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

BRIEF OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

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STATEMENT OF JURISDICTION

On September 27, 2023, the Mackinac Circuit Court issued its opinion and order on appeal (Ex A), affirming the 92nd District Court's April 18, 2023, opinion and order that ruled in favor of Defendant-Appellee Walter Joseph Caswell and dismissed the charges against him. (Ex B.) Plaintiff-Appellant People of the State of Michigan timely filed an application for leave to appeal on October 18, 2023, which this Court granted on March 22, 2024. *People v Caswell,* unpublished order of the Court of Appeals, issued March 22, 2024 (Docket No. 368232). This Court has jurisdiction pursuant to MCR 7.203(B)(2).

STATEMENT OF QUESTION PRESENTED

1. To assert treaty rights as a successful affirmative defense, this Court previously ruled that Caswell had to prove that he is a member of (1) a group of citizens of Indian ancestry, (2) who are descended from a treaty signatory, and (3) that has maintained an organized tribal structure. Caswell failed to prove any of these three elements. Did the district court abuse its discretion in dismissing the charges against Caswell for spearfishing in a closed stream on the basis that the Mackinac Tribe is a treaty tribe and, as a Mackinac Tribe member, he was exercising treaty rights?

   Appellant's answer: Yes.

   Appellee's answer: No.

   District court's answer: No.

   Circuit court's answer: No.

INTRODUCTION

This Court gave Defendant-Appellee Walter Joseph Caswell, a Mackinac Tribe member, a second chance to prove his affirmative defense to the state fishing laws he is charged with violating. *People v Caswell,* 336 Mich App 59 (2021). Once again, Caswell has failed to submit evidence that he was exercising treaty rights as a member of a treaty tribe—that is, as a member of (1) a group of citizens of Indian ancestry, (2) who are descended from a treaty signatory, and (3) that has maintained an organized tribal structure. *Id.* at 75. Neither the district court that dismissed the charges for a second time nor the circuit court that affirmed that dismissal recognized the complete absence of relevant evidence in the record nor held Caswell to his burden of proof on all three elements. The only appropriate steps left to take in this case are to reverse and remand for a third trip to the district court, where Caswell must finally face the charges brought against him.

The ramifications of courts misapplying the evidentiary requirement in this context are monumental: Groups that have no valid claim to the treaty rights they assert will be granted treaty-tribe status. That, in turn, will diminish the rights of the tribes that do have rights under the treaties and will trample on the State of Michigan's sovereign right to protect the natural resources that belong to the People of the State by enforcing state law. It is critically important that this Court correct the district court's error and provide guidance and clarity for courts applying this test in the future.

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

STATEMENT OF FACTS AND PROCEEDINGS

The State of Michigan regulates fishing within its borders, but state law can be preempted by federal law, including tribal treaties.

Fish in Michigan waters, including the Michigan areas of the Great Lakes, are the property of the State. *Aikens v Dep't of Conservation,* 387 Mich 495, 503 (1972); MCL 324.47301. The State indisputably has the authority to enact laws regulating taking fish within its boundaries. *Aikens,* 387 Mich at 502–503; MCL 324.47301; see also *United States v Washington (Washington I),* 520 F2d 676, 684 (CA 9, 1975), citing *Geer v Connecticut,* 161 US 519 (1896) ("By virtue of its police power, the state has initial authority to regulate the taking of fish and game."). Further, because Michigan's fishing laws are generally applicable and non-discriminatory, they apply to everyone, including Indians. See *Washington I*, 520 F2d at 684, quoting *Mescalero Apache Tribe v Jones,* 411 US 145, 148–149 (1973). However, the Supremacy Clause dictates that federal law, including federal treaties with Indian tribes, preempts state law in certain circumstances, even when the activities in question occur outside of formal Indian country. US Const, art VI, cl 2.

Modern-day tribes exercise fishing rights under the 1836 Treaty of Washington.

In 1836, several bands of Anishinaabe (Ojibwe/Chippewa and Odawa/Ottawa) Indians ceded to the United States nearly 14 million acres in the area that would become Michigan a year later. See Treaty of Washington, 7 Stat 491, art I (Mar 28, 1836) (1836 Treaty); see also Royce Area 205, Michigan 1, <https://www.loc.gov/resource/g3701em.gct00002?sp=29> (accessed May 16, 2024).

These bands included the Michilimackinac band that resided on and around Mackinac Island. In ceding the land, the bands reserved to themselves the usual rights of occupancy, including the right to fish within the ceded area. 1836 Treaty, art XIII. The continuing existence of those treaty rights has been confirmed by the federal courts and is not in question in this case. See generally *United States v Michigan,* 471 F Supp 192 (WD Mich 1979) (confirming treaty right to fish in ceded areas of the Great Lakes); *United States v Michigan,* unpublished order of the United States District Court for the Western District of Michigan, issued November 2, 2007 (Docket No. 2:73-cv-26) (confirming inland treaty rights).

Five of the twelve federally recognized tribes in Michigan are known political successors in interest to signatories of the 1836 Treaty: Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, and Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe). These five modern-day tribes, along with the United States and Michigan, are parties to two federal court decrees that address the exercise of the rights reserved under the 1836 Treaty: a 2023 Decree governing Great Lakes fishing and a 2007 Consent Decree governing inland hunting, fishing, and gathering. *United States v Michigan,* United States District Court for the Western District of Michigan, Docket No. 2:73-cv-26, ECF Nos. 2132, 1799. As a result, members of these five tribes exercise fishing rights under the 1836 Treaty as governed by those decrees.

Caswell belongs to a group that calls itself the Mackinac Tribe, which is not recognized by the federal government as an Indian tribe.[1] See generally *Mackinac Tribe v Jewell,* 829 F3d 754, 755 (DC Cir 2016). Further, the Mackinac Tribe is not a party to the federal decrees that implement the treaty rights in the 1836 Treaty ceded area. Until the rulings in this case, no court had determined that the Mackinac Tribe is a successor in interest to a signatory of the 1836 Treaty nor that its members are entitled to exercise fishing rights under that treaty.

Caswell was charged with violating Michigan fishing laws and asserted a treaty right as his defense.

In October 2018, Caswell was spearfishing in an inland stream in Mackinac County within the 1836 Treaty ceded area when he was contacted by a Michigan Department of Natural Resources (DNR) conservation officer. *People v Caswell,* 336 Mich App 59, 64 (2021). Caswell presented both a State of Michigan fishing license and a subsistence harvesting license issued by the Mackinac Tribe. *Id.* Under State regulations, spearfishing is prohibited, MCL 324.48711, and the stream Caswell was fishing was under seasonal closure. MCL 324.48715.[2] Thus, the conservation officer issued two citations to Caswell, the first for using illegal gear and the second for fishing in a closed stream.

[1] The State of Michigan relies on federal acknowledgment to determine which groups constitute Indian tribes and does not take a position here concerning whether the Mackinac Tribe is an Indian tribe.

[2] This statute has since been repealed. 2018 PA 529.

The district court dismissed the charges against Caswell the first time.

Caswell moved to dismiss the charges on the grounds that he was exercising a treaty right. (Def's Mot to Dismiss, 2/4/19.) The district court held a brief evidentiary hearing on the motion on February 12, 2019. (The transcript is attached as Exhibit C.) At the hearing, Mackinac Tribe Chairman Barry Adams testified that the group was "treaty signatories to the 1836 treaty, the 1855 treaty" and descended from Ainsse,[3] a band leader who signed the 1836 Treaty on behalf of the Michilimackinac band. (2/12/19 Hr'g Tr, pp 5:14–16, 22–23, 8:9–10.) He stated that members of the modern-day Mackinac Tribe are individuals who were denied membership in Sault Tribe after it closed its enrollment:

> A: And so what the Sault Tribe did is they closed the rolls after so many Mackinac people was in there, and *the people that I have as enrollment with the Mackinac Tribe is the Mackinac people that the Sault Tribe closed the rolls and wouldn't let those people in. That's—that is us. That is us.* [*Id.,* p 10:15–20 (emphasis added).]

At the hearing, Caswell submitted into evidence his tribal membership card and tribal subsistence harvesting license issued by the Mackinac Tribe. (*Id.,* p 14:11–20; 2/12/19 Hr'g Defendant Ex A and C (Ex D and E).) He also submitted a certificate of degree of Indian blood prepared by the U.S. Department of Interior, Bureau of Indian Affairs, showing that he is 1/64th Mackinac Tribe Chippewa Indian. (2/12/19 Hr'g Tr, pp 14:21–15:6; 2/12/19 Hr'g Defendant Ex B (Ex F).) The

[3] In the 1836 Treaty, the leader's name is spelled Ainse. It appears as Ainsse in the district court record, and that spelling is adopted here.

certificate notes that Caswell's great-great-great-grandmother was listed on the 1836 Census Register of the Ottawa and Chippewa Nation. (1/25/22 Hr'g Def Ex B.)

The district court dismissed the charges. (6/14/19 Dist Ct Op & Order (Ex G).) The court concluded that Caswell was a member of the Mackinac Tribe, that he possessed a valid tribal fishing license at the time of the citation, and that it was "clear from the record that the Mackinac Tribe of Odawa and Ojibwa Indians were signatories to the 1836 and 1855 treaties with the United States." (*Id.* at 4.)

The circuit court reversed and reinstated the charges against Caswell.

The People appealed, and the circuit court reversed on the basis that the Mackinac Tribe is not federally recognized and remanded for further prosecution. (11/21/19 Circ Ct Mem & Decision & Order (Ex H).) As support for its ruling, the circuit court pointed to *Jewell,* 829 F3d 754, which held that courts should refrain from deciding whether a tribe is federally recognized until the Department of Interior has received and evaluated a petition for federal recognition under the federal administrative rules. (*Id.* at 4–5.)

This Court vacated the first circuit court appellate decision and remanded to the district court for an evidentiary hearing.

Caswell appealed, and this Court vacated the circuit court's order and remanded to the district court for an evidentiary hearing. *Caswell,* 336 Mich App at 63. This Court held that whether the Mackinac Tribe was federally recognized had no bearing on whether it was entitled to treaty fishing rights. *Id.* at 74. However, it also held that the fact that members of a modern-day tribe descend from a

signatory tribe does not automatically entitle the modern-day tribe to treaty rights. *Id.* at 75. Instead, the dispositive issue is "whether the Mackinac Tribe is a political successor in interest to a signatory tribe, entitling defendant to an affirmative defense based on his tribal status." *Id.* at 77. In other words, the key issue was whether the Mackinac Tribe is a "treaty tribe," a term used to describe "a modern-day tribe that has established its right to exercise the treaty rights of a signatory tribe." *Id.* at 68.

This Court adopted the reasoning of the United States Court of Appeals for the Ninth Circuit and held that "'treaty-tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure.'" *Id.* at 75, quoting *United States v Washington (Washington II),* 641 F2d 1368, 1371 (CA 9, 1981). Thus, this Court adopted the Ninth Circuit's three-part test for treaty-tribe status, which requires evidence that (1) a group of citizens of Indian ancestry, (2) is descended from a treaty signatory, and (3) has maintained an organized tribal structure.

This Court emphasized the importance of the third element of this test: "Continually 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 *Washington II,* 641 F2d at 1372. This Court continued:

> "This single condition," explained the Ninth Circuit,
>
> reflects our determination that the sole purpose of requiring proof of tribal status is to identify the group asserting treaty rights as the group named in the treaty. For this purpose, tribal status is preserved

> if some defining characteristic of the original tribe persists in an evolving tribal community. [*Caswell,* 336 Mich App at 75–76, quoting *Washington II,* 641 F2d at 1372–1373.]

This Court stressed that, " '[t]o warrant special treatment, tribes must survive as distinct communities.' " *Caswell,* 336 Mich App at 76, quoting *Washington II,* 641 F2d at 1373.

This Court concluded that the circuit court erred "when conditioning defendant's potential treaty rights on whether his tribe is federally recognized" and vacated the circuit court's order. *Caswell,* 336 Mich App at 78. This Court also concluded that the district court erred "by assuming that the Mackinac Tribe possessed treaty rights merely because some of its members were descended from signatory tribes of the relevant treaty, and that defendant's entitlement to exercise those rights as a member of the Tribe provided him with a valid affirmative defense to the charges against him." *Id.* at 77. Because the district court "did not evaluate the case under the proper legal framework," this Court remanded to the district court "for an evidentiary hearing to allow defendant an opportunity to establish by a preponderance of the evidence that his Tribe is a political successor in interest to a signatory tribe of the 1836 treaty." *Id.* at 78.

On remand, the district court held another evidentiary hearing.

On remand, the district court held a second evidentiary hearing on January 25, 2022, at which three witnesses testified: James M. McClurken, Ph.D., Barry Adams, and DNR Conservation Officer Jon Busken. (Relevant excerpts of the transcript are attached as Exhibit I.)

McClurken was qualified as an expert in the field of ethnohistory and treaty rights. (1/25/22 Hr'g Tr, p 15:12–14.) He described ethnohistory as a combination of history, which relies on documents to reconstruct the past, and cultural anthropology, which relies on modern populations, interviews, and observations. (*Id.*, p 10:13–20.) McClurken admitted that he had done "almost nothing" to prepare for his testimony, noting that he had "one 20-minute phone call" with Caswell's attorney. (*Id.*, p 13:13–16.) When asked what research or documents his testimony would be based on, he listed general categories of federal and state records related to Michigan tribes; he did not identify or provide any specific documents. (*Id.*, pp 13:17–14:1.) He testified remotely by telephone, and when questioned about specific documents, with only one exception, he did not have copies of any documents available to him. (See, e.g., *id.*, pp 6:15–16, 80:14–16.)

McClurken testified generally—and from memory—about the history of the bands that signed the 1836 and 1855 treaties. He stated that in 1836, the Ottawas and Chippewas lived in kinship-based societies, in which three to twenty-five related families formed a band. (1/25/22 Hr'g Tr, p 17:4–9.) The band was the highest political unit. (*Id.*, p 17:4–6.) The governmental structure was egalitarian rather than hierarchical, with decisions made in council by consensus and communicated by an individual person chosen to represent the group's interests. (*Id.*, p 17:17–22.)

McClurken stated that a man named Ainsse signed the 1836 Treaty on behalf of the Michilimackinac band, which was later converted to the English form of

Mackinac. (1/25/22 Hr'g Tr, p 20:9–11.) The historical Michilimackinac band was centered on Mackinac Island, used fisheries along the southern shore of the Upper Peninsula and the northern shore of the Lower Peninsula, and had kinship ties throughout the region. (*Id.*, p 21:10–14.) The historical band received annuities under the 1836 Treaty until the federal government ended those payments in 1870. (*Id.*, p 21:20–25.)

An 1890 federal census of Indians reported hundreds of Indians living in Mackinac County. (Defendant's Hr'g Ex A; 1/25/22 Hr'g Tr, p 37:6.) McClurken opined that the document "clearly shows that there is a continuing presence of the [Mackinac] band in Mackinac County," even though he acknowledged that the census did not identify "any of the groups by their individual bands." (1/25/22 Hr'g Tr, pp 37:22–38:8.)

In 1907, a census was taken of all descendants of the bands that entered into the 1836 and 1855 treaties. (1/25/22 Hr'g Tr, p 38:9–13.) That census is commonly referred to as the Durant Roll, and the Mackinac band was identified on the census. (*Id.*, pp 27:22–28:7, 38:18–21.) The census was not offered into evidence.

McClurken testified that the band system began to break down in the 1900s, due in part to intermarriage between bands and with non-Indians, as well as Indians leaving the area to work as wage laborers on ships that traveled the world. (1/25/22 Hr'g Tr, p 39:6–15.) He explained that federal policy during that time was one of assimilation and termination, and Indian children were taken away from

their families and sent to boarding schools. (*Id.*, pp 40:10–15; 41:17–42:9.) But McClurken stated that the kin-based structure remained intact. (*Id.*, p 40:17–23.)

In 1934, McClurken explained, federal policy shifted to making tribes self-sufficient. (1/25/22 Hr'g Tr, p 42:21–23.) Congress passed the Indian Reorganization Act (IRA), which allowed tribes for the first time to form a constitutional government that would be approved by the U.S. Secretary of the Interior. (*Id.*, p 43:8–14.) According to McClurken, all Michigan bands petitioned to restore their band government under the IRA, but he did not identify which bands those were or how he determined that they represented all Michigan bands. (*Id.*, p 43:15–16.) When asked whether the Mackinac band filed a petition, he responded equivocally: "I believe there is." (*Id.*, p 43:17–19.) There is no such petition in the record.[4] At any rate, the Mackinac Band did not reorganize under the IRA and therefore did not achieve federal acknowledgement via that route. (*Id.*, p 45:12–13.)

According to McClurken, after World War II, "the bands who were signatories to the 1836 treaty formed a new constitution that governed all of the historic bands," called the Northern Michigan Ottawa Association (NMOA). (1/25/22 Hr'g Tr, p 47:14–17.) He stated that the NMOA served as the government for the 1836 Treaty bands until roughly 1981 and that the Mackinac Band formed one of the traditional units within the organization. (*Id.*, p 47:17–19.) The NMOA

[4] When asked on cross-examination if he could provide the petition or a citation to it, McClurken replied, "Yeah, if you want to pay me to find it and if you wanted to get the National Archives opened. It's now been closed for two years." (1/25/22 Hr'g Tr, p 89:5–7.)

governmental structure included annual elections for a president and representatives for each unit. (*Id.*, p 48:4–9.)

McClurken also testified that the Mackinac band was represented on the Michigan Commission on Indian Affairs. (1/25/22 Hr'g Tr, p 73:8–18.) However, he admitted that he had read the commission minutes "a very long time ago" and had not examined commission records or compiled information about the group. (*Id.*, pp 73:24–25, 74:17–19.) He did not explain what the commission's role was, what the significance was of having a Mackinac representative on the commission, or how that demonstrated a continuing organized tribal structure. He also testified that the Commission on Indian Affairs disbanded about 15 years earlier, or around 2007. (*Id.,* p 80:5–8.) That timeline was off by nearly a decade; the Commission on Indian Affairs was disbanded in 1999. Executive Reorganization Order No. 1999-6, codified at MCL 16.721.

In 1978, the federal government created the modern tribal acknowledgment process, which the Grand Traverse Band of Ottawa and Chippewa Indians used to gain federal recognition in 1980. (1/25/22 Hr'g Tr, p 50:5–17.) Then in 1994, the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians gained federal recognition through Congressional action. (*Id.*, pp 50:20–51:8.)

When asked if the Mackinac band had been asserting treaty rights in 1980 when the Grand Traverse Band was federally recognized, McClurken admitted, "I don't know what the Mackinac Band was doing in 1980 because that's a level of

documentation I've never collected for them. I have seen a few newspaper articles[.]" (1/25/22 Hr'g Tr, pp 58:24–59:3.) He also stated that he could not testify regarding the political structure or government of the Mackinac band in 1980, noting, "those are internal documents for the band itself, and I do not have access to those." (*Id.*, pp 61:18–62:2.)

McClurken testified that after 1994, a Mackinac group contacted him for assistance in seeking federal recognition through Congressional action. (1/25/22 Hr'g Tr, p 68:19–22.) He stated that he attended at least two Mackinac group community meetings, but he could not recall who invited him to attend and therefore could not identify whether it was the Mackinac Tribe or another Mackinac group. (*Id.,* pp 68:22–24, 69:3–14.) Ultimately, he did not contract with the group to assist with federal recognition or to perform the type of "detailed work" he had done for other tribes. (*Id.,* pp 68:25–69:1.)

McClurken testified that "the factional disputes within that [Mackinac] community were significant" during the time he attended the two community meetings. (*Id.,* p 68:23–24.) He asserted, again without reference to any source materials, that the Office of Federal Acknowledgment (OFA) "looks for" factional disputes within a tribe or band, claiming "they take that as evidence of a functioning community with issues so important that they're willing to fight for them. If there was no community, if there was no tribe, if there was nothing at stake, nobody would care." (*Id.,* pp 74:25–75:7.) He also noted that the Mackinac "certainly has had its share of factional disputes." (*Id.,* p 75:9–10.) However, on

cross examination, he conceded that he drew no distinction between an actual splinter group that separates from the main group and internal factional disputes like those he asserted that OFA took into consideration. (*Id.,* p 78:22–25.)

With respect to the modern-day Mackinac Tribe that Caswell belongs to, McClurken had little to offer. He admitted that he did not know which Mackinac group Caswell belonged to and he did not know Caswell's status with the modern band.[5] (1/25/22 Hr'g Tr, p 78:8–13.) He conceded that he was testifying generally about Mackinac groups and not specifically about the Mackinac Tribe, stating:

> But so far I've testified from memory except for one document that I knew that I could look up quickly because I was just using it. And all of this is a general recitation of what I've found over 35 years.
>
> So when you come to ask me specifics, I just can't do that for you right now. [*Id.,* p 80:9–19; see also p 103:5–11 ("All of the testimony is in general.").]

McClurken testified that he could not point to a particular document showing that this group, the Mackinac Tribe, is a political successor in interest to a treaty signatory, conceding that "I don't have any of their modern internal records."

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[5] The district court asserted that McClurken used "Ottawa, Chippewa, Michilimackinac, Mackinaw Band, and Mackinac Tribe" interchangeably. (4/18/23 Dist Ct Opinion, 3.) This is incorrect. McClurken was clear that the Ottawa and Chippewa were separate groups and that each consisted of far more than the Mackinac bands. Thus, Ottawa and Chippewa would not have been used interchangeably or in place of Mackinac.

However, in discussing modern-day Mackinac groups, McClurken's testimony referred to the Mackinac Tribe, the Mackinac Band(s), Mackinac bands, and the bands. Context usually, but not always, indicated whether he meant *this* Mackinac Tribe, another modern-day Mackinac group or groups (such as the Mackinac Bands that Adams mentioned), or all modern-day Mackinac groups collectively. In this brief, "Mackinac Tribe" refers to the modern-day group to which Caswell and Adams belong.

(1/25/22 Hr'g Tr, p 82:13.) He admitted that he had not talked to anyone at a Mackinac group in fifteen years and that he had not done any genealogical research regarding the Mackinac groups. (*Id.,* pp 90:1–2, 95:24–96:1.) He stated that the most recent record regarding who comprises the Mackinac band is the 1907 Durant Roll. (*Id.,* p 96:8–10.) Further, McClurken was unable to say whether the group Caswell belongs to was an actual descendant of an 1836 Treaty signatory or if it was a newly formed entity: "I know nothing about who they characterize themselves to be or who – who are their members." (*Id.,* pp 101:24–102:3.)

When asked about the factors for treaty-tribe status, McClurken testified that he did not know whether "the Mackinac Band or any of the bands" had acted to exercise political or governmental authority over any of their members. (1/25/22 Hr'g Tr, p 102:8–11.) He could not address whether Mackinac Tribe members were of Indian ancestry. (*Id.,* p 102:12–16.) Nor could he testify to the extent of Mackinac Tribe control over the lives and activities of its members, the extent and nature of Mackinac Tribe members' participation within tribal affairs, or the Mackinac Tribe's political control over a specific territory. (*Id.,* pp 102:17–103:4.) He also stated that he could not show historical continuity of the Mackinac Tribe because he had not studied the group. (*Id.,* p 102:5–10.) McClurken admitted that he did not know whether there was an organized tribal structure within the Mackinac Tribe and that he had never seen a constitution for the Mackinac Tribe. (*Id.,* pp 113:23–114:3.) This statement summed it up: "I don't know anything about the modern group." (*Id.,* p 103:19–25.)

McClurken also conceded that answering those questions would require significant documentary evidence. When asked if there was a specific record that could show a historical tie between the modern-day Mackinac Tribe and a treaty signatory, McClurken replied that it would take "thousands of records" to establish that tie and "it would take me a good year to put those records together into a form that would, A, meet a federal criteria, and, B, satisfy a lawyer's penetrating vision of the historical record." (1/25/22 Hr'g Tr, p 14:9–23.)

Next to testify was Barry Adams. Although he had testified in 2019 as the chairperson of the Mackinac Tribe, he stated at the 2022 hearing that he no longer held that position. (2/12/19 Hr'g Tr, p 4:23; 1/25/22 Hr'g Tr, p 165:16–17.) Adams, who was 82 years old at the time of the 2022 hearing, began his testimony by indicating that he had suffered health problems since his last time on the witness stand that had affected his memory. (1/25/22 Hr'g Tr, p 126:1–8.) He had lost his memory completely about six months prior to the hearing and was "having trouble remembering things." (*Id.,* p 126:4–8.) Unfortunately, these memory issues were borne out in his testimony.

Adams testified, without genealogical or other documentary support, that he is a direct descendant of Ainsse. (1/25/22 Hr'g Tr, p 129:2–3.) He is also a member of the Sault Ste. Marie Tribe of Chippewa Indians, a federally recognized tribe. (*Id.,* pp 127:13–14, 153:1–7.)

When asked how he was affiliated with the modern-day Mackinac Tribe, he stated that he and an individual named Darryl Brown started it. (1/25/22 Hr'g Tr, p

128:5–6.) He explained that when Sault Tribe closed its enrollment, he and Darryl Brown decided to "go find the Mackinac people." (*Id.,* p 128:15–18.) It is unclear from the record when this occurred. Adams could not remember when Sault Tribe closed its enrollment rolls. (*Id.,* p 158:4–16.) At times, Adams associated starting the Mackinac Tribe with land claim settlement funds that were awarded and eventually paid to Michigan tribes, asserting that Sault Tribe kept settlement funds that were intended for Mackinac Tribe. (*Id.,* pp 128:10–18, 153:8–20.) He testified that this occurred in the late 1970s. (*Id.,* pp 152:5, 154:1–6.) But in an affidavit dated March 8, 2021, presumably before his memory loss, Adams stated that the settlement fund dispute arose in the 1990s. (1/25/22 Hr'g Def Ex D, ¶ 4 (Ex J).) This is consistent with the enactment in 1997 of the federal legislation that authorized payment of the settlement funds. See Michigan Indian Land Claims Settlement Act, PL 105–143, 111 Stat 2652. The dollar amounts Adams cited were substantial: "on the land claim money that the Sault Tribe got, 14.7 million was the Mackinac's money; 5.2 was the Sault Tribe's money." (1/25/22 Hr'g Tr, pp 128:11–13, 153:15–20.)

To find members, Adams testified that he and Victor Visnaw traveled to powwows and other events and set up booths to sign people up for Mackinac Tribe membership. (1/25/22 Hr'g Tr, pp 130:1–10, 157:10–17.) He spoke generally of proving that an individual descended from a person on a historical tribal census, but he never explained what the process entailed, what records were consulted, or how information was confirmed or refuted. (*Id.,* pp 141:3–142:9, 179:16–20.) Also,

although Adams testified that he was a direct descendant of Ainsse, no genealogical or other records were offered as exhibits to establish Adams' descendancy or that of any Mackinac Tribe member other than Caswell.

Adams testified that the Mackinac Tribe had 468 members, which was a significant decrease from the 600 members he testified to in 2019. (*Id.,* p 159:6–10; 2/12/19 Hr'g Tr, p 7:13–16.) He said the Mackinac Tribe prepared a constitution and declaration of independence, an unsigned, undated copy of which was admitted into evidence, but he could not remember exactly when the documents were written, only that it was in 2008 or later. (1/25/22 Hr'g Tr, p 138:3, 11–17; Defendant Ex E (Ex K).) He also could not remember when the documents were put into effect. (1/25/22 Hr'g Tr, p 152:17–25.) No testimony was offered regarding the terms of the documents. Adams also indicated that the Mackinac Tribe is led by a chairperson, who is appointed to the position through a process he could not articulate. (*Id.*, pp 166:17–167:4.)

With respect to cultural influence on members, Adams testified that the Mackinac Tribe hosts powwows, fall gatherings, and other types of events. (1/25/22 Hr'g Tr, p 149:1–4.) However, he offered no details, such as how often events are held or how many members attend.

With respect to hunting and fishing licenses, Adams could not recall when the Mackinac Tribe started issuing them, but he remembered that he talked to someone about it and that person bought a card printer so the licenses could be produced. (*Id.,* p 162:3–11.) He admitted that the Mackinac Tribe does not have a

tribal court, and he said that when he was tribal chair, he assigned people to enforce the group's hunting and fishing regulations. (*Id.,* pp 170:2–3, 171:15–18.) If someone violated the regulations, he indicated they were fined. (*Id.,* p 171:19–25.) And if the person failed to pay the fine? "Well, couldn't put them in jail so you'd beat their ass on that. . . . I mean, that's the only thing they could do if you wanted to collect your fines." (*Id.,* p 172:14–20.) Adams later retracted his statement about beating people up for unpaid fines (*id.,* p 186:11–12), but he did not identify any other mechanism for enforcing the regulations or penalties.

Finally, Conservation Officer Busken testified. He stated that in his work, he had not encountered any conservation officers from the Mackinac Tribe, any vehicles associated with the Mackinac Tribe or Mackinac Tribe law enforcement, or any person who had been cited by the Mackinac Tribe for violating the group's hunting or fishing regulations. (1/25/22 Hr'g Tr, pp 189:18–190:3.) Busken also testified that he was unaware of any Mackinac Tribe tribal courts. (*Id.,* p 190:4–6.) Busken confirmed that other tribes have conservation departments and regulations and that all five federally recognized 1836 Treaty tribes have conservation officers. (*Id.,* pp 191:9–21, 192:20–193:2.)

The district court dismissed the charges a second time.

After the evidentiary hearing, the district court again dismissed the charges against Caswell. In its opinion, the district court correctly stated that Caswell "must establish by a preponderance of evidence that his tribe is a political successor in interest to a signatory tribe of the 1836 Treaty." (4/18/23 Dist Ct Op & Order, 4–

5 (Ex B).[6]) However, the district court's recitation of the treaty-tribe test announced in this Court's decision was not quite accurate. The district court stated, "To do so, the Defendant must demonstrate that, (A) the Defendant is a part of a group of people of Indian ancestry, (B) that the Defendant descended from a treaty signatory tribe, and (C) that that tribe has maintained an organized tribal structure." (*Id.,* 5.) The second element, of course, requires that the *entire group* claiming treaty-tribe status be descended from a treaty signatory tribe, not just Caswell. The district court erroneously concluded that Caswell established each of the three elements and again dismissed the charges. (*Id*.)

The circuit court affirmed the district court.

The People appealed, arguing that the district court had not faithfully applied the test that this Court adopted in the prior appeal and that the very limited evidence in the record did not support the district court's decision. Nonetheless, the circuit court affirmed, agreeing with the district court's conclusion that Caswell satisfied his burden of proof on all three prongs of the test. In its seven-page opinion, the circuit court simply deferred not only to the district court's factual findings, but also to its interpretation of the treaty-tribe test. (9/27/23 Circ Ct Op & Order (Ex A).)

The People now appeal.

[6] The pages of the district court opinion are not numbered. Citations are based on page order.

STANDARD OF REVIEW

A trial court's decision on a motion to dismiss charges against a defendant is reviewed for an abuse of discretion. *People v Parlovecchio*, 319 Mich App 237, 239–240 (2017). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id*. at 240 (quotation marks and citation omitted). In addition, "[a]n abuse of discretion occurs when, for example, a trial court premises its decision on an error of law." *People v Parker*, 319 Mich App 664, 669 (2017). Further, the trial court's findings of fact in a motion to dismiss are reviewed for clear error. See *People v Vansickle*, 303 Mich App 111, 114 (2013). Clear error occurs when the reviewing court is "left with a firm conviction that the trial court made a mistake." *Id*. at 115.

ARGUMENT

I. The district court abused its discretion when it dismissed the charges against Caswell on the basis that he was exercising treaty rights reserved to the Mackinac Tribe because Caswell did not prove that the Mackinac Tribe is a treaty tribe.

A. Issue Preservation

The People preserved this issue by opposing dismissal of the charges in the response to the original motion to dismiss (People's Response to Mot, 2/11/19) and at the hearing on that motion (see generally 2/12/19 Hr'g Tr); in the prior appeal brief in the circuit court (Appellant's Br, 9/9/19); in the prior appeal brief in this Court (Appellee's Answer, 8/31/20); at the evidentiary hearing on remand to the district court (see generally 1/25/22 Hr'g Tr) and in a post-hearing filing (Prosecution's

Closing Br, 4/22/22); and in the second appeal to the circuit court, in the appeal briefs (Appellant Br, 6/12/23; Reply Br, 7/24/23) and at oral argument (see generally 8/9/23 Hr'g Tr).

B. Burden of Proving the Affirmative Defense

A defendant bears the burden of proving an affirmative defense to the charges against him. *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). Accordingly, as this Court recognized and the district court acknowledged, Caswell bore the burden of proof to establish that the Mackinac Tribe is a treaty tribe. See *Caswell,* 336 Mich App at 78; (4/18/23 Dist Ct Op, 1, 4–5).

C. Analysis

" '[T]reaty-tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure.' " *Caswell*, 336 Mich App at 75, citing *Washington II,* 641 F2d at 1371. Thus, this test comprises three elements: (1) a group of citizens of Indian ancestry, (2) that is descended from a treaty signatory, and (3) has maintained an organized tribal structure. Establishing treaty-tribe status, even under a

preponderance of the evidence standard,[7] see *Caswell,* 336 Mich App at 78, requires a voluminous documentary record and a broad range of evidence to demonstrate each of the three factors. Caswell fell far short of making this evidentiary showing, and the district court failed in its role of historical gatekeeper, ruling that the Mackinac Tribe was a treaty tribe even though Caswell had not provided an unbroken chain of historical evidence tying his modern-day group to the historical Mackinac bands.

Caswell at best offered ancestry evidence regarding only *two* of the more than 400 members of the Mackinac Tribe, and yet the district court concluded from that evidence that the Mackinac Tribe *as a group* consists of people of Indian ancestry and is descended from a treaty signatory. And Adams, who is also a Sault Tribe member, testified that he *created* the Mackinac Tribe about 25 years ago in response to political events at the Sault Tribe—a far cry from demonstrating a continuous organized tribal structure since treaty times. Caswell presented no documents about the historical Mackinac groups, and the few documents he offered about the modern group failed to show a functioning governmental structure. The district court committed clear error in finding that this evidence established that the Mackinac Tribe is a treaty tribe and abused its discretion in dismissing the charges, and the circuit court failed to correct the error. This Court should reverse.

[7] " 'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross,* 281 Mich App 737, 740 (2008), citing *People v Pugh,* 48 Mich App 242, 245 (1973).

1. Caswell offered insufficient documentary evidence to support his affirmative defense and so failed to meet the robust evidentiary requirement for a group to establish treaty-tribe status.

The treaty-tribe test imposes a robust evidentiary requirement. Although the test for treaty-tribe status is not identical to the standard for federal recognition, "the two inquiries are similar." *Greene v United States,* 996 F2d 973, 976 (CA9, 1993); see also American Indian Law Deskbook, § 9:11 ("Though the two inquiries address legally distinct issues, *the facts a group must establish* to gain federal acknowledgement as an Indian tribe are similar to those it must establish to show that it is entitled to exercise treaty rights.") (emphasis added). Because these tests are similar, it is instructive for purposes of the treaty-tribe test to look at the type of evidence that is required to achieve federal recognition.

A tribe seeking federal recognition must document, among other things, "whether it has been identified as an American Indian entity on a 'substantially continuous basis' since 1900; whether it comprises a 'distinct community;' whether it has historically maintained 'political influence or authority over its members;' and whether its membership 'consists of individuals who descend from a historical Indian tribe.' " *Jewell,* 829 F3d at 756, citing 25 CFR 83.11(a)–(c), (e). These factors largely mirror the three prongs of the treaty-tribe test. Both the federal recognition standard and the treaty-tribe test look at the ancestry of the group's members, whether the members descend from a historical tribe, and whether the group has continuously functioned as a government by exerting influence or authority over its members.

To meet that standard, petitioners for federal recognition must present voluminous documentary evidence demonstrating the group's genealogy, ethnohistory, and political life, which requires multiple experts including anthropologists, genealogists, and lawyers. *Jewell,* 829 F3d at 759–760 (BROWN, J., concurring). Indeed, "[t]he creation of the documents alone has been estimated to take between two-and-a-half and five years." *Id.*, quoting Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation,* 151 U Pa L Rev 1827, 1840 (2003). " 'At present day, a federal acknowledgment petition can be over 100,000 pages long and cost over $5 million to assemble[.]' " *Jewell,* 829 F3d at 758 (BROWN J., concurring), quoting Jackson, *Note, The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty,* 64 Rutgers L Rev 471, 497 (2012). In other words, the documentary evidence needed to support federal recognition is substantial, wide-ranging, and exacting.[8] The documentary evidence needed to establish treaty-tribe status is held to a similarly high standard.

[8] Although not a final decision, the Bureau of Indian Affairs' recent proposed finding against federal acknowledgment of the Grand River Bands of Ottawa Indians illuminates the difficulty in providing documents with the level of detail needed to meet this evidentiary requirement. Proposed Finding Against Acknowledgment of the Grand River Bands of Ottawa Indians, 2/22/23 <https://www.bia.gov/sites/default/files/dup/inline-files/146_pf.pdf> (accessed May 16, 2024) (finding that the group's evidence failed to show that "its members comprise a distinct community that has existed as a community through time"). By contrast, the Nottawaseppi Huron Band of Potawatomi Indians provided detailed evidence of the historical continuity between the historical band that signed the treaty and the modern petitioner, which was sufficient to meet the federal acknowledgment criteria. Proposed Finding for Huron Potawatomi, Inc., 5/10/95 <https://www.bia.gov/sites/default/files/dup/assets/as-

And well it should be. Treaties between the United States and Indian tribes are contracts between sovereigns. *Washington v Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658, 675, modified sub nom *Washington v United States*, 444 US 816 (1979); see also Royster & Blumm, *Native American Natural Resources Law* (Durham, NC: Carolina Academic Press, 2002), ch VIII, p 473 ("Indian hunting, gathering, and fishing rights are peculiar kinds of profits a prendre, however. They were affirmed or recognized *by one sovereign for another sovereign*.") (emphasis added). Thus, determining that a modern-day group is a treaty tribe is akin to declaring that this group—the whole group—has key attributes of the historical sovereign that signed the treaty regardless of whether the federal government recognizes it as a sovereign today. It is a declaration that the modern-day group has "a continuing special political relationship with the United States" based on a treaty entered into by the members' ancestors. *United States v Washington (Washington II),* 476 F Supp 1101, 1110 (WD Wash, 1979), aff'd 641 F2d 1368 (CA 9, 1981). That is no small thing, especially in a case like this where the federal government has rejected the Mackinac Tribe's attempt to gain federal recognition through means other than the federal administrative process. See generally *Jewell,* 829 F3d 754. Moreover, a treaty tribe has authority to regulate its members' use of natural resources outside the parameters of state law, thereby depriving the State of regulatory jurisdiction it otherwise would possess.

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ia/ofa/petition/009_hurpot_MI/009_pf.pdf> (accessed May 16, 2024). The final determination for federal acknowledgment of the Huron Potawatomi can be found at 245 Fed Reg 66315 (December 21, 1995).

These considerations are why the evidentiary requirement to demonstrate treaty-tribe status is so substantial, even under a preponderance of the evidence standard.

Caswell's own witness McClurken understood the type and volume of documentary evidence that was required to demonstrate treaty-tribe status. He testified that it would take "thousands of records" to establish a historical tie between the modern-day Mackinac Tribe and a treaty signatory and that "it would take me a good year to put those records together[.]" (1/25/22 Hr'g Tr, p 14:9–23.)

Considering the type of evidence that Caswell had to admit into the record to prevail on his defense, the evidence that the district court accepted as establishing treaty-tribe status was alarmingly deficient.[9] Caswell entered merely a handful of documents into the record. The only ones that directly addressed the treaty-tribe test factors were Caswell's certificate of degree of Indian blood, tribal membership card and harvesting license; an 1890 federal census of Indians; the Mackinac Tribe constitution; and Adams' affidavit. And those documents fail to make any sort of cogent historical connection between the modern-day Mackinac Tribe and the bands that signed the 1836 Treaty that the treaty-tribe test requires.

[9] Despite the clear allocation of the burden of proof to Caswell, the circuit court at multiple points in its opinion faulted the People for failing to rebut Caswell's evidence. (9/27/23 Circ Ct Op, 3) ("However, Appellant failed to contradict any of the evidence presented by Appellee."); see also *id.,* 4 ("The Appellant wants more, but again provided no contradictory evidence."), *id.,* 6 ("Further, as stated previously, the Appellant failed to rebut or contradict the evidence submitted by the Appellee."). This was improper burden shifting, as the People had no obligation to counter Caswell's evidence or to prove that the Mackinac Tribe is *not* a treaty tribe.

More notable is what the record lacks. No genealogy records were presented for any members of the Mackinac Tribe other than Caswell. Caswell did not even submit genealogical records to support Adams' testimony about his own ancestry, a notable failing given Adams' role in creating the Mackinac Tribe and selecting its members. No other documents were submitted showing that any other tribal member has Indian ancestry or descends from the historical Mackinac groups—in fact, no records were submitted showing who the members even are. Further, the 1890 federal census of Indians simply identified the number of Indians residing in each county and then briefly described the Indian population in Michigan. It offered no particular insights into the historical Mackinac band. No other documents were provided regarding the historical Mackinac groups, either during treaty times or at any time in the nineteenth or twentieth centuries. And as noted, the only modern records addressing the group itself were the Mackinac Tribe constitution and Adams' affidavit.

In addition to these few documents, Caswell offered testimony from McClurken and Adams. Their testimony was almost entirely unsupported by documents, and this type of anecdotal testimony has been rejected as insufficient to establish treaty-tribe status. See *Timpanogos Tribe v Conway,* unpublished opinion of the United States District Court for the District of Utah, issued Jan 24, 2005 (Case No. 2:00-CV-734 TC), p 3, 2005 WL 8176199 (rejecting personal statements presenting anecdotal information in considering whether tribe was descended from a treaty signatory or had merged with another tribe) (attached as Exhibit L). But

even if this type of testimony were acceptable, just a cursory review of McClurken's and Adams' testimony uncovers significant shortcomings that make that testimony insufficient to support the decision to dismiss the charges.

McClurken was the only expert witness that Caswell called to testify. Although he was qualified as an expert in ethnohistory and testified about the historical Mackinac bands, he did not act as an expert in this case. Rather, McClurken conceded that his only preparation for the hearing was "one 20-minute phone call" with Caswell's attorney. (1/25/22 Hr'g Tr, pp 13:13–16, 15:12–14.) He did not review any documents, conduct any research, or prepare any analysis. When asked what research or documents his testimony would be based on, he listed only general categories of federal and state records related to Michigan tribes; he did not identify any specific documents and certainly none expressly related to Mackinac groups. (*Id.,* pp 13:17–14:1.) His testimony was based on his memory of documents that he had reviewed for other purposes, which were largely unidentified and not entered into the record so that they could be examined or challenged.

McClurken even admitted the deficiency of his efforts preparing to testify, explaining:

> If somebody wanted to pay me $200,000, I would write a detailed report. I would track down the internal documents. I would produce it and answer all of your questions.
>
> But so far I've testified from memory except for one document that I knew that I could look up quickly because I was just using it. And all of this is a general recitation of what I've found over 35 years.
>
> So when you come to ask me specifics, I just can't do that for you right now. [*Id.,* p 80:9–19.]

In other words, McClurken explained what ethnohistory requires, but by his own testimony, he did not perform the work of an ethnohistorian in this case. His generalized testimony was not a substitute for the documentary evidence that he described as necessary to demonstrate treaty-tribe status, which Caswell would have had to submit to prove his defense. Further, McClurken did not (and could not) opine that Adams' group had all the attributes of a treaty tribe because he "[didn't] know anything about the modern group." (*Id.,* p 103:19–25.). Taken as a whole, his testimony was not the type or quality of expert testimony that supported the district court's findings or its ultimate decision to dismiss the charges.[10]

Adams' testimony was equally lacking. He began his testimony by stating that he had suffered serious medical conditions that caused him to lose his memory and that he was "having trouble remembering things." (1/25/22 Hr'g Tr, p 126:4–8.) This was borne out in his testimony, which was jumbled, disjointed, and difficult to follow, with his answers often not addressing the question that was asked.

Nonetheless, and as explained more below, the district court concluded that the limited and inadequate evidence that Caswell presented was sufficient to establish treaty-tribe status, and the circuit court failed to correct that error. Neither court gave proper consideration to what the treaty-tribe test requires or its proper application. Instead, the district court accepted "trust me" testimony from

[10] McClurken's suggestion that he could do the research if someone paid him does not mean that he could prove that the Mackinac Tribe is a treaty tribe. There is no basis to assume that the evidence he would find would establish treaty-tribe status or support the district court's decision.

Caswell's witnesses in place of documentary evidence, which was an abuse of discretion. See generally *People v Wilhite*, 240 Mich App 587, 595 (2000) (holding the trial court abused its discretion by trusting defense counsel rather than "mak[ing] its decision [to allow plea withdrawal] according to the evidence on the record, none of which supported its decision in this case").

The Ninth Circuit test that this Court adopted was not intended to set so low an evidentiary bar. The district court's relaxing of the evidentiary requirement will allow groups without valid treaty rights to be deemed treaty tribes and thereby diminish the treaty rights of tribes validly claiming them and intrude on the State's sovereign right to enforce its laws. It is crucial that this Court correct this error.

2. Caswell failed to prove that the modern-day Mackinac Tribe consists of citizens of Indian ancestry when he provided evidence concerning at best only two out of 400-plus members.

The first element of the treaty-tribe test requires the group asserting that status to demonstrate that its members are of Indian ancestry. *Caswell,* 336 Mich App at 75. Caswell presented evidence regarding only two Mackinac Tribe members, himself and Adams, which could not support the district court's finding regarding *the group's* ancestry.

The only evidence in the record regarding the ancestry of any Mackinac Tribe member is documentation of Caswell's ancestry and Adams' unsubstantiated testimony. Caswell's certificate of degree of Indian blood shows that he is of Indian ancestry. Adams testified that he is directly descended from Ainsse (1/25/22 Hr'g

Tr, p 129:2–3), but his testimony was not supported by genealogical records and clearly was not based on his personal knowledge of someone who lived in 1836. Adams also claimed that some Mackinac Tribe members are his relatives, so those individuals *might* also be of Indian ancestry. (*Id.,* p 145:22–23.) However, Adams never identified those relatives or even stated how many of Mackinac Tribe's 468 members are related to him. No evidence was provided about the ancestry of any other Mackinac Tribe members. For all the record shows, Caswell and maybe Adams could be the *only* members of the Mackinac Tribe who can rightfully claim to have Indian ancestry.

Nonetheless, the district court concluded that the Mackinac Tribe was *a group* of people of Indian ancestry. The district court cited only to Caswell's certificate of degree of Indian blood showing that *he* is a descendant of an individual who appeared on the 1836 Census Register to conclude that "[t]he constituents of the current day Mackinac Tribe are clearly descendants of Ainsse as their signatory to the 1836 Treaty of Washington." (4/18/23 Dist Ct Op, 5.) Similarly, the district court concluded from Adams' testimony identifying himself as a direct descendant of Ainsse that "[h]e and his relatives, *as well as others who descended from that tribe,* constitute the Mackinac Tribe." (*Id.* (emphasis added).) In other words, the district court concluded that the Mackinac Tribe, which consists of 468 members, is a group of Indian ancestry based on evidence regarding at best two members and possibly some unknown number of Adams' relatives. Proving a characteristic of *a group* requires evidence about what the 400-plus members have in common, not just one

or two of them. This focus on Caswell's ancestry, even if supplemented by Adams' testimony about his own ancestry, was the specific error that the district court committed in 2019 that led this Court to reverse that first decision to dismiss the charges. *Caswell,* 336 Mich App at 77 (holding that the district court erred "by assuming that the Mackinac Tribe possessed treaty rights merely because some of its members were descended from signatory tribes of the relevant treaty"). The district court's findings in this regard were clear error yet again and likewise must be reversed.

Further, Adams' general testimony about researching Mackinac Tribe members' ancestry did not suffice to prove that the group is of Indian ancestry. Adams testified that he researched the genealogy of people who sought membership in the group, but he did not describe how the genealogical research was conducted, what specific sources were used, what process was followed, or how information was confirmed or refuted. Adams at no point explained how he determined a specific person's Indian ancestry or revealed whether he had used any particular criteria to determine Indian ancestry. He gave no examples of instances where Indian ancestry was proved or disproved. Also, no genealogical documents were entered into the record or identified in Adams' testimony, even about his own ancestry. When considering an issue as monumental as treaty-tribe status, it is not enough simply to take Adams' word for it. See *Wilhite,* 240 Mich App at 595. Nonetheless, the district court stated that the Mackinac Tribe is a group of Indian ancestry because "[t]he efforts that Mr. Adams and others made to identify those relatives

and descendants cannot be ignored." (4/18/23 Dist Ct Op, 5.) Given the lack of documentary evidence and the scant details in Adams' testimony, this finding was clear error.

Finally, the district court stated that McClurken's testimony supported its finding on this element, even though McClurken offered no testimony regarding the Indian ancestry of Mackinac Tribe members. (*Id.*) Indeed, McClurken stated that he had no information about the modern-day Mackinac Tribe and had not done any genealogical research into the Mackinac bands. (1/25/22 Hr'g Tr, pp 78:8–13, 95:24–96:10.) The district court's reliance on McClurken's non-existent testimony to support its conclusion was also clearly erroneous.

For its part, the circuit court only compounded the error, disregarding even the slim documentary evidence that Caswell offered and finding Adams' vague testimony about enrolling members and researching their ancestry to be sufficient to establish this element. (9/27/23 Circ Ct Op, 3.) The circuit court's discussion of the first factor does not even mention Caswell's certificate of degree of Indian blood or Adams' testimony asserting his Indian ancestry. Under the circuit court's reasoning, the treaty-tribe test can be met with *no* documentary evidence and *no* information about the ancestry of specific group members.

In sum, the record shows that Caswell is of Indian ancestry. Taken at face value, Adams' testimony shows that he is of Indian ancestry and that some unknown number of Mackinac Tribe members who are related to him might be of Indian ancestry. However, this evidence about two members did not establish that

the Mackinac Tribe *as a group* is of Indian ancestry. Indeed, concluding that this group is a treaty tribe based on the ancestry of only two members is in direct conflict with the principle that treaty rights belong to a tribe and are not vested in the tribe's members. *United States v Michigan,* 471 F Supp at 271–272 (the right reserved by the tribes or bands that signed the 1836 Treaty "is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to individual tribal members") (citations omitted). Moreover, recognizing a group as a treaty tribe based on evidence of only two members implies that an individual Indian like Adams or Caswell can possess a communal right and then share it with anyone he chooses to make a member of the group he forms regardless of their Indian ancestry or connection to a treaty signatory. That is plainly incorrect.

The district court committed clear error in finding that the Mackinac Tribe is a group of Indian ancestry without any evidence in the record concerning the ancestry of members other than Caswell and Adams. This error alone requires this Court to reverse and remand for trial on the charges.

3. Caswell failed to prove that the modern-day Mackinac Tribe descends from a treaty signatory when he failed to provide any evidence of the group's ties to the historical Mackinac band.

The second element of the treaty-tribe test requires the group asserting treaty-tribe status to demonstrate that it is descended from a treaty signatory.[11] *Caswell,* 336 Mich App at 75. This element is related to the first: To establish the first element, the group must demonstrate Indian ancestry, and to meet the second element, that ancestry must link to a treaty signatory. Here, because the Mackinac Tribe claims rights under the 1836 Treaty, Caswell had to show that the Mackinac Tribe was descended from a signatory of the 1836 Treaty. As with the first element, the only evidence Caswell offered regarding the Mackinac Tribe's descendancy from a treaty signatory is documentation of Caswell's ancestry and Adams' testimony. And similarly, this evidence was insufficient to establish that the Mackinac Tribe *as a group* is descended from a treaty signatory.

The only documentary evidence that links the modern-day Mackinac Tribe to an 1836 Treaty signatory is Caswell's certificate of degree of Indian blood, and that document links only *him* to a treaty signatory. Taken at face value, Adams' testimony shows that he descends from Ainsse, an 1836 Treaty signatory, as do potentially some number of Mackinac Tribe members who are related to Adams. (1/25/22 Hr'g Tr, pp 129:2–3, 145:22–23.) But no information was offered about how

[11] The district court misstated the second prong as requiring Caswell to prove that *he*, rather than the Mackinac Tribe as a whole, descended from a treaty signatory tribe. (4/18/23 Dist Ct Opinion, 5 ("that the Defendant descended from a treaty signatory tribe").)

many of the 468 Mackinac Tribe members are related to Adams, much less information about their ties to the treaty signers. This information about these two individual members is simply insufficient to establish that *the group* as a whole descended from a treaty signatory, and the test for treaty-tribe status turns on evidence as to *the group*.

Although Adams offered vague testimony about proving that Mackinac Tribe members descended from persons identified as Mackinac on the Durant Roll, as explained, Adams did not describe how any genealogical research was conducted, what specific sources or criteria were used, what process was followed, or how information was confirmed. Further, no documents supporting Adams' testimony about his genealogical research, or the results of that research, were entered into the record. Adams even called into question the reliability of his own research. He testified that he found people who did not know they were Mackinac, and when asked how these individuals could "forget such a thing," he replied, "Well, they got so many of the same names out there, you don't know if you're getting the right person or not." (*Id.,* p 179:12–17.)

This slim evidence did not support the district court's conclusion that Caswell had shown that the Mackinac Tribe—the whole group—descended from a treaty signatory. (4/18/23 Dist Ct Opinion, 5.) Citing only Adams' unsubstantiated testimony about his own ancestry and that of his relatives, the district court acknowledged that "there's *no evidence of any other members having directly descended from those identified in the Durant Roll other than the Defendant*," but

then used a double-negative to try to overcome the lack of evidence as to the Mackinac Tribe as a group: ". . . that does not lead to the logical conclusion that all members of the Mackinac Tribe are not somehow descendants of the Defendant's members identified on the Durant Roll."[12] (*Id.* at 6 (emphasis added).)

While the district court may have been logically correct that lack of evidence did not prove that Mackinac Tribe members were *not* descended from persons on the Durant Roll, Caswell bore the burden of establishing by a preponderance of the evidence that the Mackinac Tribe as a group *was* descended from a treaty signatory. See *Caswell,* 336 Mich App at 78. If Caswell had met his burden of proof on the affirmative defense, the district court could have pointed to the evidence indicating that other Mackinac Tribe members were descended from individuals on the Durant Roll or otherwise descended from a treaty signatory. It was not appropriate for the district court to assume without any supporting evidence in the record that someone may "somehow" establish such evidence to reach a conclusion in the absence of proofs required to meet the test for treaty-tribe status. Again, this same error by the district court in 2019 led this Court to reverse the first decision to dismiss the charges. *Caswell,* 336 Mich App at 77 (holding that the district court erred "by assuming that the Mackinac Tribe possessed treaty rights merely because some of its members were descended from signatory tribes of the relevant treaty").

[12] Presumably, "Defendant's members" in the quoted statement means Mackinac Tribe members, with "Defendant" meant to refer to the group and not Caswell.

In sum, the record at best shows that Caswell and Adams are descended from signatories of the 1836 Treaty, and some unknown number of other members of the Mackinac Tribe related to Adams *might be* related to treaty signers. But without documentary evidence and detailed, thorough information about the efforts made to verify identities and the link to the historical Michilimackinac band of 1836, the record did not support the district court's conclusion that the modern-day Mackinac Tribe *as a group* descends from a signatory of the 1836 Treaty. Therefore, the district court committed clear error in reaching that conclusion. This Court should reverse and remand for trial on the charges.

4. Caswell failed to prove that the Mackinac Tribe maintained an organized tribal structure from treaty times through today.

The third element requires the group asserting treaty-tribe status to demonstrate that it has maintained an organized tribal structure since treaty times. *Caswell,* 336 Mich App at 75. Even if Caswell had established the first two prongs of the treaty-tribe test (which he did not), establishing treaty-tribe status requires more than merely tracing the modern group's ancestry to the original tribe. See *Caswell,* 336 Mich App at 75; see also *United States v Suquamish Indian Tribe,* 901 F2d 772, 776 (CA 9, 1990) ("That a tribe includes descendants of treaty-signatory tribes does not alone allow it the fishing rights of a treaty tribe."). In addition, a tribe must have "functioned since treaty times as [a] 'continuous separate, distinct and cohesive Indian cultural or political communit[y].'" See *Caswell,* 336 Mich App at 76, quoting *Washington II,* 641 F2d at 1373. This third

element of the treaty-tribe test is paramount: "*Continually* 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 *Washington II,* 641 F2d at 1372 (emphasis added).

"[T]he sole purpose of requiring proof of tribal status is to identify the group asserting treaty rights as the group named in the treaty." *Caswell,* 336 Mich App at 75, quoting *Washington II,* 641 F2d at 1372–1373. "For this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community." *Caswell,* 336 Mich App at 75–76, quoting *Washington II,* 641 F2d at 1372–1373. This Court acknowledged that " 'changes in tribal policy and organization attributable to adaptation do not destroy tribal status' " and that "the degree of assimilation inevitable in response to shifts in federal policy between favoring tribal autonomy and seeking to destroy it" does not " 'entail the abandonment of distinct Indian communities.' " *Caswell,* 336 Mich App at 76, quoting *Washington II,* 641 F2d at 1373. Nevertheless, " '[t]o warrant special treatment, tribes must survive as distinct communities.' " *Caswell,* 336 Mich App at 76, quoting *Washington II,* 641 F2d at 1373.

The inquiry considers such things as whether tribal governments have "controlled the lives of the members" or established "continuous informal cultural influence." *Caswell,* 336 Mich App at 76, quoting *Washington II,* 641 F2d at 1373.

> In determining whether a group of persons have maintained Indian tribal relations and a tribal structure sufficient to constitute them an Indian tribe having a continuing special political relationship with the United States, the extent to which the group's members are persons of

> Indian ancestry who live and were brought up in an Indian society or community, the extent of *Indian governmental control over their lives and activities*, the extent and nature of the members' participation in tribal affairs, the extent to which *the group exercises political control over a specific territory*, the *historical continuity* of the foregoing factors, and the extent of express acknowledgement of such political status by those federal authorities clothed with the power and duty to prescribe or administer the special political relationships between the United States and Indians are all relevant factors to be considered. [*Washington II*, 476 F Supp at 1110 (emphasis added).]

The evidence simply fails to address most of these critical factors. For example, the record leaves unanswered whether the Mackinac Tribe as a whole has Indian members, whether the members live as part of an Indian community, or whether the group has a specific territory over which it exercises political control.

Simply being descendants of a treaty signatory tribe is not enough where the members have "no common bond of residence or association *other than such association as is attributable to the fact of their voluntary affiliation with*" the modern-day group. *Id.* at 1109 (emphasis added). In other words, there must be a relationship between the members that demonstrates that they are a tribal community regardless of federal recognition, which Caswell has not shown. As discussed, he has not even explained who these group members may be.

The district court's finding on the third factor was based solely on McClurken's testimony about the Mackinac bands from treaty times through about 1981, from which the court astonishingly concluded that "the record shows a lineal continuation of tribal governance from the inception of the Treaty of 1836." (4/18/23 Dist Ct Op, 8.) Evidence regarding only the historical groups, with no mention of what happened in the past 40 years and nothing linking the modern group to the

historical groups, did not support a finding in Caswell's favor on this factor. On appeal, the circuit court at least seemed to acknowledge the need to demonstrate a continuance of tribal structure through the present day, but its findings also were based on inadequate evidence. In fact, the record showed that Adams' Mackinac Tribe was formed recently in response to modern-day political events and that it had not maintained a tribal government since treaty times or exerted governmental authority over its members. The district court's rulings on this factor were clearly erroneous.

a. Caswell did not demonstrate continuity of tribal government from treaty times through the present.

The Mackinac Tribe is a recent creation, not an entity that has "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. Adams' testimony shows that the Mackinac Tribe was created about 25 years ago when the Sault Tribe closed its enrollment rolls and there were millions of dollars in federal land claim settlement funds at play. (1/25/22 Hr'g Tr, pp 128:5–6, 10–18, 153:8–20.) The fact that the Mackinac Tribe was created in response to modern-day political events in another tribe disproves any argument that the Mackinac Tribe has maintained an organized tribal structure since treaty times. It could not have existed since treaty times and also have been created recently. Indeed, if the group that Caswell belongs to had existed since treaty times, there would have been no need for Adams to create the Mackinac Tribe and

go searching for members. (See *id.*, pp 128:15–18, 130:1–10, 157:10–17.) Nor could the Mackinac Tribe be a distinct community if its members were either members of the Sault Tribe, like Adams, or claimed they were entitled to be members of the Sault Tribe. This alone is sufficient to defeat this factor.

Separately, the Mackinac Tribe cannot show continuity because the timeline established by the evidence that Caswell presented has a twenty-year gap. McClurken's general testimony, unsupported by documentary evidence, covered treaty times through about 1981, when the NMOA disbanded. Adams picked up with the Mackinac Tribe's creation in the late 1990s. That leaves nearly twenty years unaccounted for—a two-decade hole that precluded a finding that the Mackinac Tribe had maintained a continuous government since treaty times.

The circuit court attempted to fill this gap by noting that the Mackinac Tribe appointed representatives to the Michigan Commission on Indian Affairs. (9/27/23 Circ Ct Op, 5.) Relying on McClurken's testimony, the circuit court stated that the Commission had closed about 15 years ago, which was "evidence of a functioning government up until 2007." (*Id.*) There are several problems with this finding.

First, McClurken was incorrect about the timeline; the Commission disbanded in 1999. Executive Reorganization Order No. 1999-6, codified at MCL 16.721. Second, members of the Commission were appointed by the governor, not by tribes, and eligibility for membership was based largely on blood quantum and geography rather than tribal membership. See, e.g., MCL 16.711(1) ("Nine members shall have not less than ¼ quantum Indian blood, 2 of whom shall be from

Indian reservations and recommended by the intertribal council, 5 of whom shall be appointed by the governor from geographic areas representative of Indian population, and 2 of whom shall be appointed by the governor from a city having a population greater than 1,000,000 and 2 members at large, not necessarily Indian."). The Commission membership criteria were consistent with the duties of the Commission, which included addressing the needs of individual Indians residing in Michigan and did not focus exclusively on tribal governments. See MCL 16.714. Third, even if Mackinac groups played some role on the Commission, there is no evidence that *this* Mackinac Tribe did so. After all, McClurken admitted he had no information about the modern-day Mackinac groups that would allow him to connect the two. Thus, the circuit court's statement that the "Mackinac Tribe," implying the group that Caswell belongs to, appointed representatives to the Commission is an unsupported assumption and was clear error.

Finally, the circuit court found that appointing representatives to a state commission was "evidence of a functioning government." (9/27/23 Circ Ct Op, 5). But there is nothing in the record to support that conclusion—and it is far from self-evident. A group does not have to be a separate government to appoint representatives to this state commission. See MCL 16.711. Even if there had been evidence of the Mackinac Tribe's participation on the Indian Affairs Commission, that would not be evidence that it was a functioning government. And again, members were appointed by the governor, not tribes.

Finally, to establish this third element, Caswell had to provide evidence that the historical groups that McClurken described eventually became *this group* known as the Mackinac Tribe and founded by Adams. This factor is particularly important given that there are multiple groups of individuals in Michigan who claim exactly what Caswell and Adams claim, i.e., that their group stands in the place of the historical Mackinac band and has rights under the 1836 Treaty. (See, e.g., 1/25/22 Hr'g Tr, pp 78:3–7, 145:2–7.) But again, McClurken's testimony did not tie the historical Mackinac groups he talked about to the Mackinac Tribe at issue in this case because he had no knowledge of the many modern-day Mackinac groups. Similarly, Adams did not offer testimony tying his modern-day group to those historical groups. Instead, even given the reading most favorable to Caswell, the record shows that there were historically bands at Mackinac that signed the 1836 Treaty and that there is a modern-day group that calls itself the Mackinac Tribe. Caswell failed to prove any connection between the historical tribe and this group.

Overall, the record does not show that the Mackinac Tribe has maintained continuity of tribal government from treaty times through today.

b. Caswell did not demonstrate that the Mackinac Tribe exercises governmental authority over its members.

The lack of continuity between the historical Mackinac groups and the modern-day Mackinac Tribe means that Caswell failed to establish the third factor. But even if Caswell had established a continuous timeline from treaty times through today (which he did not), the record does not show that the modern-day

Mackinac Tribe exercises governmental authority over its members. In particular, the evidence fails to demonstrate that the Mackinac Tribe has "controlled the lives of the members" or established "continuous informal cultural influence." *Caswell,* 336 Mich App at 76, quoting *Washington II,* 641 F2d at 1373.

The record includes very limited evidence about the Mackinac Tribe's governance of its members. Notably, a constitution and a chairperson do not alone show continuous governmental control over members' lives or continuous cultural influence. See *Caswell,* 336 Mich App at 76, quoting *Washington II,* 641 F2d at 1373 ("Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members."). In *Washington II,* the federal court denied treaty-tribe status to the Snohomish tribe even though the group had a constitution, bylaws, a tribal council, and tribal chairperson and claimed 720 members. 476 F Supp at 1107. These hallmarks of government were not enough where the tribe's members had not maintained "a continuous separate, distinct and cohesive Indian cultural or political community." *Id.*

The Mackinac Tribe's lack of control over its members' lives is demonstrated by Adams' testimony about the Mackinac Tribe's enforcement (or rather, nonenforcement) of its natural resources regulations. Adams had no knowledge of how the natural resources regulations were currently enforced, but he said that when he was tribal chair, he assigned people to enforce them. (1/25/22 Hr'g Tr, p 171:15–18.) These individuals were not formal conservation officers or game wardens, and their only power was to issue fines. (*Id.*, p 171:17–25.) And if a

member did not pay, recourse was limited. The Mackinac Tribe has no jail and no tribal court. (*Id.*, pp 170:2–3, 172:16.) In fact, the only means Adams identified for compelling payment was to beat the person up. (*Id.*, p 172:14–20.) Adams' later retraction of the statement (*id.*, 186:11–12) does not change the fact that the Mackinac Tribe does not have a mechanism to enforce its regulations. This limited evidence does not support a conclusion that the group controls its members' lives.[13]

The evidence also does not show that the Mackinac Tribe has informal cultural influence over its members. Notably, the record does not even support a finding that the *historical* Mackinac bands maintained informal cultural influence over its members because McClurken's testimony did not address that issue. As for the modern group, Adams testified that the Mackinac Tribe holds powwows, fall gatherings, and other events. (*Id.*, p 149:1–4.) However, nothing in the record indicates how often these events are held, how many members participate in them, or how long the Mackinac Tribe has been holding them, much less whether it has done so continuously.

* * *

[13] The circuit court pointed to Adams' testimony stating that members always paid fines issued by the group as evidence that "members regulated themselves without the need for law enforcement or courts." (9/27/23 Circ Ct Op, 6.) However, Adams' testimony on this point was characteristically unclear. His testimony could also fairly be read to mean that the Mackinac Tribe never issued any tickets and, therefore, there were no fines to be paid. (1/25/22 Hr'g Tr, pp 185:25–186:5.) While it would be reasonable to conclude that tickets were not issued because members fully complied with the regulations, an equally reasonable conclusion would be that no tickets were issued because the Mackinac Tribe had no effective enforcement. Accordingly, this is not sufficient evidence to demonstrate tribal governance.

In summary, the record does not demonstrate that the Mackinac Tribe has maintained an organized tribal structure from 1836 until the present. At best, the evidence showed a tribal structure existed until around 1980 and then a new group was created in the late 1990s when millions of dollars in land claims settlement funds became available. The mere fact that Adams had to track down people to form the Mackinac Tribe shows that the group had not maintained an organized tribal structure. Further, Adams' testimony about the modern-day group fails to show that the Mackinac Tribe controls the lives of its members or has informal cultural influence over them. Even allowing for evolution of the tribal government over time and considering the history of policy failures of the federal government with respect to tribes, the evidence that Caswell offered simply failed to show an organized tribal structure from treaty times through today.

Showing a continuous organized tribal structure is the key requirement of the treaty-tribe test and is necessary to a finding that a group is entitled to exercise treaty rights. See *Caswell,* 336 Mich App at 75. The district court's finding on this third and paramount element was clear error.

5. The district court abused its discretion in dismissing the charges against Caswell based on its clearly erroneous finding that the Mackinac Tribe is a treaty tribe.

The district court's decision to dismiss the charges against Caswell stemmed from its determination that he had established each of the three elements of the treaty-tribe test. However, as discussed, the district court's factual findings on each of those factors were clearly erroneous and unsupported by the record. A decision

based on clearly erroneous factual findings necessarily "falls outside the range of reasonable and principled outcomes." *Parlovecchio*, 319 Mich App at 240 (quotation marks and citation omitted). By basing its decision on improper factual findings, the district court abused its discretion in dismissing the charges against Caswell.

Under the district court's reasoning, a couple of people with Indian ancestry and a link to a treaty signatory tribe could form a group, call it a treaty tribe, and then share treaty rights with anyone to whom the group gives a membership card and a fishing license. Recognizing these groups as treaty tribes would diminish the rights of the tribes that validly claim the treaty rights and preempt the State's sovereign duty to protect the natural resources by enforcing state law. This Court should reverse the district court's misapplication of the treaty-tribe standard to preclude such an outcome here.

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. As it did the first time it dismissed these charges, the district court accepted little more than Caswell's barebones claim in place of the significant evidence needed to prove this special status, and the circuit court simply allowed this error to persist uncorrected. Allowing this ruling to stand will allow any number of groups to claim treaty-tribe status without making the showing that *People v Caswell* requires. It is imperative that this Court correct the district court's error.

For these reasons, this Court should reverse the circuit court, reinstate the charges against Caswell, and remand to the district court for trial on the charges.

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