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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES	**Case No. 3:16-cr-00436-SI**
v.	
JOHNNY ELLERY SMITH,	**RESPONSE TO DEFENDANT'S 28 U.S.C. § 2255 MOTION**
Defendant.	

Defendant Johnny Ellery Smith, a Native American, eluded police on the Warm Springs reservation and was charged in federal court with attempt to elude. In 2017, defendant pleaded guilty, but reserved the right to challenge the authority of the federal government to prosecute him. The Ninth Circuit rejected his jurisdictional challenge and concluded that the federal government retained the right to prosecute him for certain crimes, including state crimes under the Assimilated Crimes Act, 18 U.S.C. § 13. Now, having violated his supervised release, defendant once against challenges the right of the federal government to prosecute him. His attack on his conviction must be rejected.

FACTUAL BACKGROUND

In the September and again in October of 2016, defendant, a Native American, led Warm Springs police officers on two separate high-speed chases at night on the Warm Springs Indian Reservation.

In 1855, the Warm Springs and Wasco tribes entered into a treaty with the United States in which they ceded over ten million acres of their traditional territory to the United States government and reserved the Warm Springs Reservation for their exclusive use.[1] Because Warm Springs is an Indian reservation and defendant is a Native American, jurisdiction for his attempts to elude rested with the federal government.

Defendant, who had numerous state and tribal convictions for traffic offenses (PSR ¶¶ 26, 27, 33, 34, 36), as well as a prior federal conviction for attempting to elude the police (PSR ¶ 28), was indicted by a federal grand jury for two counts of fleeing or attempt to elude a police officer for these two criminal episodes in violation of Or. Rev. Stat. § 811.540(1), assimilated for federal prosecution under the Assimilative Crimes Act, 18 U.S.C. § 13 (ACA), and the Indian Country Crimes Act, 18 U.S.C. § 1152 (ICCA). (ECF No. 1).

Following his indictment, defendant moved to dismiss the charges claiming that he was not subject to Oregon law via the ACA or the ICCA. Because defendant was unquestionably a Native American who violated state law on Reservation land, and because no other federal law applied to his conduct, this Court concluded that defendant could be prosecuted for eluding and attempting to elude police. (ECF No. 21).

[1] http://www.warmsprings.com/2016/08/history/ (last visited Dec 21. 2020).

Thereafter, defendant pleaded guilty to both charges in the indictment without the benefit of a plea agreement. (ECF No. 23). Defendant was sentenced to a total sentence of 19 months and one day, followed by a three-year term of supervised release. (ECF Nos. 34, 35). Defendant appealed, arguing the federal government lacked jurisdiction to prosecute him. (ECF No. 37).

The Ninth Circuit disagreed and affirmed the conviction, concluding that "the ACA applies to Indian County" and that defendant's crimes were properly assimilated. *United States v. Smith*, 925 F.3d 410, 415 (9th Cir. 2019). In October 2019, the Supreme Court denied certiorari. (ECF No. 70).

In July 2020, the Supreme Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which held that the Creek nation in Oklahoma was "Indian country" and subject to federal—not state—jurisdiction.

On October 30, 2020, defendant was arrested for violating the terms of his supervised release. (ECF No. 76). Two weeks later, on November 16, 2020, defendant filed a habeas petition seeking to vacate his conviction or, in the alternative, to terminate his supervised release. (ECF No. 78). The petition argues that the decision in *McGirt* effectively overrules *Smith*.

ARGUMENT

Defendant is challenging his underlying conviction. In the alternative, he seeks termination of his supervised release. This challenge to his prior conviction is properly treated as a habeas petition. *See United States v. Cate*, 971 F.3d 1054 (9th Cir. 2020) (holding that the validity of an underlying conviction cannot be challenged in a supervised release revocation proceeding).

Defendant's challenge to his conviction fails. The Supreme Court's decision in *McGirt* does not undermine the Ninth Circuit's decision in *Smith*. The federal government had—and still has—jurisdiction over his crime. His habeas petition should be denied.

Given defendant's seeming inability to comply with the terms of his supervision and the risk his noncompliance presents, this Court should also decline to terminate his supervision early pursuant to 18 U.S.C. § 3583(e)(1).

A. Defendant's Habeas Motion

As a general rule, "a motion under 28 U.S.C. § 2255 is the exclusive means by which a federal prisoner may test the legality of his detention[.]" *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006) (internal citations omitted). When it formulated the § 2255 remedy for federal prisoners to replace the traditional habeas relief, Congress included several procedural bars and limits for prisoners seeking § 2255 review. *See McCarthan v. Dir. Of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1082 (11th Cir. 2017) (en banc).

Typically a habeas petition must be filed within one-year from the date a conviction became final; defendant's petition was not 28 U.S.C. § 2255(f)(1). There is an exception for a claim based on an intervening decision by the Supreme Court made retroactive to his case. *See id.* at § 2255(f)(3) (allowing late-filed claim based on new, retroactive right). Defendant's motion relies on *McGirt*, 140 S. Ct. 2452, which was decided within the last year. Because defendant's petition fails on the merits, this Court need not decide the retroactivity of *McGirt*.

B. *McGirt* Does Not Undermine *Smith*

The core of defendant's contention is that the Supreme Court's decision in *McGirt* undercuts the Ninth Circuit's decision in *Smith.* It does not.

The question in *Smith* was whether the ACA, 18 U.S.C. § 13, applied to crimes committed by Native Americans on the Warm Spring reservation. The Ninth Circuit concluded that it does. And that decision remains good law and it is binding on this Court.

The Ninth Circuit concluded it the ACA applied for two reasons—based on the plain language of 18 U.S.C. § 7, which defines special maritime and territorial jurisdiction of the United States, and by operation of the ICCA, 18 U.S.C. § 1152. *Smith,* 925 F.3d 410, 418. The Supreme Court's decision is *McGirt* does not undermine either holding.

First, the Ninth Circuit concluded that "any Indian reservation or land that is (1) 'reserved or acquired for the use of the United States,' and (2) 'under the exclusive or concurrent jurisdiction thereof' falls within the ambit of 18 U.S.C. § 7." *Id.* at 415-416. And it found Warm Springs clearly fell within that ambit. In doing so, it specifically rejected defendant's argument that the treaties between Warm Springs and the United States—treaties that vested Warm Springs with exclusive jurisdiction—precluded the application of this provision. *Id*. The treaties defendant cited "provide specific examples of how Indian reservations were 'reserved or acquired' by the United States for the federal purpose of protecting Indian tribes, which traditionally were considered 'wards of the nation' under federal law." *Id.* at 416 (citations omitted). In other words, Congress made clear an intention to include Indian Country as part of the exclusive or concurrent jurisdiction in § 7. *Id.* at 416-418. And the treaties supported the application of the ACA to Warm Springs.

Second, the Ninth Circuit concluded that the phrase "'general laws of the United States' in the ICCA [] refer[ed] to 'federal enclave laws,' meaning those laws passed by the federal government in exercise of its police powers in areas of exclusive or concurrent federal

jurisdiction as defined in 18 U.S.C. § 7." *Id.* at 416 (citations omitted). Thus, "[t]he ACA, as a federal enclave law, thus also applies to Indian country by operation of the ICCA." *Id*. at 418 (citing cases).

Defendant's challenges to those clear holdings based on *McGirt* are misplaced. In *McGirt*, the question before the Supreme Court was whether defendant McGirt, an enrolled member of the Seminole Nation of Oklahoma who committed his crimes on the Creek Reservation, could be prosecuted in state court for sexual assault. 140 S. Ct. at 2459. The answer to that question rested on whether the Creek Reservation was considered "Indian Country" for purposes of the Major Crimes Act (MCA). *Id.* The Supreme Court concluded it was and as a result, jurisdiction for McGirt's crimes rested with the federal government.

Much like the Warm Springs Reservation, Congress established the Creek Reservation as part of a treaty in which Congress promised the Creek tribe certain lands in exchange for an agreement by the Creek Indians to cede other land to the United States. *Id.* at 2460. While it was not specifically called a reservation, the Supreme Court concluded the language was sufficient to conclude that area was a reservation. *Id*. at 2461. As part of the treaty, the Creek "were to be 'secured in the unrestricted right of self-government,' with 'full jurisdiction' over enrolled Tribe members and their property." *Id.* at 2461. But, of course, as the Supreme Court recognized, many of the promises made in the treaty were broken because the land once held for the exclusive use of the tribe, now belongs to people not affiliated with the Tribe. *Id.* at 2462. After walking through the history of the encroachment onto Creek land as well as the Creek Nation's self-governance, the Supreme Court concluded that there was no Act of Congress that "dissolved the Creek Tribe or disestablished its reservation." *Id.* at 2463-48.

The Supreme Court then went on to clarify that there was no reason to look to other sources to determine the status of the tribe, because "once a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *Id.* at 2469 (citation omitted). Once it was clear that the Creek nation was an established reservation, the state lost jurisdiction over McGirt and the MCA applied. In reaching the conclusion that the MCA applied, the Supreme Court recognized that "[b]y subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves," but there were limits on that intrusion. *Id.* at 2459.

In *McGirt*, the question was whether the state had overstepped its authority in Indian country, not whether a Native American could be prosecuted in federal court for a crime committed in Indian country. But, McGirt does, by default, answer that question in the affirmative. The federal government, not the state of Oklahoma, had jurisdiction to try McGirt. *Id.* at 2478. And it did; McGirt was found guilty of aggravated sexual abuse and abusive sexual contact in federal court.[2] This is true despite the clear promise that the Creek nation would have "full jurisdiction" over its members. *Id.* at 2461. Even though Congress had reauthorized the Creek tribal courts, the federal government retained the right to prosecute Indians for major crimes committed in Indian country. *Id*. at 2478.

The *McGirt* decision focused on the MCA and it does not appear defendant is seriously challenging the application of the MCA to the Warm Springs Reservation. If he was, any such

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[2] https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-found-guilty-aggravated-sexual-abuse-abusive-sexual-contact-indian-country (last visited Dec. 21, 2020).

argument would be doomed. Instead, defendant focuses on the ICCA, 18 U.S.C. § 1152, and argues that this Court lacks jurisdiction under that provision. This focus does not save his argument.

As the Supreme Court recognized, the ICCA is "a neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country." 140 S. Ct. at 2479. Nothing in *McGirt* discounts the application of the ICCA to the Creek Nation. In fact, the majority in *McGirt* cites 18 U.S.C. § 1152, to dispute the notion that crimes in Indian country in Oklahoma could go unpunished. 140 S. Ct. at 2479. Similarly, nothing in *McGirt* undermines Congress' ability to legislate Indian affairs; in fact, that is the focus of *McGirt*—Congress' actions with respect to Indian reservations.

In this case, applying the principles of *McGirt* and looking at Congress' intent, the answer is clear—both the MCA and the ICCA apply to Warm Springs. The Treaty with the Tribes of Middle Oregon, 1855 created a reservation that is now referred to as the Warm Springs Reservation. *See* 12 Stat. 963. The ICCA applies to "Indian country." 18 U.S.C. § 1152. Indian country is defined by Congress a "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation" and "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151. There can be little doubt that Congress established Warm Springs as a reservation. Through the MCA and the ICCA, Congress choose to exercise federal jurisdiction over certain criminal behavior in Indian reservations; this clearly includes Warm Springs. *See McGirt*, 140 S. Ct. at 2459.

Defendant's argument that the Supreme Court has effectively overruled the Ninth Circuit's conclusion that the ICCA applies to Warm Springs requires a tortured reading of *McGirt*. The application of the MCA and the ICCA turn on whether the land at issue is a reservation. Warm Springs is. Yet, defendant would have this Court construe the grant of exclusive jurisdiction to Warm Springs in 1855 as preempting the ICCA. The ICCA may be, like the MCA, a breaking of a promise to the tribes, but it is also a clear statement of Congress' intent to apply federal law to Indian country. This intent controls; if Congress had wanted to exempt Warm Springs (or the Creek Nation) from the MCA or the ICCA, it needed to say so. It did not. The Ninth Circuit's decision in *Smith* that the ICCA applies to Warm Springs is not irreconcilable with *McGirt*—it is completely consistent.

Once it becomes clear that—as the Ninth Circuit clearly held in *Smith*—the ICCA applies to Warm Springs, the remainder of defendant's challenges to the *Smith* decision unravel. It appears that defendant is arguing that the grant of sovereignty to Warm Springs means that Warm Springs has retained "exclusive jurisdiction" over all criminal offenses (except maybe those in the MCA). Running this its logical conclusion, defendant would limit jurisdiction on the Warm Springs reservation to the MCA and the limited jurisdiction of tribe itself. There is no basis for this argument.

To the extent defendant is trying to argue that Warm Springs has exclusive jurisdiction over the crimes he committed, taking him out of the ambit of § 1152, his argument also fails. The plain language of the ICCA empowers the federal government to prosecute the general laws of the United States within Indian country. This authorization is limited, and does not apply when 1) offenses involve crimes committed by one Indian against the person or property of

another Indian; 2) crimes that have been punished by the local law of the tribe; and 3) exclusive jurisdiction over the offense is reserved to the tribe by treaty stipulation. 18 U.S.C. § 1152. But, nothing in the Treaty of 1855 can be read to mean that Warm Springs exercises exclusive jurisdiction over all specific criminal offenses. To read the statute this way would render the ICCA superfluous for almost every tribe in the nation. It would also be contrary to Congress' clear intent to make sure that Indian reservations do not become enclaves where crimes go unpunished.

Defendant's focus on the concurrence in *Smith* to support his argument also misses the point. While the concurrence questioned the straight application of the ACA, it did not question the conclusion that the ICCA made the ACA applicable to Warm Springs. Even if there was some doubt on direct applicability of the ACA (and there is not), the alternative conclusion holds—the ACA is part of the federal enclave law that applies to reservations like Warm Springs based on the ICCA. The concurrence makes this clear—"the bottom line is the same: the ACA applies to Indian country subject to the ICCA's three exceptions." *Smith*, 925 F.3d at 423.

At bottom, defendant takes issue with the application of the ACA, but the plain language of the ICCA empowers the federal government to prosecute the general laws of the United States within Indian country. Congress has endorsed this application of the federal criminal law to crimes committed in Indian county—including on Warm Springs—and nothing in *McGirt* undermines this decision. The conclusion in *Smith* remains good law and this Court is bound by that decision.

C. This Court Should Decline to Terminate Supervision

In the alternative, defendant requests that this Court dismiss the violation and terminate supervision under 18 U.S.C. § 3583 (e)(1). Given defendant's history, his performance on supervision and the general risks of his conduct, this is not a case for early termination. Defendant needs the services offered by Probation to address his addiction issues. He is a high risk to reoffend in the community and supervision is necessary.

CONCLUSION

Defendant eluded police not once but twice. The Ninth Circuit rejected his challenge to this Court's jurisdiction over his criminal case. Nothing in the Supreme Court's decision in *McGirt* undermines the Ninth Circuit's conclusion that the ICCA applies to Warm Springs. As such, this Court should deny defendant's habeas petition. This Court should also decline to terminate defendant's supervision early because he remains a danger and needs the services that are offered by Probation.

Dated: December 21, 2020

Respectfully submitted,

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