate some of the jurisdictional problems inherent with having a reservation next to a metroplex like Tulsa. Agreements between tribes and the State are a matter of state policy.[120] Oklahoma law provides for these agreements,[121] and courts must enforce them.[122]

Cross-deputization agreements are on the rise.[123] They are often "the best way to provide services to these unique populations without wasting valuable resources on ineffective programs."[124] Cooperation is "in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments."[125] The Oklahoma Secretary of State has listed hundreds of tribal-state agreements, including ones related to law enforcement.[126]

Agreements between the Mvskoke Nation and the State are necessary. As one scholar has put it, "[t]here is always some police force and court with jurisdiction to stop,

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119. United States v. Sands, 968 F.2d 1058, 1063 (10th Cir. 1992) (observing the "jurisdictional void" pre-*McGirt* when Oklahoma's Native jurisdiction was a "checkerboard of Indian and non-Indian land"); *see also id.* (agreements "may assist in filling a jurisdictional void").

120. *See* OKLA. STAT. tit. 74, § 1221(B) (State policy "recognizes the unique status of Indian tribes within the federal government and . . . work[s] in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments.").

121. *See id.* at (C)(1) (stating that the Oklahoma executive division and Oklahoman political subdivisions may "negotiate and enter into cooperative agreements" with Indian tribes in the state "to address issues of mutual interest").

122. *See* Rule 30(B) of the Rules for District Courts of Oklahoma, OKLA. STAT. tit. 12, ch. 2, App., R. 30(B), (providing that "[t]he district courts of the State of Oklahoma shall grant full faith and credit and cause to be enforced any tribal judgment where the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma, provided, a tribal court judgment shall receive no greater effect or full faith and credit under this rule than would a similar or comparable judgment of a sister state."); *see* Barrett v. Barrett, 878 P.2d 1051, 1054 (Okla. 1994); *see also* FULL FAITH AND CREDIT OF TRIBAL COURTS, OKLA. STATE CTS. NETWORK (Apr. 18, 2019), http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214.

123. *See Conference of Western Attorneys General*, AMERICAN INDIAN LAW DESKBOOK § 14, at 1022 (2018) (noting that these agreements not only "resolve the core uncertainties" on jurisdiction, but also result in more effective delivery).

124. Nat'l Conference of State Legislatures, *Government to Government: Models of Cooperation Between States and Tribes* 1, 3 (2009).

125. OKLA. STAT. tit. 74, § 1221(B).

126. *See Tribal Compacts and Agreements*, OKLA. SECRETARY OF STATE, https://www.sos.ok.gov/gov/tribal.aspx (last visited Apr. 17, 2021).

arrest, and convict offenders, but the current framework creates a system in which the police who are most prevalent in the area are often not the ones with authority."[127] It is difficult in general to tell on Native lands which sovereign's jurisdiction trumps that of the other.[128] Officer hesitation can be a serious issue.[129]

By law, a tribe may assume federal law enforcement authority by contracting with the Bureau of Indian Affairs ("BIA") through the Indian Self-Determination and Education Assistance Act of 1975 ("PL 638").[130] The Mvskoke police department, like other Native police departments, is administered by the tribe through a PL 638 contract.[131] The State determines whether Lighthorse members may enforce state law in Tulsa and other places in the Mvskoke reservation.[132]

The Mvskoke Nation has entered into these agreements with the State of Oklahoma,[133] and these are much needed in light of the high crime rate in Oklahoma and Tulsa, specifically.[134] If proper agreements and procedures are not in place, Tulsa and its surrounding areas are in danger of becoming a criminal's paradise.[135] The State of Oklahoma has granted authority to Lighthorse officers to enforce Oklahoma law on the reservation.[136] In 2013, Oklahoma passed a law granting Lighthorse officers and other tribal law enforcement agents the authority to enforce state laws on and off the reservation.[137] Lighthorse officers must meet state training standards and liability requirements in order to enforce state laws.[138]

Oklahoma and the tribe have entered into agreements with a total of forty of the forty-four counties whose borders lie, in whole or in part, within the bounds of the Mvskoke reservation.[139] Pursuant to these agreements, Lighthorse officers commissioned

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127. Developments in the Law, *Fresh Pursuit From Indian Country: Tribal Authority to Pursue Suspects onto State Land*, 129 HARV. L. REV. 1685, 1689 n.35 (2016).

128. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 1, 62 (2007) (asserting that "some crimes just fall through the cracks" (internal quotations omitted)).

129. *See, e.g.*, Davis v. Dir., N.D. Dep't of Transp., 467 N.W.2d 420, 423 (N.D. 1991) (officer mistakenly thought he was on reservation, causing case to be dismissed).

130. *See* Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450).

131. *See* DEPUTATION AGREEMENT, MUSCOGEE (CREEK) NATION (2006), http://www.mcn-nsn.gov/wp-content/uploads/2017/10/Special-Law-Enforcement-Commission-Deputation-Agreement-1.pdf.

132. Morrow, *Bridging the Jurisdictional Void*, *supra* note 96, at 73.

133. *See* ADDENDUM TO DEPUTATION AGREEMENT, MUSCOGEE (CREEK) NATION (2020), https://www.mcn-nsn.gov/wp-content/uploads/2020/07/Tulsa-cross-dep.pdf.

134. *See* Federal Bureau of Investigation, Crime in the United States, Tables 4 & 5 (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crimein-the-u.s.-2018 (publishing data showing Oklahoma as the state with the twelfth highest rate of violent crime reports); Sam Stebbins, *The Midwest is Home to Many of America's Most Dangerous Cities*, USA TODAY (Oct. 26, 2019), https://www.usatoday.com/story/money/2019/10/26/crime-rate-higher-usdangerous-cities/40406541/; *see also* Transcript of Oral Argument at 74 lns.15–19, Carpenter v. Murphy, 140 S. Ct. 2412 (2018) (No. 17-1107).

135. *See generally* Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post-*Oliphant *Guardian and the Dual-Edged Nature of* Parens Patriae, 2010 ILL. L.R. 1012, 1119 (2019).

136. *See* OKLA. STAT. tit. 21, § 99 (2018).

137. H.B. 1871, 2013 Okla. Sess. Laws 1270.

138. *See* Lysakowski & Jones, *supra* note 97, at 551.

139. Transcript of Oral Argument at 74 lns.15–19, Carpenter v. Murphy, 140 S. Ct. 2412 (2018) (No. 17-1107).

by the Bureau of Indian Affairs and certified by the Council on Law Enforcement Education and Training may enforce Oklahoma state law in the same way that an Oklahoma state police officer can.[140] So, if a person is pulled over for speeding in Tulsa, either a police officer, a state trooper, or a Lighthorse officer can issue a ticket to the person that will be enforced in state court (if the person is non-Native) and tribal court (if the person is Native). The same applies for a domestic violence call or any minor crime not covered by the Major Crimes Act.

B. What Happens When a Suspect Flees a Jurisdiction?

This brings us to the doctrine of "fresh pursuit," the notion that an officer should be able to pursue a suspect who flees across jurisdictional boundaries even when the officer would normally have no authority in the neighboring community.[141] Because criminals often attempt to avoid arrest and prosecution by fleeing to or from the reservation, it is vital that the fresh pursuit doctrine apply to Lighthorse officers and State police officers.

There is a large gap in jurisdictional power between the reservation borders and the State's borders. "The present jurisdictional apportionment by territorial compartmentalization, while adequate to cover most arrest situations, is inadequate to resolve the issue of fresh pursuit, where a Native suspected of violating state law off the reservation [or vice-versa, a non-Native suspected of violating tribal law is pursued by Lighthorse officers on the reservation is pursued off the reservation] is pursued by state law enforcement officers across reservation borders onto tribal lands."[142] Each sovereign has jurisdiction—exclusive in the State's case where the crime was committed off-reservation—over crimes committed in their lands.[143] When the suspect flees to the other sovereign's lands, the respective officer has no jurisdiction over the suspect.

In *Nevada v. Hicks*, the Supreme Court stated that "[n]othing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation."[144] However, there is some controversy in the academy about the applicability of *Hicks*.[145] Furthermore, the Tenth Circuit has voided a state search warrant because the property was within reservation and was rented by an enrolled member.[146]

Practically, the issue of cross-border pursuits has a limited effect in Oklahoma. Most state courts will avoid limiting tribal or state officers from arresting fleeing felons across

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140. *See* OKLA. STAT. tit. 21 § 99 (2018).

141. Fennessy & Joscelyn, *A National Study of Hot Pursuit*, 48 DEN. L.J. 389, 390 n.3 (1972); Carson v. Pape, 112 N.W.2d 693, 697 (Wis. 1961); 5 AM. JUR. 2D Arrest § 51 (1962).

142. Royster, *Fresh Pursuit*, *supra* note 55, at 194.

143. *See infra* Part III.B.

144. *See* Nevada v. Hicks, 533 U.S. 353, 366 (2001); *Jones*, 411 U.S. at 148 (listing cases).

145. *Compare* Laura A. Shattuck, Comment, *State v. Cummings: Collision with Nevada v. Hicks*, 51 S.D. L. REV. 373, 403 (2006) (Supreme Court's statements in *Hicks* appear to imply state criminal jurisdiction over the reservations for off-reservation offenses), *with* Expert Report and Affidavit by Alex T. Skibine at 10, Jones v. Norton, 3 F. Supp. 3d 1170 (D. Utah 2012) ("Hicks is of very little relevance, if any, in assessing the legality of hot pursuit by state officers inside Indian reservations.").

146. United States v. Baker, 894 F.2d 1144, 1146 (10th Cir. 1990); *accord* United States v. Peltier, 344 F. Supp. 2d 539, 547–48 (E.D. Mich. 2004) (state judicial officer did not have authority to issue warrant to search premises within Indian country).

jurisdictional boundaries by honoring charges made against those felons.[147] State officers have the express authority to pursue suspects onto tribal land.[148] In fact, State officers have been given full criminal authority over persons on the reservation, and an on-reservation arrest for an off-reservation crime is valid whether or not the suspect is Native American.[149] They have the authority to arrest Native and non-Native suspects on the reservation fleeing from off the reservation.[150] The State has not yet determined that Lighthorse officers have an inherent power (independent of a cross-deputization agreement) to pursue fleeing suspects.[151] But despite any lack of agreements, Lighthorse officers may still "exercise their power to detain the offender and transport him to the proper authorities."[152] Therefore, if a Native or non-Native flees to the reservation or off the reservation after being suspected of committing an offense, a State or Lighthorse officer may detain them.

V. POST-CONVICTION TURMOIL

The Article now turns to post-conviction rights and remedies. A complaint lodged against the *McGirt* decision is that Native defendants who were convicted in state courts, which now lack jurisdiction over those defendants, can appeal their convictions and have them overturned. The State of Oklahoma represented in its brief before the Supreme Court in *McGirt* that a ruling in the tribe's favor "risks reopening thousands of state convictions, . . . cases that the federal government may be unable to retry because of statutes of limitations, stale evidence, or insufficient resources."[153] If this were true, the effects would be overwhelming for victims and the public. The author takes the position, however, that the effects will not be overwhelming because of impediments to Native prisoners' post-conviction rights through the Anti-Terrorism and Effective Death Penalty Act

147. *See, e.g.*, State v. Bickham, 404 So. 2d 929, 932–33 (La. 1981).

148. United States v. Mikulski, 317 F.3d 1228, 1231 (10th Cir. 2003) (citing Ross v. Neff, 905 F.2d 1349, 1354 n.6 (10th Cir. 1990)) (Oklahoma).

149. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987), *superseded by statute*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), *as recognized in*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014).

150. Royster, *Fresh Pursuit*, at 224 (discussing that "[e]ven on reservations not subject to Public Law 280 [like Oklahoma], state police arrests for off-reservation offenses have been held to be valid. As one commentator has observed, the identity of the suspect as Native or non-Native has not been decisive" (citing Bruce E. Bohlman, *Indians—Crimes by Indians out of Indian Country or Reservation—Jurisdiction of State to Arrest Indian on the Reservation*, 45 N.D. L. REV. 430, 431–32 (1969)); *see also* State v. Herber, 598 P.2d 1033 (Ariz. Ct. App. 1979) (concerning state officers' capture and arrest of a non-Native suspect on reservation on charge of possession of marijuana for sale).

151. *See* Developments in the Law, *supra* note 127, at 1689.

152. *Duro*, 495 U.S. at 697, *superseded by statute*, Civil Rights Act of 1968, Pub. L. No. 90-284, § 201, 82 Stat. 73, 77, *as recognized in*, United States v. Lara, 541 U.S. 193 (2004); *see also* United States v. Terry, 400 F.3d 575, 580 (8th Cir. 2005) (suspect held in tribal jail overnight); United States v. Keys, 390 F. Supp. 2d 875, 884 (D.N.D. 2005) (detention by tribal police became unreasonable after two days); State v. Schmuck, 850 P.2d 1332, 1342 (Wash. 1993) (en banc) (tribe retained the right to stop non-Native violators and to detain them for delivery to state authorities for prosecution); Colyer v. Dep't of Transp., 203 P.3d 1104, 1110 (Wyo. 2009) (reservation officer may detain suspect for formal arrest by a state officer).

153. Brief for Respondent at 43, *McGirt*, 140 S. Ct. 2452 (No. 18-9526). Attorney for the State, Lisa Blatt, stated at oral arguments during the *Sharp v. Murphy* case that hundreds of convicted felons will walk free: "That's 155 murderers, 113 rapists, and over 200 felons who committed crimes against children." Transcript of Oral Argument at 76 lns.1–3, Carpenter v. Murphy, 140 S. Ct. 2412 (2018) (No. 17-1107).

("AEDPA").

A reporter from *The Atlantic* wrote that she had found "a list of 1,887 Native Americans incarcerated as of December 31, 2019, for crimes that occurred in counties in the treaty territory of all five tribes."[154] She estimated that, out of a sample of approximately 300 inmates, "fewer than 10 percent . . . would actually qualify for a new trial."[155] She also looked at a sample that might qualify for federal habeas corpus relief.[156] She estimated that for people convicted of first-degree murder, "less than 10 percent are eligible for federal habeas relief. . . . [For] people convicted of first-degree rape, about 5 percent are eligible" for federal habeas corpus relief.[157] She estimated that "[i]n total, less than 10 percent of the nearly 300 convictions we examined are still within the one-year statute of limitations [discussed below] created by the [AEDPA]."[158]

There are multiple problems with overturning sometimes decades old convictions. First, there is staleness of the evidence. How can a prosecutor call a witness to testify about a murder that occurred twenty years prior? What if the DNA evidence was thrown away? These problems are of course balanced with fairness to defendants and the tribes' interest in trying their members in federal court. Tribal defendants tried in federal court can get out of the death penalty if the tribe consents.[159] While the concerns have some merit, they can be dispelled because of the finality of many of these convictions.

A. Overview of Habeas Corpus

Procedurally, a Native defendant who has been convicted in state court should appeal their conviction through a writ of habeas corpus—specifically, through 28 U.S.C. § 2254, which allows state prisoners to challenge their convictions.[160] After a prisoner in custody under a criminal judgment issued by a state requests federal habeas relief through § 2254, a federal court may grant relief from that judgment if the prisoner shows that he or she "is in custody in violation of the Constitution or laws or treaties of the United States.[161] In 1996, Congress amended § 2254 through the AEDPA, which added procedural limitations to prisoners challenging their convictions, such as a one-year statute of limitations and no provision for indigent counsel unless the prisoner was sentenced to death.[162]

A state court defendant's habeas petition may only be granted if the decision is either (1) contrary to "clearly established Federal law," or (2) was based on an unreasonable decision considering the evidence.[163] As used in § 2254(d)(1), the phrase "clearly

154. Rebecca Nagle, *Oklahoma's Suspect Argument in Front of the Supreme Court*, THE ATLANTIC (May 8, 2020), https://www.theatlantic.com/ideas/archive/2020/05/oklahomas-suspect-argument-front-supreme-court/611284/.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *See* 18 U.S.C. § 3598 (1996); Grant Christensen, *The Wrongful Death of an Indian: A Tribe's Right to Object to the Death Penalty*, 68 UCLA L. REV. 404, 406–08 (2020).

160. *See* 28 U.S.C. § 2254 (1996).

161. *Id.* § 2254(a).

162. *See id.* § 2244.

163. *Id.* § 2254(d)(1), (2).

established Federal law" means "the governing legal principle or principles" stated in "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision."[164]

Native petitioners should challenge their conviction by means of the first part of the habeas statute, contending that their conviction was contrary to clearly established federal law. In *McGirt*, the Court paved the way for this argument by holding that the State of Oklahoma's lack of jurisdiction over Native defendants on the Mvskoke reservation was clearly established law.[165] If clearly established law governs the federal claim presented in state court, the state court's decision is contrary to the law if that decision "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases."[166] If the state court identifies and applies "the correct legal rule," its decision will not be "contrary to" federal law, but the state court's application of the correct rule can still be evaluated under § 2254(d)(1)'s "unreasonable application' clause."[167]

As discussed above, the matter of an arrest and conviction is jurisdictional. A jurisdictional defense cannot be waived,[168] unlike some other defenses, like ineffective assistance of counsel.[169] Habeas corpus is the proper vehicle for challenging a state court's lack of jurisdiction.[170] Oklahoma law allows a prisoner to challenge his or her conviction through a habeas corpus petition based on lack of jurisdiction.[171] It also allows a petitioner to seek habeas relief on the basis of unconstitutional confinement.[172] And Oklahoma's post-conviction procedures provide a path for prisoners to raise a jurisdictional challenge.[173]

These challenges are unlikely to succeed in the majority of cases. The initial stumbling blocks are exhaustion and waiver, and the subsequent stumbling block is the

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164. Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003).

165. The Court did not use the term "clearly established law" or make the case retroactive to new petitioners. However, the Tenth Circuit in *Murphy v. Royal*, 875 F.3d 896, 921 (10th Cir. 2017) (en banc), *aff'd*, *Sharp v. Murphy*, 140 S. Ct. 2412 (2020), concluded that the *Solem* framework, which is the framework by which a court determines that a reservation has not been disestablished, was clearly established law. *See id.* (stating that the issue was "[w]hether the OCCA rendered a decision contrary to this clearly established law when it resolved Mr. Murphy's jurisdictional claim" and concluding that "it did because the OCCA failed to apply the *Solem* framework and took an approach incompatible with it"). Because the Supreme Court affirmed this decision based on the reasons stated in *McGirt*, *McGirt* is clearly established law. *See Sharp*, 140 S. Ct. 2412.

166. Williams v. Taylor, 529 U.S. 362, 405 (2000).

167. *Id.* at 406–07; 28 U.S.C. § 2254(d)(1).

168. *Ex parte* Merton, 205 P.2d 340, 342 (Okla. Crim. App. 1949) (noting that jurisdiction cannot be waived in a habeas case).

169. Berget v. State, 907 P.2d 1078, 1084 (Okla. Crim. App. 1995) (reasoning that a claim for ineffective assistance of counsel must "be raised on direct appeal, not through a collateral attack, or it is waived"); Strong v. State, 902 P.2d 1101, 1103 (Okla. Crim. App. 1995) (same).

170. *See Ex parte* Smith, 187 P.2d 1003, 1007 (Okla. Ct. Crim. App. 1947) ("It has been held that the remedy of habeas corpus is available wherever it has been found that the court in which the petitioner was convicted had no jurisdiction to try him, or that in its proceedings petitioner's constitutional rights were denied.").

171. OKLA. STAT. tit. 22, § 1080(b) (authorizing an individual previously convicted of and sentenced for a crime to raise a jurisdiction challenge to the same).

172. *See* OKLA. STAT. tit. 12, §1331; State v. Powell, 237 P.3d 779, 780 (Okla. 2010); *see also* Crank v. Jenks, 224 F. App'x 838, 839 (10th Cir. 2007) (unpublished) (denying a certificate of appealability for a state prisoner's federal habeas action, wherein he argued for retroactive application of state law affecting his parole, because he had not first filed a habeas action in state court).

173. *See* OKLA. STAT. tit. 22, § 1080(b).

one-year statute of limitations. However, further roadblocks are in front of incarcerated individuals seeking to overturn their sentences. For instance, the Tenth Circuit has determined that *Murphy v. Royal* (and likely now *McGirt*) provides insufficient basis for overturning a conviction.[174]

B. The Issues of Exhaustion and Waiver

One problem that these defendants must overcome is exhaustion.[175] The United States Supreme Court has stated that

> [b]efore a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.[176]

Similarly, the AEDPA prohibits federal courts from granting habeas relief to state prisoners who have not exhausted available state remedies. Section 2254(b)(1) states, "[a]n application for a writ of habeas corpus . . . shall not be granted unless it appears that[] . . . the applicant has exhausted the remedies available in the courts of the State." Section 2254(c) elaborates that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State[] . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." The AEDPA's exhaustion requirement "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts . . . ."[177] In addition, a federal court must dismiss "mixed petitions"—petitions that include exhausted claims and unexhausted claims.[178] A federal court also has the option, in addition to dismissing the mixed petition entirely, to (1) stay the habeas proceeding (if the petitioner has shown "good cause")[179] and permit the Native petitioner to return to state court to exhaust unexhausted claims, (2) allow the Native petitioner to amend the petition to dismiss unexhausted claims and proceed only on exhausted claims, or (3) deny the entire petition on the merits.[180] A defendant must raise an issue, like lack of jurisdiction, in his

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174. *See* Dopp v. Martin, 750 F. App'x 754, 757 (10th Cir. 2018); Boyd v. Martin, 747 F. App'x 712, 716–17 (10th Cir. 2018).

175. Ronald Sokol, *Federal Habeas Corpus Practice*, *in* 20 AM. JUR. TRIALS, at § 19 (1973) ("One convicted of crime in a state court, and claiming he was deprived of his constitutional rights in the state proceedings, does not have an immediate right of recourse to the federal courts for habeas corpus relief; he must first exhaust the remedies available to him in the state courts.").

176. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

177. *Id.* at 845.

178. *See* Rhines v. Weber, 544 U.S. 269, 274 (2005). The *Rhines* Court stated:

> As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy*'s dismissal requirement, petitioners who come to federal court with "mixed" petitions run the risk of forever losing their opportunity of any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review.

Id. at 275.

179. *Id.* at 278.

180. Wood v. McCollum, 833 F.3d 1272, 1273 (10th Cir. 2016); Moore v. Schoeman, 288 F.3d 1231, 1235 (10th Cir. 2002); *see also, e.g.*, Patterson v. Whitten, No. 18-CV-0153-GKF-JFJ, 2018 WL 6840153, at *3 (N.D.

or her petition for habeas relief on direct appeal or in the first habeas petition to exhaust state remedies.[181] Without proper exhaustion, a habeas petition will fail and the defendant will not obtain post-conviction relief.

At least two federal courts have dismissed a Native prisoner's § 2254 petition because he failed to exhaust state court remedies.[182] In *Draper v. Pettigrew*, for example, a federal judge for the Western District of Oklahoma dismissed the prisoner's § 2254 claim, noting that "the Section 2254 exhaustion requirement contains no exception for jurisdictional claims."[183] And in *Morgan v. Bureau of Indian Affairs*, a federal judge rejected a prisoner's jurisdictional claim, noting that § 2254's exhaustion requirement "does not contain an exception" for a jurisdictional *Murphy* (or *McGirt*) claim.[184]

Oklahoma state law that refuses to allow petitioners to present an argument that could previously have been raised, *viz.*, the argument was waived, is another issue with *McGirt* post-conviction appeals.[185] Waiver is likely to be a significant problem depending on how Oklahoma courts view the arguments presented. According to Oklahoma law, "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review."[186] The Oklahoma Court of Criminal Appeals ("OCCA") has in at least one case found that a *McGirt*-type claim was "waived and procedurally barred."[187] However, the United States Supreme Court vacated that judgment,[188] and the OCCA remanded for findings on the jurisdictional issue.[189] At least one federal district court has rejected the OCCA's application of waiver to a *McGirt* habeas corpus challenge.[190] Arguably, the Supreme Court also rejected the waiver doctrine when it decided *McGirt*.[191] Furthermore, there is Oklahoma law that states that jurisdictional issues "are never waived and can therefore be raised on a collateral appeal."[192] It remains

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Okla. Dec. 31, 2018) (granting a stay of the petition rather than dismissing the petition without prejudice or requiring the petitioner to omit his unexhausted claim).

181. Logan v. State, 293 P.3d 969, 973 (Okla. Crim. App. 2013) ("[I]ssues that were not raised previously on direct appeal, but which could have been raised, are waived for further review.").

182. *See* Draper v. Pettigrew, No. CIV-20-800-D, 2020 WL 8225500, at *3, *4 (W.D. Okla. Dec. 22, 2020); Morgan v. Bureau of Indian Affairs, No. CIV-18-290-G, 2018 WL 5660301, at *3 (W.D. Okla. Oct. 31, 2018).

183. 2020 WL 8225500, at *4.

184. 2018 WL 5660301, at *3.

185. *See* Nagle, supra note 154 (noting that "Oklahoma's highest court for criminal appeals is already throwing out most of the cases making the reservation argument" reasoning that these arguments could have been asserted in a prior appeal).

186. Logan v. State, 293 P.3d 969, 973 (Okla. Crim. App. 2013) (citing OKLA. STAT. tit. 22, § 1086).

187. Ord. Affirming Denial of Petitioner's 11th & Subsequent Application for Post-Conviction Relief at 3, Johnson v. State (Okla. Crim. App. July 24, 2018) (No. PC-2018-343).

188. *See* Johnson v. Oklahoma, 141 S. Ct. 192 (2020).

189. *See* Ord. Remanding for Evidentiary Hearing, Johnson v. State (Okla. Crim. App. Nov. 23, 2020) (No. PC-2018-343).

190. *See* Deerleader v. Crow, No. 20-CV-0172-JED-CDL, 2021 WL 150014, at *2, *6 (N.D. Okla. Jan 15, 2021); *see also, e.g.*, Tucker v. Lawson, No. CIV-20-979-J, 2020 WL 7222089, at *2–*3 (applying *Younger* abstention to a *McGirt* claim when the claim was pending in state court).

191. *Cf. McGirt*, 140 S. Ct. at 2502 (Thomas, J., dissenting) (arguing that the majority erred by assuming jurisdiction over a case over which it "lack[ed] jurisdiction . . . because it rests on an adequate and independent state ground").

192. Wallace v. State, 935 P.2d 366, 372 (Okla. Crim. App. 1997); *see also* Munson v. State, 758 P.2d 324, 332 (Okla. Crim. App. 1988); Guthrey v. State, 374 P.2d 925, 927 (Okla. Crim. App. 1962). This rule that subject matter jurisdiction is never waived applies to post-conviction relief. *See* Wackerly v. State, 237 P.3d 795, 797 (Okla. Crim. App. 2010).

to be determined how (and whether) Oklahoma courts will apply this law, but it is likely that state courts will treat jurisdictional arguments as not waived.

In practical terms, a Native prisoner must be wary of failing to raise his or her jurisdictional argument on direct appeal. The United States Supreme Court has "long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [its] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.'"[193] There are two ways to get around this problem, both identified by Justice Thomas in his dissent in *McGirt*.[194] First, a Native prisoner may argue "that the state procedural bar is not an 'adequate' ground for decision in th[e] case."[195] Second, a Native prisoner may argue that the federal court has jurisdiction because the state court's decision does not rest on independent state grounds, but instead rests on federal grounds.[196] A final point is that the author could find no cases in which a federal court has dismissed a *McGirt* habeas petition for lack of jurisdiction because it was decided on independent state grounds. However, a Native prisoner challenging his or her convictions should be sure to point out that the *McGirt* majority, which is binding precedent on all state courts, held that the jurisdictional challenge rested on federal grounds.[197]

Exhaustion and waiver will be significant hurdles to overcome when an incarcerated individual challenges his or her conviction based on *McGirt*. And many if not most prisoners will not have the assistance of counsel, leaving them to figure out the complex appeals procedures on their own. Practically, to avoid these hurdles, Native prisoners should appeal their convictions to the OCCA, file for post-conviction relief in the state district court and then to the OCCA if their challenge is denied, and then file a § 2254 motion in federal court. The federal court will likely abstain from hearing the matter if the Native prisoner's case is in the process of review in state court.[198] In addition, if the Native prisoner has already filed a § 2254 motion in the federal district court, he or she must appeal that decision and ask the Tenth Circuit Court of Appeals for permission to file a second or successive petition for habeas corpus relief.[199]

C. The Issue of Statute of Limitations

A subsequent hurdle Native defendants who have been convicted in state court have to overcome is the one-year statute of limitations period under the AEDPA.[200] The one-

193. Michigan v. Long, 463 U.S. 1032, 1038 n.4 (1983) (quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935)).

194. *See McGirt*, 40 S. Ct. at 2503 (Thomas, J., dissenting).

195. *Id.*

196. *Id.*

197. *Id.* at 2479 n.15.

198. *See, e.g.*, Ross v. Oklahoma, No. CIV-20-1092-D, 2020 WL 7775453, at *2 (W.D. Okla. Nov. 20, 2020) (applying *Younger* abstention when the Native prisoner's case was pending in Oklahoma state court).

199. *See, e.g.*, Tripp v. Whitten, No. CIV-20-965-SLP, 2020 WL 7865721, at *2–*3 (W.D. Okla. Nov. 16, 2020) (dismissing a second or successive habeas corpus petition because the Native prisoner did not obtain permission from the Tenth Circuit to file a second or successive petition).

200. 28 U.S.C. § 2244(d) provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person

year filing requirement commences on the date the Native prisoner's conviction becomes final, which occurs at the conclusion of direct review or when the time for direct review has expired.[201] In addition, this limitation period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."[202] An application for post-conviction relief or other collateral review is "properly filed," for purposes of statutory tolling, "when its delivery and acceptance are in compliance with the applicable [state] laws and rules governing filings."[203] To obtain the benefit of statutory tolling, a Native prisoner must file his or her application for state collateral review in accordance with applicable state rules and within the one-year limitation period.[204] If a Native pleads guilty, he or she must directly appeal his or her judgment and sentence within ten days from the sentencing hearing by filing a motion to withdraw plea and request an evidentiary hearing.[205] Because the limitation period is not jurisdictional, a federal court can also sometimes toll the limitation period for equitable reasons.[206]

Unfortunately for Native defendants, none of the statutory tolling provisions will work to toll the one-year statute of limitations. In *Murphy*, the Tenth Circuit explained that the *Teague* doctrine—which provides that a defendant cannot attack his or her conviction based on a rule that was established after his or her conviction became final, unless that rule was made retroactive by the United States Supreme Court[207]—did not apply because the "disestablishment" analysis[208] was not "new."[209] Courts are very hesitant to apply these statutory or equitable tolling principles in *McGirt* cases, reasoning that the one-year

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in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

201. *Id.* § 2244(d)(1)(A).

202. *Id.* § 2244(d)(2).

203. Artuz v. Bennett, 531 U.S. 4, 8 (2000).

204. Clark v. Oklahoma, 468 F.3d 711, 714 (10th Cir. 2006); Burger v. Scott, 317 F.3d 1133, 1138–41 (10th Cir. 2003).

205. Clayton v. Jones, 700 F.3d 435, 441 (10th Cir. 2012); *see also* OKLA. STAT. tit. 22, § 1051; OKLA. CRIM. APP. R. 4.2(A) (2019).

206. Holland v. Florida, 560 U.S. 631, 645 (2010).

207. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) (providing that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"); *see also* Danforth v. Minnesota, 552 U.S. 264, 266 n.1 (2008) (explaining that "[a]lthough *Teague* was a plurality opinion . . . the *Teague* rule was affirmed and applied by a majority of the Court shortly thereafter"); *see also* Ronald Sokol, FEDERAL HABEAS CORPUS PRACTICE, *in* 20 AM. JUR. TRIALS, at § 28.5 (1973).

208. Disestablishment is the legal term used to denote when Congress has acted to terminate a reservation.

209. Murphy v. Royal, 875 F.3d 896, 921, 929 n.36 (10th Cir. 2017) (en banc), *aff'd*, Sharp v. Murphy, 140 S. Ct. 2412 (2020) (explaining that "none of the cases" applying the *Solem* framework "created a new rule").

statute of limitations period is tolled "only in rare and exceptional circumstances."[210] Furthermore, federal courts are already declining to toll the statute of limitations period based on arguments that *McGirt* announced a new constitutional right made retroactive on appeal.[211] Reports have already shown that these petitions are being denied by Oklahoma courts.[212] For example, there are cases coming out of the Northern District of Oklahoma recognizing the one-year limitations period and either neglecting or refusing to discuss statutory or equitable tolling.[213] A Native defendant will thus only succeed if he or she challenged his or her conviction within one year of the date the conviction became final—and after he or she exhausts remedies through direct appeals and collateral review. It has yet to be seen how many Native defendants will attempt this approach or succeed in their challenges.[214]

D. The Problem of Proving Indian Status

Another issue Native prisoners will have to overcome is proving their "Indian" status. The law, as described above, provides jurisdictional conditions on which sovereign can try which offenders, depending on the Native status of the offender and victims.[215] The word "Indian" appears in federal law delineating jurisdiction, but the term itself is not defined.[216] Therefore, a Native prisoner or his or her attorney must look to state and federal law to define the term. The United States Supreme Court has not defined who is and who is not "Indian," but lower courts have their own definitions of "Indian" derived from *United States v. Rogers*.[217]

The Tenth Circuit, which is over Oklahoma federal courts, applies a two-part test for determining an offender or victim's "Indian" status:[218] "[T]he court must make factual findings that the defendant (1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government."[219] The Tenth Circuit did not say how much Indian blood is required, but it is a proper inference that any amount of blood will do.[220] The Tenth Circuit also has a factor-based test for determining the second prong of the

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210. Barbre v. Whitten, No. CIV 18-259-RAW-KEW, 2019 WL 3976518, at *2 (E.D. Okla. Aug. 22, 2019) (quoting York v. Galetka, 314 F.3d 522, 527 (10th Cir. 2003)).

211. *See, e.g.*, Berry v. Braggs, No. 19-CV-0706-GKF-FHM, 2020 WL 6205849, at *6–*7 (N.D. Okla. Oct. 22, 2020). This federal district court also declined to apply any other statutory or equitable tolling principles to the Native petitioner's case.

212. *See, e.g.*, Nagle, *supra* note 154 (noting that of the 140-plus petitions filed since the Tenth Circuit ruled in *Murphy v. Royal* that the Mvskoke reservation had never been disestablished, these "writs have produced a slew of denials and dismissals").

213. *See, e.g.*, Berry v. Whitten, No. 20-CV-0668-CVE-JFJ, 2021 WL 262560, at *3 (N.D. Okla. Jan. 26, 2021) (concluding that the petitioner's *McGirt* claim "is untimely and appears subject to dismissal under § 2244(b)(1)").

214. On September 8, 2020, a Cherokee Nation reporter noted that the Cherokee Nation Attorney General was "tracking more than 100 cases that involve appeals and pending criminal matters." Chad Hunter, *Conviction Appeals Piling up Following* McGirt *Decision*, CHEROKEE PHOENIX (Sept. 8, 2020), https://www.cherokeephoenix.org/Article/index/155258.

215. *See supra* Part III.B.

216. *See* 18 U.S.C. §§ 1151, 1152, 1153 (2020).

217. 45 U.S. 567, 572–73 (1846).

218. *See* United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001).

219. *Id.* (internal quotation marks omitted).

220. *Id.* at 1282–83 (citing cases that conclude that a quantum listed on a tribal enrollment card was sufficient).

"Indian" status test: (1) enrollment in a tribe; (2) government recognition formally and informally through providing the person assistance reserved only to "Indians"; (3) enjoying benefits of tribal affiliation; and (4) social recognition as an "Indian" through residence on a reservation or participation in "Indian" social life.[221]

Oklahoma courts, however, are bound by state law or the United States Supreme Court's law. The OCCA defines "Indian" as having (1) "a significant percentage of Indian blood," and (2) being "recognized as an Indian either by the federal government or by some tribe or society of Indians."[222] The "significant percentage of Indian blood" requirement is concerning, because it is unclear how much of a degree is necessary to satisfy the test. In *Goforth*, the defendant who was "slightly less than one-quarter Cherokee[,]" satisfied that prong of the test.[223] But what about a Native who is a member of his or her tribe but has a very insignificant amount of Native blood? The answer under Oklahoma law as to whether this individual is "Indian" is unclear. It is also perplexing what the second prong of the Oklahoma "Indian" status test means. Does an individual need to be a member of his or her tribe, or is it sufficient if he or she simply identifies with the tribe? The Supreme Court has said no.[224] It is unclear, however, what the requirement for non-members is under Oklahoma law.

Finally, tribal jurisdiction is not limited to enrolled members or blood quantum. For instance, the Mvskoke Nation has jurisdiction over all Natives.[225] The Cherokee Nation defines "Indian" as "any person who is a member or who is eligible for membership in a federally-recognized tribe, nation, or band of Indians."[226]

As an aside, if a Native prisoner is a Freedman (a descendant of a former enslaved person of one of the tribes), he or she will likely not qualify as "Indian" unless he or she can demonstrate some quantum of "Indian" blood.[227] A possible issue courts will have to consider is whether this classification of the Freedmen violates the Equal Protection Clause of the United States Constitution.[228]

A Native prisoner will be required to prove his or her "Indian" status when challenging his or her conviction. It is necessary for Natives and practitioners to be familiar with the various "Indian" status tests for purposes of appealing convictions.

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221. United States v. Nowlin, 555 F. App'x 820, 823 (10th Cir. 2014) (unpublished) (quoting St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988)).

222. Goforth v. State, 644 P.2d 114, 116 (Okla. Crim. App. 1982) (citing *Rogers*, 45 U.S. at 567).

223. *Id.*

224. *See* United States v. Antelope, 430 U.S. 641, 647 n.7 (1977) ("[E]nrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction.").

225. *See* MUSCOGEE (CREEK) NATION CODE ANN. tit. 27, § 1-102.

226. CHEROKEE NATION CODE, § 2-103; *see also* CHEROKEE NATION CODE tit. 10, ch. 1B § 40.2(3) ("'Indian,' means a person who is either: (a) a member of an Indian tribe; or (b) eligible for membership in an Indian tribe.").

227. *See* Clint Summers, *Rethinking the Federal Indian Status Test: A Look at the Supreme Court's Classification of the Freedmen of the Five Civilized Tribe of Oklahoma*, 7 AM. INDIAN L.J. 194, 214 (2018) [hereinafter "Summers, *Rethinking the Federal Indian Status Test*"]; *see also* Alberty v. United States, 162 U.S. 499, 501 (1896) (finding that a Freedman was not "Indian"); Lucas v. United States, 163 U.S. 612, 617 (1896) (same).

228. *See* Summers, *Rethinking the Federal Indian Status Test*, at 220–24 (arguing that the "Indian" status test violates the Equal Protection Clause as applied to the Freedmen of the Five Civilized Tribes of Oklahoma).

E. A Success Story: Deerleader v. Crow

The federal court for the Northern District of Oklahoma, which encompasses much of the Mvskoke reservation, recently granted a § 2254 writ of habeas corpus in *Deerleader v. Crow*.[229] An analysis of that case provides hope at the end of the tunnel for other Natives who wish to challenge their convictions.

In *Deerleader*, a Native American was convicted by a jury in Creek County, Oklahoma, of second-degree burglary and larceny of an automobile, both violations of state law.[230] Because Deerleader had been convicted of two prior felonies, his sentence was forty-five years as to both counts, to be served consecutively, for a total of ninety years of imprisonment.[231] He was sentenced on June 5, 2017.[232]

Following his conviction, Deerleader filed a direct appeal in the OCCA, challenging the sufficiency of the evidence to support his convictions and the length of his sentences.[233] The OCCA affirmed the judgment and sentence, and Deerleader applied for postconviction relief in state district court.[234] He claimed ineffective assistance of counsel at the trial and appellate levels; additionally, he asserted that the State lacked jurisdiction over his criminal prosecution because he is Native and a citizen of the Mvskoke Nation and committed the crimes within the historical boundaries of the Mvskoke reservation.[235] "The state district court seemingly found that Deerleader's claims were procedurally barred and without merit."[236] The state district court also noted that, because *Murphy*, the predecessor of *McGirt*, was then pending before the Supreme Court and the Tenth Circuit had issued a stay on the mandate of that case, Deerleader's claim was premature.[237] Deerleader then timely filed a post-conviction appeal to the OCCA.[238]

The OCCA rejected Deerleader's ineffective assistance of counsel and sufficiency of the evidence claims and held that his jurisdictional challenge was without merit with little explanation.[239] Deerleader then filed a § 2254 federal habeas petition on April 27, 2020.[240] Relevant to this Article, Deerleader challenged his conviction and sentence, claiming that the State lacked jurisdiction over him.[241]

Judge Dowdell of the Northern District of Oklahoma accepted Deerleader's contention that the State lacked jurisdiction over him and overturned his conviction and sentence, ordering his immediate release.[242] Judge Dowdell first discussed the *Murphy* and *McGirt* cases.[243] He noted that re-exhaustion of Deerleader's jurisdiction argument in

229. *Deerleader*, 2021 WL 150014, at *6 (N.D. Okla. Jan. 15, 2021).
230. *Id.* at *1.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Deerleader*, 2021 WL 150014, at *1.
235. *Id.*
236. *Id.* at *2.
237. *Id.*
238. *Id.*
239. *Deerleader*, 2021 WL 150014, at *2.
240. *Id.*
241. *Id.*
242. *Id.* at *6.
243. *Id.* at *3.

light of the recent *McGirt* decision (which was decided after the OCCA heard Deerleader's case) was unnecessary.[244]

Next, Judge Dowdell discussed the relevant habeas law.[245] He noted that § 2254 does not bar habeas relief because the OCCA's decision as to Deerleader's jurisdictional claim was contrary to clearly established federal law.[246] Judge Dowdell then proceeded to the merits of Deerleader's petition. He held that Deerleader's assertion that he was "Indian" was within the meaning of 18 U.S.C. §§ 1152 and 1153 (note that Judge Dowdell extended *McGirt*'s holding that the Mvskoke Nation's reservation is limited to Major Crimes Act offenses).[247] To establish his "Indian" status, Deerleader provided evidence that he was an enrolled member of the Mvskoke Nation and that he had 7/16 Mvskoke blood.[248] Judge Dowdell next reasoned that the law and record support Deerleader's contention that he committed the crimes in "Indian country" as defined in 18 U.S.C. § 1151(a).[249] Finally, after considering Deerleader's "Indian" status and the fact that the crimes were committed in "Indian country," Judge Dowdell found that Deerleader was entitled to federal habeas relief.[250]

As a result of this, Judge Dowdell was required to determine the remedy. He noted that "[f]ederal courts are authorized under 28 U.S.C. § 2243 to dispose of a habeas corpus petition as law and justice require and thus have broad discretion to craft appropriate habeas relief."[251] Judge Dowdell stated that because the State cannot correct the jurisdictional error in Deerleader's case through further proceedings, the appropriate remedy was to grant the petition for writ of habeas corpus and issue an unconditional writ setting aside the invalid judgment and sentence, barring retrial in state court, and directing the State to immediately release Deerleader from its custody.[252]

Despite the success of Deerleader in challenging his conviction, Native prisoners should keep in mind that they may still be tried in federal court if their state court convictions are overturned due to *McGirt*.[253] Double jeopardy does not limit the federal government's ability to re-prosecute the prisoner for a federal crime, such as a violation of the Major Crimes Act or some other federal criminal statute.[254]

F. Summary

Post-conviction rights and remedies since *McGirt* have been overstated.[255] As

244. *Deerleader*, 2021 WL 150014, at *3.
245. *Id.*
246. *Id.* at *4.
247. *Id.* at *5.
248. *Id.*
249. *Deerleader*, 2021 WL 150014, at *5.
250. *Id.*
251. *Id.* (quoting Clayton v. Jones, 700 F.3d 435, 443 (10th Cir. 2012)) (cleaned up).
252. *Deerleader*, 2021 WL 150014, at *5.
253. *See, e.g.*, United States v. Kepler, 2021 WL 66654, at *2 (N.D. Okla. Jan. 7, 2021) (denying defendant's motion to dismiss and noting that the Double Jeopardy Clause of the United States Constitution does not bar trial in federal court after a defendant has already been convicted of a crime is state court).
254. *See id.*
255. *See McGirt*, 140 S. Ct. at 2479 ("Still, Oklahoma and the dissent fear, '[t]housands' of Native Americans like Mr. McGirt 'wait in the wings' to challenge the jurisdictional basis of their state court convictions.").

Justice Neil Gorsuch put it in the *McGirt* opinion: "[D]efendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings."[256] These limitations include, as discussed above, exhaustion, waiver, and the one-year statute of limitations for challenging a conviction. The *Deerleader* case discussed above is the only case I found in which a Native prisoner successfully challenged his conviction in federal court.

On the bright side for defendants, however, this might not be a bad thing. As Justice Sonia Sotomayor observed during *McGirt*'s oral argument, "some defendants who would be entitled to challenge their convictions would choose not to because the risk would be too high for them" due to some higher penalties in federal court than in state court.[257] Justice Gorsuch echoed this sentiment in the majority opinion.[258] And many defendants will have served much of their sentences already. Further, defendants must keep in mind that they would be subject to prosecution again by the United States and the Mvskoke Nation, or both, if their conviction is overturned.[259] Therefore, it might not make sense for a defendant to challenge his or her conviction after *McGirt*.

VI. CONCLUSION

The practical effects of the *McGirt* decision as they relate to new rates of violence, criminal jurisdiction, police powers, and post-conviction rights are still inconclusive. Nobody can say for certain how this will affect the staggeringly high crime rates in Indian country. It remains to be seen how law enforcement will cope with the changes inherent in having three sovereigns with criminal jurisdiction in one major metroplex like Tulsa. Likewise, it is impossible to know how many Native prisoners will challenge their convictions and seek new trials.

It is clear, however, what should happen: The Mvskoke Nation should increase cooperation; the federal government should provide more funding to Lighthorse officers and other branches of the Mvskoke criminal justice system; and prisoners should challenge their convictions if they are able to do so within one year of their conviction becoming final.

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256. *Id.*

257. Transcript of Oral Argument at 18 ln.23–19 ln.1, *McGirt*, 140 S. Ct. 2479 (No. 18-9526).

258. *McGirt*, 140 S. Ct. at 2479 ("Still, Oklahoma and the dissent fear, '[t]housands' of Native Americans like Mr. McGirt 'wait in the wings' to challenge the jurisdictional basis of their state court convictions. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver.") (citation to the record omitted).

259. *See* United States v. Magnan, 863 F.3d 1284, 1291 (10th Cir. 2017).