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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

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| **UNITED STATES OF AMERICA,** | **Case No. 3:16-cr-00436-SI** |
| **Plaintiff,** | **REPLY TO GOVERNMENT RESPONSE ON PETITION TO VACATE, SET ASIDE OR CORRECT CONVICTION PURSUANT TO 28 U.S.C. § 2255** |
| **v.** | |
| **JOHNNY ELLERY SMITH** | **ORAL ARGUMENT REQUESTED** |
| **Defendant.** | |

The defendant, Johnny Smith, through his attorney, respectfully submits this reply to the government's response to his motion to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255.

**A. The Intervening Supreme Court Opinion In *McGirt* Represents A Change In Indian Law Jurisprudence That Undermines The Holding And Reasoning Of The Ninth Circuit's Opinion In This Case.**

The government's response ignores the fundamental reorientation of Indian law jurisprudence the Supreme Court announced in *McGirt v. Oklahoma*, 140 S. Ct. 407 (2019). Prior to *McGirt,* in deciding whether Congress had diminished a reservation or a tribe's sovereignty,

courts looked to three sources: 1) the statutory or treaty text, 2) the circumstances surrounding a statute's passage, and 3) subsequent historical events. *Solem v. Bartlett,* 465 U.S. 463 (1984). However, as the Seventh Circuit recognized, "*McGirt* adjust[ed] the *Solem* framework to place a greater focus on statutory text" in determining whether Congress's words broke a treaty promise. *Oneida Nation v. Village of Hobart,* 968 F.3d 664, 668 (7th Cir. 2020). The government's response makes no mention of *Oneida Nation* and the Seventh Circuit's recognition that the earlier framework for addressing diminishment of tribal sovereignty in Indian country—as occurs in treating a congressionally-approved Indian reservation as a "federal enclave"—has now changed.

Because the government failed to address the changes rendered by *McGirt,* the government failed to rebut the defense's assertion that the Ninth Circuit's decision in this case is in conflict with *McGirt.* As the government concedes, the Treaty of 1855 was explicit in its promise that the Warm Springs reservation was set aside for the *exclusive* use of the Warm Springs Tribe. Govt. Resp. at 2; Art. 1, para. 5, 12 Stat. 963. Congress has the power to break the promise of exclusive use made in the Treaty of 1855, but under *McGirt*, to do so, "it must say so." *McGirt,* 140. S. Ct. at 2462. Not a syllable of the plain language of the Assimilative Crimes Act and 18 U.S.C. § 7 (the statutory provision defining federal enclaves for purposes of the Assimilative Crimes Act) transforms a treaty-recognized reservation for the exclusive use of the Tribe into the "special maritime and territorial jurisdiction of the United States." 18 U.S.C. §§ 7 and 13. Moreover, although largely unaddressed by the government, the Indian Country Crimes Act provides an exception to the criminal jurisdiction in Indian country in "any case where, by treaty stipulations, the exclusive jurisdiction over offenses is or may be secured by the Indian tribes respectively." 18

U.S.C. § 1152. Again, no statutory text compromises the tribal rights created by the treaty stipulations in this case.

The plain language of the Ninth Circuit opinion is irreconcilable with *McGirt*'s simple requirement that, when Congress intends to intrude on treaty rights, "it must say so": "The plain text of the ACA lacks any express reference to Indians or Indian country." *United States v. Smith*, 925 F.3d 410, 415 (9th Cir. 2019). In the absence of express language, the *Smith* court turned to a vague history in which an understanding "emerged" that when the government set aside land for use by an Indian tribe, the land was understood to still be "reserved or acquired for the use of the United States." *Id*. at 416. This is precisely the type of indirect and unarticulated reasoning the Court in *McGirt* rejected as providing a basis for compromising treaty promises. The *Smith* court's holding and mode of analysis are irreconcilable with the intervening authority of *McGirt*, essentially echoing the methodology expressly discarded by the Supreme Court's rejection of historical context to make up for the lack of express text reducing tribal sovereignty. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (Lower courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'") (citation omitted). The government provides the Court no language in any statute allowing the government to break the exclusive use promise made in the Treaty of 1855 nor is there such language compromising the exception promised in the Indian Country Crimes Act.

After *McGirt,* "extratextual sources" cannot be used to manufacture ambiguity where none exists in the text of the treaty or statute. *Oneida*, 968 F.3d at 685. The government fails to address how, despite the promises of exclusive use and an exception to jurisdiction made by Congress, prosecution of Mr. Smith was allowed without the *Smith* court finding any explicit language

revoking the promises as required by *McGirt.* As the Ninth Circuit held en banc, where intervening Supreme Court authority undercuts the holding or reasoning of prior lower court decisions, subsequent courts are obligated by the rules of stare decisis to follow the controlling authority – both in holding and mode of analysis – from the Supreme Court. *Miller*, 335 F.3d at 900 (intervening Supreme Court authority controlled over lower court authority because it "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.").

**B. Rather Than Address Conflict Between *McGirt* And The Application Of The Assimilative Crimes Act To The Warm Springs Reservation, The Government Focusses On The Indian Country Crimes Act And Major Crimes Act, Which Supports The Defendant's Argument Why The Assimilative Crimes Act Does Not Apply To The Warm Springs Reservation.**

Rather than address the conflict *McGirt* creates with the *Smith* court's opinion applying the Assimilative Crimes Act to the Warm Spring Reservation, the government instead focuses on the Indian Country Crimes Act and the Major Country Crimes Act. Govt. Resp. at 7-10. As the government would have it, because the Indian Country Crimes Act and Major Crimes Act expressly state their application to "Indian country," such express language satisfies *McGirt's* requirement that promises made in tribal treaties only be broken with express language from Congress.

But the express language in those statutes only solidifies the point that no such language is found anywhere in the Assimilative Crimes Act or 18 U.S.C. § 7. Since Mr. Smith was not prosecuted under the Major Crimes Act or Indian Country Crimes Act, but rather under statutes that do not even use the express term "Indian country," the government's response serves as a

perfect example of why Mr. Smith's prosecution violates tribal sovereignty protected by the Supreme Court's holding and reasoning in *McGir*t.

**1. The Government Prosecuted Mr. Smith Under Statutes That Never Expressly Mention Indian Country Nor Purport To Intrude On Treaty-Protected Tribal Sovereignty.**

The government prosecuted Mr. Smith under the Assimilative Crimes Act. 18 U.S.C. § 13. The Assimilative Crimes Act allows for the prosecution of state crimes in federal court so long as no federal statute punishes the same conduct *and*—crucially—the crime occurred on a federal enclave as defined in 18 U.S.C. § 7. Section 7 includes a long list of very specific places to which the Assimilative Crimes Act applies, including the high seas, ships on the Great Lakes, islands or rocks containing deposits of guano, and airplanes among other places. Neither provision mentions Indians or Indian country.

In contrast to the lack of reference to Indian country in those statutes, the Major Crimes Act expressly confers on the federal government jurisdiction to prosecute Indians who commit certain enumerated major crimes "within the Indian country." 18 U.S.C. § 1153(a). The government could not have prosecuted Mr. Smith under the Major Crimes Act because eluding the police is not one of the enumerated major crimes. The Major Crime Act demonstrates that Congress knows exactly how to compromise tribal sovereignty and expand federal criminal jurisdiction by using express language as required by *McGirt*.

Similarly, the Indian Country Crimes Act allows prosecution of non-major federal crimes committed in "the Indian country." 18 U.S.C. § 1152. Mr. Smith could not have been prosecuted exclusively under the Indian Country Crimes Act because the Indian Country Crimes Act does not allow for the prosecution of state crimes in federal court. Instead, because Mr. Smith committed a

state crime in Indian country, the government assimilated the state crime through the Assimilative Crimes Act.

**2. The Express References To "Indian Country" In The Indian Country Crimes Act And Major Crimes Act Establishes That Applying The Assimilative Crimes Act To The Warm Springs Reservation Cannot Be Reconciled With The Supreme Court's Decision In *McGirt*.**

The government argues that both the Indian Country Crimes Act and the Major Crimes Act apply to the Warm Springs reservation because both statutes expressly state their application to "Indian country," satisfying *McGirt's* requirement that promises made in treaties may only be broken with express Congressional language. Govt. Resp. at 8. What the government ignores—because it is fatal to their argument—is that that Assimilative Crimes Act contains no equivalent express language indicating that it applies to Indian country, let alone to a tribe that was explicitly promised exclusive use in the Treaty of 1855.

If nothing else, the Indian Country Crimes Act and the Major Crimes Act prove that, when Congress wants to apply a federal criminal statute to Indian country, they know how to do so expressly by stating the statute applies to "Indian country." Where Congress uses a term in one statute, but omits it in another related statute, courts must presume the omission was intentional. *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) (holding that where Congress omits a term from a statute, "[w]e have said that '[d]rawing meaning from silence is particularly inappropriate' where 'Congress has shown that it knows how to [legislate] in express terms.'" (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)); *see generally Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1232 (9th Cir. 2020) ("Under the maxim of *expressio unius est exclusio alterius*, there is a presumption 'that when a statute designates certain persons, things, or manners

of operation, all omissions should be understood as exclusions.'") (quoting *Copeland v. Ryan*, 852 F.3d 900, 907 (9th Cir. 2017) (quoting *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991)).

The Assimilative Crimes Act contains no reference to Indians or to Indian country. Rather, the Assimilative Crimes Act applies to a long list of federal enclaves defined in 18 U.S.C. § 7. Those federal enclaves include the high seas, vessels voyaging upon the Great Lakes, islands containing guano deposits, and aircraft among others. The only place referred to in § 7 that could even plausibly include Indian country is contained in § 7(3). Section 7(3) states that the Assimilative Crimes Act applies to "[a]ny *lands reserved or acquired for the use of the United States*, and under the exclusive or concurrent jurisdiction thereof." 18 U.S.C. § 7(3) (emphasis added). Under *McGirt*'s respect for treaty language, the statutory language cannot be reconciled with the treaty's recognition of exclusive tribal use, making it an unwarranted leap to presume that Congress meant to include Indian country by implication in § 7(3) after providing an exhaustive list of areas to which federal enclave law directly applies. *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 695 (9th Cir. 2004) (describing the assertion that Congress intended "United States military and other reservations" to apply to Indian reservations without stating so as an unjustified "leap").

But, more problematic than matters of statutory construction is the fact that, while the Assimilative Crimes Act applies to" [a]ny lands reserved or acquired for the use of the United States," as the government concedes, the Treaty of 1855 "reserved the Warm Spring reservation for their [the Tribe's] exclusive use" not the United States' use. Govt. Resp. at 2. After *McGirt,* courts must not "lightly infer" a "breach" of a promise made in a treaty. 140 S. Ct. 2462. Rather, where Congress intends to break a promise made in a treaty, "it must say so." *Id.* With the Major

Crimes Act and Indian Country Crimes Act, Congress expressly broke the exclusive use promise of the treaty of 1855 by explicitly stating that the statutes apply to "Indian country." But the language of 18 U.S.C. § 7(3)—applying the Assimilative Crimes Act to "[a]ny lands reserved or acquired for the use of the United States"—not only does not expressly include Indian country, but is in direct conflict with Congress' promise in the treaty of 1855 that the Warm Springs reservation would be "set apart, and, so far as necessary, surveyed and marked out for *their* [tribal members'] *exclusive use*[.]" Art. 1, para. 5, 12 Stat. 963 (emphasis added).

In summary, the government explains well how Congress expressly broke the exclusive use promise it made in the Treaty of 1855 with the Major Crimes Act and Indian Country Crimes Act's express references to "Indian country." However, the government does not—and cannot—explain how, as required by *McGirt,* Congress expressly broke its exclusive use promise with the Assimilative Crimes Act, a statute that does not obliquely, let alone expressly, refer to Indian country.

**C. If The Court Does Not Vacate Mr. Smith's Conviction, It Should Immediately Terminate His Supervision And Release Him, Not—As Suggested By The Government—Because He Has Earned Early Termination Pursuant To 18 U.S.C. § 3583(e)(1), But Because His Continued Incarceration Is Unlawful Under 18 U.S.C. § 4001(a).**

The government argues that Mr. Smith should not have his supervision terminated because "given defendant's history, his performance on supervision and the general risks of his conduct, this is not a case for early termination" under 18 U.S.C. § 3583(e)(1). Govt. Resp. at 11. However, Mr. Smith is not asking that his supervision be terminated pursuant to § 3583(e)(1). Rather, Mr. Smith is asking that his supervision be terminated pursuant to 18 U.S.C. § 4001(a). Section 4001(a) prohibits the incarceration of an individual except pursuant to an Act of Congress. Because Mr.

Smith is incarcerated for minor state law crimes that—as *McGirt* now makes clear—cannot be charged in federal court, his conviction and incarceration are not authorized by an Act of Congress, and he must be immediately released *regardless* of whether he is a "good case" for early termination under § 3583(e)(1)

**Conclusion**

The defense does not dispute the government's assertion that had Mr. Smith been prosecuted exclusively under the Indian Country Crimes Act or Major Crimes Act—both of which expressly refer to "Indian country"—*McGirt* would not have undermined the validity of his convictions. However, the government prosecuted Mr. Smith under the Assimilative Crimes Act, a statute that by its terms applies only to lands "acquired for the use the United States." Moreover, with the Indian Country Crimes Act, Congress promised an exception to criminal jurisdiction in Indian county for "any case where, by treaty stipulations, the exclusive jurisdiction over offenses is or may be secured by the Indian tribes respectively." 18 U.S.C. § 1152.

As required by *McGirt,* Congress must speak clearly when breaking promises made to Indian tribes in treaties or statutes. Because Congress has not explicitly broken the promises it made in the Treaty of 1855 or the Indian Country Crimes Act, the Ninth Circuit's opinion in *United States v. Smith* is clearly irreconcilable with the holding and the reasoning provided by the Supreme Court in *McGirt.* The Court must vacate Mr. Smith's convictions for minor state law crimes because the government never had jurisdiction to prosecute the case in federal court.

RESPECTFULLY SUBMITTED this 28th day of December, 2020.

*/s/ Conor Huseby*
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