STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WALTER JOSEPH CASWELL,

Defendant-Appellee.
_____/

Court of Appeals No. 368232

Mackinac Circuit Court No. 23-4360-AR

92nd District Court No. 18D657689A/B-SM

REPLY BRIEF OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

John S. Pallas (P42412)
Attorney for Plaintiff-Appellant
Criminal Trials and Appeals Division
525 W. Ottawa Street
Lansing, MI 48933
(517) 335-7650
pallasj@michigan.gov

Kelly M. Drake (P59071)
Attorney for Plaintiff-Appellant
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
drakek2@michigan.gov

Dated: November 29, 2023

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INTRODUCTION

In his answer to the application for leave to appeal, Defendant Walter Joseph Caswell makes little effort to argue that the evidence he offered was sufficient to meet his burden of proving that the Mackinac Tribe of Odawa and Ojibwa Indians (Mackinac Tribe) is a treaty tribe under the test this Court established. Instead, Caswell attempts to distract from the fact that he failed to satisfy the test by: (1) incorrectly accusing the People of misunderstanding the principles of federal Indian law that underlie the treaty-tribe test; (2) improperly shifting his burden of proof on his affirmative defense to the prosecution; and (3) mischaracterizing what the treaty-tribe test requires. These arguments are meritless and simply demonstrate that he cannot meet the test on his proofs.

This Court should grant leave to appeal, reverse the circuit court, reinstate the charges against Caswell, and remand to the district court for trial on those charges.

ARGUMENT

I. The doctrine of general applicability merely requires this Court to apply the treaty-tribe test it has already articulated to the clearly deficient evidence on the record.

Caswell begins his brief with an argument about the doctrine of general applicability and *Mescalero Apache Tribe v Jones,* 411 US 145 (1973), which he asserts the People misunderstood. Caswell's assertion is incorrect; the People correctly understood and correctly explained the doctrine and the case law in the

application for leave. (App for Lv, 3.) However, Caswell never explains how, if at all, the doctrine of general applicability supports his affirmative defense or the district court's decision.

The doctrine of general applicability merely holds that generally applicable and non-discriminatory state laws apply to Indians and non-Indians alike outside of Indian country, unless pre-empted by federal law. See *United States v Washington (Washington I),* 520 F2d 676, 684 (CA 9, 1975), citing *Mescalero,* 411 US at 148–149. In other words, the doctrine of general applicability explains why a conservation officer with the Michigan Department of Natural Resources (MDNR) can cite an Indian for violating state fishing laws that apply to everyone (i.e., they are generally applicable), do not disadvantage Indians (i.e., they are non-discriminatory), and involve conduct at a location outside of Indian country. Caswell's musings that the State "might" exercise jurisdiction over natural resources outside of Indian country pursuant to generally applicable, non-discriminatory laws in the absence of federal preemption is just wishful thinking. (Answer to App for Lv, 3.) Under *Mescalero*, the State clearly has jurisdiction.

Caswell does not contest that the state fishing laws he was charged with violating are generally applicable and non-discriminatory. Nor does he challenge the fact that those alleged violations occurred outside of Indian country.[1] The sole

[1] The location where Caswell was cited for violating state fishing laws was within the area ceded to the United States in the 1836 Treaty, but it was not on an Indian reservation, tribal trust lands, or another place that would qualify as Indian country under federal law. See 18 USC 1151 (defining Indian country); *People v*

issue related to the doctrine of general applicability, and the sole issue his affirmative defense poses, is whether the 1836 Treaty preempts the state fishing laws that the People allege he violated. Because treaty rights belong to tribes and not individual Indians, see *United States v Michigan,* 471 F Supp 192, 271–272 (WD Mich 1979), the question here is not whether Caswell himself has treaty rights, but whether the Mackinac Tribe that Caswell belongs to holds such rights. To decide that issue, the Court must apply the treaty-tribe test to the evidence on the record.

Because Caswell has failed to carry his burden of proving each of the three elements of the treaty-tribe test by a preponderance of the evidence, he has failed to prove that the 1836 Treaty preempts the state fishing laws under which the People have charged him. Consequently, the doctrine of general applicability allows the People to prosecute Caswell for violating state fishing laws. The People respectfully urge the Court to grant the application for leave to appeal and correct the district court's error in dismissing the charges.

II. Caswell cannot shift the burden of proving his affirmative defense to the People.

This Court made clear that Caswell bore the burden of proof to establish that the Mackinac Tribe is a treaty tribe. See *People v Caswell,* 336 Mich App 59, 78 (2021). Caswell even acknowledges this burden in his answer to the application,

---

MacLeod, unpublished per curiam opinion of the Court of Appeals, issued July 14, 2016 (Docket No. 326950), p 2, 2016 WL 3767496 (land "ceded to the United States in the 1836 Treaty . . . ceased to be 'Indian Country'") (attached as Exhibit A).

stating, "Accordingly, the previous ruling that Mr. Caswell needed to meet *his burden* by a preponderance of the evidence must stand and cannot be decided differently because all material facts remain the same." (Answer to App for Lv, 4–5 (emphasis added).) But Caswell also still suggests—incorrectly and without citation to any authority—that the People had some obligation to rebut the evidence he presented. (*Id.,* 4, 7.) In doing so, Caswell engages in the same improper burden shifting that the circuit court employed.

The People have no obligation to come forward with evidence where the defendant bears the burden on a defense. See *People v Likine*, 492 Mich 367, 405 nn 80 and 81 (2012) (noting that a defendant bears the burden of proving an affirmative defense to the charges against him); see also *Patterson v New York,* 432 US 197, 210 (1977) (holding that due process requires the prosecution to prove beyond a reasonable doubt all the elements of the charged offense, but proof of nonexistence of all affirmative defenses is not constitutionally required). Here, that means that the People had no obligation to counter Caswell's evidence or to prove that the Mackinac Tribe is *not* a treaty tribe. It is enough, as the People have done in its briefing, to point out the many deficiencies in the record, illustrating just how far Caswell falls short of proving his affirmative defense. Indeed, Caswell's efforts to shift the burden of proof on the treaty-tribe test only underscore that he cannot meet the test through his proofs.

Caswell also attempts to bolster his argument by pointing to the preponderance of the evidence standard as meaning "simply that evidence which

outweighs that which is offered to oppose it." (Answer to App for Lv, 3 (citation omitted)). Although the preponderance of the evidence standard is generally phrased in this way—with the suggestion of opposing burdens—the standard cannot impose a burden that does not exist. See *Hanna v McClave,* 273 Mich 571, 574–575 (1935). The People had no burden with respect to Caswell's defense, and Caswell failed to meet his burden. The district court erred in holding otherwise.

III. Caswell, not the People, mischaracterizes this Court's treaty-tribe test, reading out of the third prong the requirement that a group claiming treaty rights must have maintained an organized tribal structure since treaty times.

Caswell incorrectly asserts that the People have mischaracterized the third prong of the treaty-tribe test. Caswell's argument relies on the recitation of the third prong in the conclusion of this Court's opinion, which states, "has maintained an organized tribal structure such that some defining characteristic of the original tribe persists in an evolving tribal community." *Caswell,* 336 Mich App at 78. Caswell appears to accuse the People of two errors: (1) improperly inserting a requirement that the group seeking treaty-tribe status have maintained an organized tribal structure *since treaty times* and (2) failing to account for the evolution of the tribal organization over time. Neither of these arguments is persuasive. In reality, it is Caswell who mischaracterizes the third prong.

First, although the conclusion of this Court's opinion merely says that the tribal structure must have been "maintained," this Court held that "*[c]ontinually* maintaining an organized tribal structure is the 'single necessary and sufficient

condition for the exercise of treaty rights by a group of Indians.'" *Caswell,* 336 Mich App at 75, quoting *United States v Washington (Washington II)*, 641 F2d 1368, 1372 (CA 9, 1981) (emphasis added). This Court also noted that a group cannot establish treaty-tribe status if the group has not "functioned *since treaty times* as [a] '*continuous* separate, distinct and cohesive Indian cultural or political communit[y].'" *Caswell,* 336 Mich App at 76, quoting *Washington II,* 641 F2d at 1373 (emphasis added).

When this Court's opinion is read as a whole, it is indisputable that the third prong requires that the group seeking treaty-tribe status have *continually* maintained an organized tribal structure *since treaty times*. This Court's reiteration of the treaty-tribe test in the conclusion of its opinion was not meant to revise the third prong to omit these requirements. The People correctly characterized and applied this prong as it was adopted by this Court, whereas Caswell seems at minimum to eliminate key elements of it, if not to read "maintained" out of the test altogether.

This leads to Caswell's second point, regarding the last phrase of the third prong from the opinion's conclusion: "some defining characteristic of the original tribe persists in an evolving tribal community." Caswell seems to argue that the tribal structure does not need to have been maintained continuously since treaty times as long as he can show that the modern-day group has a structure that evolved from the historical group's structure. As proof that he met this newly devised third prong, Caswell proclaims that Mackinac Tribe Chair Barry Adams

"described the *evolution* of the Mackinac Bands from how it looked and functioned in 1836 to how it looks and functions today – and that trajectory is very similar to other bands that have had the good fortune to secure federal recognition in the past 40 years." (Answer to App for Lv, 6.) As an initial matter, there is nothing in the record about the trajectory of other tribes that have been federally recognized, and so that statement must be disregarded. As for Adams' testimony, he did no such thing. Adams did not discuss the historical Mackinac groups or explain how the community evolved over time. Simply inserting the word "evolution" into the discussion does not change the fact that Caswell did not establish the third prong.

The third prong is not met simply because Mackinac groups historically existed and a group calling itself the Mackinac Tribe exists today. Even allowing for changes to the tribal structure over time, including because of oppressive federal policies, the key question remains whether *this modern-day group* is the political successor in interest to the historical Mackinac groups that entered into the treaty with the United States. The evidence that Caswell offered did not show that.

Indeed, the evidence proved the contrary—that Adams formed the Mackinac Band in recent times because he was unhappy with the Sault Ste. Marie Tribe of Chippewa Indians (of which he remains a member) and because millions of dollars of land claim settlement funds were at issue. Caswell concedes that the Mackinac Tribe is a recent creation: "Eventually, he [Adams] saw that descendants of the Mackinac Band were not included in the protections afforded federally recognized tribes, nor were their interests adequately protected by larger, recognized tribes. At

that time, he began to seek out and research other descendants of Mackinac Band members, to organize and assert their own continuing interests." (Answer to App for Lv, 5 (citations omitted).) The fact that Adams created this group about thirty years ago shows, in itself, that the group has not maintained an organized tribal structure.

The many shortcomings of Caswell's evidence were discussed at length in the application, and the People rely on that discussion. Regardless of James McClurken's qualifications, he did no research in anticipation of his testimony, conducted no analysis of the Mackinac Tribe's assertion of treaty-tribe status, and offered no documentary support in the record to back up his testimony. In short, he failed to act as an ethnohistorian in this case, and he did not even offer an opinion (however unsupported it would have been) about whether the Mackinac Tribe that Adams formed is connected in any way to the historical bands that signed the 1836 Treaty. Recall that McClurken testified that he knew nothing about the modern-day Mackinac Tribe. (1/25/22 Hr'g Tr, p 103:19–25.) And whatever credit can be given to Adams' disjointed testimony, his testimony combined with McClurken's did not demonstrate that *this group* had maintained a continuous tribal organization relating back to the historical Mackinac bands that signed the 1836 Treaty. In other words, Caswell argues he should prevail simply because McClurken and Adams testified, ignoring the fact that the substance of their testimony utterly failed to establish the third prong of the treaty-tribe test. The lower courts

undeniably erred in concluding that Caswell did meet that burden.[2] This Court should grant leave to correct that error.

CONCLUSION AND RELIEF REQUESTED

The district court abused its discretion in dismissing the charges against Caswell because he failed to prove that the modern-day Mackinac Tribe is a political successor in interest to a treaty signatory. If this ruling stands, any number of groups will be able to claim treaty-tribe status without making the showing that *People v Caswell* requires. Leave must be granted to correct the district court's error and to provide guidance and clarity for courts applying this test in the future.

For these reasons and those explained in the application, this Court should grant leave to appeal, reverse the circuit court, reinstate the charges against Caswell, and remand to the district court for trial on the charges.

[2] As explained in the application, Caswell also did not establish the first two prongs of the treaty-tribe test. (App for Lv, 31–38.) However, Caswell barely addressed these factors in his answer, and so no reply is warranted.

Respectfully submitted,

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

/s/ Kelly M. Drake
John S. Pallas (P42412)
Attorney for Plaintiff-Appellant
Criminal Trials and Appeals Division
525 W. Ottawa Street
Lansing, MI 48933
(517) 335-7650
pallasj@michigan.gov

Kelly M. Drake (P59071)
Attorney for Plaintiff-Appellant
Environment, Natural Resources,
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
drakek2@michigan.gov

Dated: November 29, 2023

WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.205(D) and 7.212(G) because, excluding the part of the document exempted, this **reply brief at the application stage** contains no more than 3,200 words. This document contains 2,163 words.

/s/ Kelly M. Drake
Kelly M. Drake (P59071)
Attorney for Plaintiff-Appellant
Environment, Natural Resources,
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
drakek2@michigan.gov

LF: Caswell, Walter Joseph (People v) (DNR) COA#2/AG 2020-0301436-C/Reply Brief 2023-11-29