ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TRAVIS JOHN HOGNER,	)	
	)	
Appellant,	)	
v.	)	
	)	Case No. F-2018-138
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	
	)	

SUPPLEMENTAL BRIEF OF APPELLANT
FOLLOWING REMANDED EVIDENTIARY HEARING

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES
CASE AUTHORITIES

FEDERAL CASES

MISCELLANEOUS

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STATEMENT OF THE CASE AND FACTS

Mr. Hogner was accused of committing a number of crimes and was acquitted of all but one: possession of a firearm after previous felony conviction. Because Mr. Hogner had prior felony convictions, the jury found him guilty of possessing the firearm and sentenced him to 50 years in prison.

Mr. Hogner appealed his conviction. One of his propositions of error was that the State had no jurisdiction to prosecute him because he was an Indian and he committed his crime in Indian Country. This Court remanded the case to the district court for an evidentiary hearing to discover whether Mr. Hogner was indeed an Indian and whether the crime occurred in Indian Country. Reference to the record with include the record filed in this Court on remand (R.) and the evidentiary hearing transcript. (E.H.)

The parties stipulated to the fact that Mr. Hogner was an Indian and that that the crime occurred within the historical boundaries of the Cherokee Nation. (R. 152) The only issue that was left to be resolved by evidentiary hearing was whether the Cherokee reservation was established as a

reservation by Congress and whether it had since been disestablished. Mr. Hogner argued for the establishment and continued existence of the reservation and the State of Oklahoma took no position as to whether a reservation had been established. (R. 6)

After the hearing, the district judge concluded that a reservation had been established and that the crime occurred in Indian Country. (R. 160) This Court's order stated that a supplemental brief, "addressing only those issues pertinent to the evidentiary hearing" may be filed by either party. (R. 4)

PROPOSITION

MR. HOGNER'S CONVICTION MUST BE REVERSED AND DISMISSED BECAUSE HE PROVED INDIAN STATUS AND THE DISTRICT COURT OF CRAIG COUNTY CORRECTLY FOUND THE CHEROKEE NATION HAS NOT BEEN DISESTABLISHED.

Since the issue of Indian status was dealt with entirely by stipulation, Appellant's brief will only concern the issue of whether the crime occurred in "Indian Country."

The parties agreed that the crimes occurred within the "historical boundaries of the Cherokee Nation." (R. 152) Therefore, the only questions before the district court were whether a reservation had ever been established for the Cherokees and whether it still exists today.

The analysis from *McGirt v. Oklahoma,* 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020), leads to the conclusion that Congress established a reservation not only for the Creeks, but also for the Cherokees. The *McGirt* analysis started with what the United States Supreme Court said "should be obvious." Congress established a reservation for the Creeks. *McGirt,* 140 S. Ct. 2452 at 2460. To reach this conclusion, the Court pointed to two things. First, they pointed to the language that granted the creeks a "permanent home", second they were given the right to self-governance. *McGirt,* 140 S. Ct. 2452 at 2462.

The Cherokee treaties mirror these two important elements. In the Treaty with the Western Cherokee, 1833, the text states that, "The United States agrees to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven million acres of land, to be

bounded as follows..." language this is later followed by a legal description of the land. *Treaty With the Western Cherokee, 1833,* 7 Stat 414.

Further, in the Treaty with the Cherokee, 1835, the treaty has,

> a view to reuniting their people in one body and securing a *permanent home* for themselves and their posterity tin the country selected by their forefathers without the territorial limits of the State sovereignties and where they can *establish and enjoy a government of their choice* and perpetuate such a state of society as may be most consonant with their views, habits and conditions, and as may tend to their individual comfort and their advancement in civilization.

Treaty with the Cherokee, 1835, 7 Stat. 478. (emphasis added)

From the plain language of this treaty, it is apparent that Congress intended to do the same thing with the Cherokees that it did with the Creeks, establish a permeant home with the rights of self-governance—in other words, establish a reservation.

Like Creek treaty promises, the United States' treaty promises to the Cherokees "weren't made gratuitously." *McGirt,* 140 S. Ct. 2452 at 2462. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi. *Treaty with the Cherokee, 1835,* 7 Stat. 478.

The lands were only diminished by the express sessions in the 1866 and by an 1891 agreement ratified by Congress in 1893. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "the boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846

diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." *1999 Cherokee Constitution*, art. 2.

Congress established a reservation for the Cherokee. These early treaties, like the early treaties of the Creeks, did not refer to the Cherokee lands as a "'reservation'– perhaps because that word had not yet acquired such distinctive significance in federal Indian law." *McGirt*, 140 S. Ct. 2452 at 2461. But the Supreme Court does not insist "on any particular form of words" when it comes to establishing a reservation. *McGirt*, 140 S.Ct. 2452 at 2463. Like the Creek, the Cherokee were promised of a permanent home, assured the right of self-government on those homelands, and promised the lands "would lie outside both the legal jurisdiction and geographical boundaries of any State." Under any definition, this was a reservation." *McGirt*, 140 S.Ct. at 2462. Because of this, this Court should adopt the findings of the district court in holding that Congress created a reservation for the Cherokees.

The Cherokee Nation was never disestablished

On July 9, 2020, the United States Supreme Court affirmed the Tenth Circuit's decision in *Murphy, Sharp v. Murphy*, 140 S.Ct. 2412, 207 L.Ed.2d 1043 (2020), and decided *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), determining that the Creek Reservation was never disestablished. The Court held that Congress created a reservation for the Creeks through a series of 19th century treaties, even though the early treaties did not refer to the designated lands as a "reservation." *McGirt*, 140 S.Ct. at 2461.

The Court rejected Oklahoma's argument that the Creek Nation's original fee title to the land precluded reservation status. *McGirt,* 140 S.Ct. at 2475. The Court emphasized that Congress alone can disestablish as reservation, *McGirt,* 140 S.Ct. at 2462-2463, 2468, and that Congress neither terminated the reservation through allotment, *McGirt,* 140 S.Ct. at 2463-2465, nor through certain intrusions on the Creek's sovereignty and right to self-govern in the late 19th and early 20th centuries, *McGirt,* 140 S.Ct. at 2465-2467.

The Court determined that the reservation was not disestablished by Oklahoma's historical practice of exercising jurisdiction over Native American offenders in the region, *McGirt,* 140 S.Ct. at 2470-2471, by statements of tribal leaders and federal government officials, *McGirt,* 140 S.Ct. at 2472, or by white settlement, *McGirt,* 140 S.Ct. at 2473. The Court held that the Major Crimes Act applied to all of Oklahoma immediately upon statehood and that no exception was created by the Oklahoma Enabling Act or otherwise. *McGirt,* 140 S.Ct. at 2476-2478. The *McGirt* opinion pertained only to the Creek Reservation. *McGirt,* 140 S.Ct. at 2479. "[B]ut the Court's reasoning portends that there are four more such reservations in Oklahoma." *McGirt,* 140 S.Ct. at 2482, Roberts, C.J., dissenting. One of these four reservations is the Cherokee reservation.

It is settled law that only Congress can disestablish an Indian Reservation or diminish its boundaries. *See Solem v. Bartlett,* 465 U.S. 463, 470, 104 S. Ct. 1161, 1166, 79 L. Ed. 2d 443 (1984). The reason that the

McGirt Court held that the Creek reservation was not disestablished was because in order for a reservation to be so disestablished, Congress must explicitly say so. As the United States Supreme Court stated, "If Congress wishes to break the promise of a reservation, it must say so." *McGirt*, 140 S. Ct. 2452 at 2462. And although there is no particular form of words that is necessary for disestablishment, Congress commonly does so with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests. *McGirt*, 140 S. Ct. at 2463, (citing *Nebraska v. Parker*, 557 U.S. 481, 136 S.Ct. 1072, 194 L.Ed. 2d 152 (2016).)

Here, just like with the Creek reservation, there is no "statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands *See McGirt*, 140 S. Ct. at 2464 "Courts do not lightly infer that Congress has exercised its power to disestablish or diminish a reservation." *Murphy v. Royal*, 875 F.3d 896, 918 (10th Cir. 2017), aff'd sub nom. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) Indeed, the Supreme Court entertains a "presumption" that the reservation is not disestablished. *Id.*

The State cannot and did not point to any such language regarding the Cherokee reservation. Therefore, this Court should find, as the district court did, that Congress did not disestablish the reservation for the Cherokees.

CONCLUSION

The district court, relying on relevant case law, stipulations, and federal treaties, concluded that Mr. Hogner is an Indian and that his crime occurred in "Indian Country." This Court should adopt the findings of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on October 22, 2020, a true and correct copy of the foregoing Brief of Appellant was served upon the Attorney General by leaving a copy with the Clerk of the Court of Criminal Appeals for submission to the Attorney General, and was caused to be mailed, via United States Postal Service, postage pre-paid, to others listed below.

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