STATE OF MICHIGAN
IN THE COURT OF APPEALS

SCOTT WILLIAM MOSES,

Plaintiff-Appellant,

V.

STATE OF MICHIGAN,

Defendant-Appellee.

_____/

COURT OF APPEALS NO: 262970

CIRCUIT COURT NO: 01-0272-FC

Stephen L. Borrello, Presiding Judge
Peter D. O'Connell, Judge
Alton T. Davis, Judge

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PLAINTIFF-APPELLANT'S REPLY BRIEF TO DEFENDANT-APPELLEE'S, ISABELLA COUNTY PROSECUTOR'S, BRIEF OPPOSING PLAINTIFF-APPELLANT'S COMPLAINT FOR WRIT OF HABEAS CORPUS

ORAL ARGUMENT REQUESTED

Respectfully submitted,
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STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE DECISIONS OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN V. UNITED STATES, IN DOCKET 13-H, 2 IND CL COM 380 (1953) AND 3 IND CL COM 380 (1954) ARE DISPOSITIVE OF THE ISSUE OF CRIMINAL JURISDICTION ON THE FEDERAL ISABELLA INDIAN RESERVATION.

THE PLAINTIFF-APPELLANT WOULD ANSWER, "NO"

THE DEFENDANT-APPELLEE WOULD ANSWER, "YES"

II. WHETHER THE STATE OF MICHIGAN'S ASSERTION OF CRIMINAL JURISDICTION IN MR. MOSES' CASE CONSTITUTES A RADICAL JURISDICTIONAL DEFECT.

THE PLAINTIFF-APPELLANT WOULD ANSWER, "YES"

THE DEFENDANT-APPELLEE WOULD ANSWER, "NO"

ARGUMENT

I. WHETHER THE DECISIONS OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN V. UNITED STATES, IN DOCKET 13-H, 2 IND CL COM 380 (1953) AND 3 IND CL COM 380 (1954) ARE DISPOSITIVE ON THE ISSUE OF CRIMINAL JURISDICTION ON THE FEDERAL ISABELLA INDIAN RESERVATION.

In their response brief, Defendant-Appellee asserts that the decision of People v. Bennett, 195 Mich. App. 455; 491 N.W.2d 866 (1992) is dispositive on the issue of criminal jurisdiction in Mr. Moses' case. Appellee's Brief In Opposition To A Complaint For A Writ of Habeas Corpus, pp. 4-5 (Appellee's Brief) . Here, Mr. Moses disagrees and on this issue relies upon his arguments as set forth in "Plaintiff-Appellant's Brief In Support Of Complaint For Writ of *Habeas Corpus* Pursuant To Michigan Court Rules 7.203(C)(3),and 7.2206(D)(3)".

Defendant-Appellee also asserts that the decisions found in Saginaw Chippewa Indian Tribe v. United States, Docket 13-H, 2, Ind. Cl. Com. 380 (1953), and 3 Ind. Cl. Com. 380, (1954), are dispositive of the issue of criminal jurisdiction in Mr. Moses' case. Appellee's Brief, pp.5-8. Essentially, Defendant-Appellee argues that because the swamp land in question was granted to the State of Michigan pursuant to the Swamp Land Grant Act of 1850, 9 Stat. 519, and which predates the Treaty With The Chippewa's, August 2, 1855, 11 Stat. 633 (Treaty of 1855); and the Treaty With the Chippewa Indians, October 18, 1864, 14 Stat. 657, (Treaty of 1864) said swamp land is not part of the Federal Isabella Indian Reservation and it is not therefore "Indian Country" for purposes of asserting criminal jurisdiction therein. To this argument, Plaintiff-Appellant, Mr. Moses respectfully responds.

Mr. Moses asserts that the controlling law on what constitutes "Indian Country" for purposes of exercising criminal jurisdiction within the Federal Isabella Indian Reservation over

Indian persons has been set forth by the U.S. Congress in Title 18 U.S.C. 1151, Indian Country. This Section provides:

"Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country", as used in this chapter [18 USCS sections 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c)all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-ways running through the same."

Under this statute, the U.S. Congress has set forth the definition of what constitutes "Indian Country", and Indian Country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, (emphasis not original)..." Under 18 U.S.C. 1151, it is clear that it was the intent of the United States Congress, which has plenary power over Indian affairs, to specifically define what is, and what is not Indian Country. See United States v. Celestine, 215 U.S. 278, 285, 30 S.Ct. 93 (1909)(finding "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."). Under Section 1151, it is of no legal consequence to the present case whether the swamp land in question was granted to the State of Michigan prior to the Treaty of 1855, or the Treaty of 1864. Rather, the swamp land in question is "Indian Country" because it falls within the exterior boundaries of the Federal Isabella Indian Reservation.

Furthermore, the Treaty of 1864, did affirm and designate as the boundaries of the Federal Isabella Reservation six townships within the County of Isabella, State of Michigan. The legal description given in Article II of the Treaty of 1864 is as follows:

"In consideration of the foregoing relinquishments, the United States hereby agree to set apart for the exclusive use, ownership, and occupancy of the said of the said (sic) Chippewas of Saginaw, of Saginaw, Swan Creek, and Black River, all of the unsold lands within the six townships in Isabella County, reserved to said Indians by the treaty of August 2d, 1855, aforesaid, and designated as follows, viz:-

The north half of township fourteen, and townships fifteen and sixteen north, of range three west; the north half of township fourteen and township fifteen north, of range four west, and townships fourteen and fifteen north, of range five west."

Indeed, it has been the position of the United States that the boundaries of the Isabella Reservation have not been diminished since these were established by the Treaties of 1855, and 1864, with the United States. See. Brief on behalf of the United States of America, United States of America v. Manier, Case No. 77-20066, (E. Dist, Mich.1977). (Plaintiff-Appellant's original Brief, Appendix P). See, Manier, Case No. 77-20066 (E. Dist. Mich. 1977) (Memorandum and Opinion, finding that allotment of lands within an Indian reservation does not reduce the boundaries of the reservation nor terminate its existence, and once Congress has established a reservation, all tracts of land within it remain a part of the reservation until separated by Act of Congress, *citations omitted.*) (Plaintiff-Appellant's original Brief, Appendix Q). United States of America v. Peltier, 344 F.Supp. 2d. 539, 547 (E. Dist. Mich. 2004) (finding, there is no evidence that Michigan has sought or obtained consent by Congress or its own political affirmation to assert jurisdiction, or that the Saginaw Chippewa Indian Tribe consented to it; criminal jurisdiction over tribal members on the reservation, therefore, is exclusively tribal or federal).

Furthermore, Defendant-Appellee's reliance on the findings of the Indian Claims Commission, Saginaw Chippewa Indian Tribe, Docket 13-H, 2, Ind. Cl. Com. 380 (1953), and 3 Ind. Cl. Com. 380, (1954), is in error when read in conjunction with the judicial opinions of the U.S. Supreme Court in Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424 (1962); the U.S.

6th Circuit Court of Appeals in Cardinal v. United States of America, 954 F.2D 359 (1992) (6th Cir. Mich); the U.S. District Court in Keweenaw Bay Indian Community v. State of Michigan, 784 F. Supp. 418, (1991) (W.D. Mich.); and the U.S. District Court in United States v. Peltier, 344 F.Supp. 2d. 539 (E. Dist. Mich. 2004). The application of these decisions are set forth in Plaintiff-Appellant's original Brief. However, due to their importance in addressing the arguments set forth by Defendant-Appellee, Mr. Moses respectfully offers further analysis herein.

In Seymour, 368 U.S. 351, 82 S.Ct. 424, the State of Washington did assert criminal jurisdiction over an Indian person who was alleged to have committed a crime on the federally recognized Colville Indian reservation. Copy of Opinion, Appendix A. Here, the State of Washington did assert that because Seymour had committed his crime on land held in fee patent by a non-Indian, it could not be Indian Country. Id. 357, 428. In response, Defendant Seymour sought a writ of *Habeas Corpus* which was denied by Supreme Court of Washington. Id. at 351, 424. Defendant, Seymour then did appeal. Id.

In rejecting the State of Washington's assertion, the Seymour Court did find that even though the parcel of land in question was held under patent in fee by a non-Indian person, it was still Indian Country in light of 18 U.S.C. 1151. In this regard, the Seymour Court did state:

"...But the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in Section 1151 to include 'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent.'"

Seymour, 368 U.S. 351, 357-358, 82 S.Ct. 424, 428. Lastly, the Seymour Court did set forth a practical reason for its ultimate holding, and which is applicable in the present case. Id. at 358, 428. Here, the Seymour Court did reason that it was impractical to have a "checkerboard

jurisdiction" where law enforcement officers would have to search tract books in order to determine proper criminal jurisdiction. Further, that such checkerboard jurisdiction issues was prevented by the plain language found in Title 18 U.S.C. 1151. Id. at 358, 428.

Similarly, in the present case Defendant-Appellee asserts that because Mr. Moses is alleged to have committed his crime on swamp land, and which was granted to the State of Michigan under the Swamp Land Act of 1850, it cannot be Indian Country. Yet, this very argument was rejected by the Seymour Court. Seymour, 368 U.S. 351, 357-358, 82 S.Ct. 424, 428. In this regard, Mr. Moses asserts that under the reasoning of Seymour, *supra*, it does not matter whether the swamp land in question was granted, or put under patent, to the State of Michigan prior to the Treaty of 1855, or the Treaty of 1864. Rather, the swamp land in question is "Indian Country" because it falls within the exterior boundaries of the Federal Isabella Reservation. Consequently, the lawful exercise of criminal jurisdiction thereon (as it concerns crimes committed by Indian persons) is either with the Saginaw Chippewa Indian Tribe, or the Federal government. See Nevada v. Hicks, 533 U.S. 353, 365; 121 S.Ct. 2304, 2313 (2001) (finding, Sections 1152 and 1153 of Title 18 give the United States and tribal criminal law generally exclusive application, but which apply only to crimes committed in Indian Country).

Thus, it is for these reasons that Defendant-Appellee's reliance on the decisions of the Indian Claim Commission in Saginaw Chippewa Indian Tribe, Docket 13-H, 2 Ind. Cl. Com. 380 (1953), and 3 Ind. Cl. Com. 380, (1954), as being dispositive of the issue of criminal jurisdiction on the Federal Isabella Indian Reservation are in error. See Cardinal, 954 F.2D 359, 362-363 (1992) (6th Cir. Mich)(*citing*, Title 18 U.S.C. 1151, and finding that irrespective of so-called patents designated canal, school and swamp lands, if they are found within the exterior

boundaries of the federally created Indian reservation, the same are a part of Indian Country for purposes of federal jurisdiction); Keweenaw Bay Indian Community, 784 F. Supp. 418, 426 (1991) (W.D. Mich.)(finding that all the lands in question were within the boundaries of the L'Anse Federal Indian Reservation, and irrespective of whether they had been sold by the United States prior to the effective date of the 1854 Treaty with the Chippewa, 10 Stat. 1109); Peltier, 344 F.Supp. 2d. 539, 547 (E. Dist. Mich. 2004). For the above stated reasons of law and fact, Plaintiff-Appellant respectfully requests this Honorable Court reject Defendant-Appellee's arguments in this regard.

II. WHETHER THE STATE OF MICHIGAN'S ASSERTION OF CRIMINAL JURISDICTION IN MR. MOSES' CASE CONSTITUTES A RADICAL JURISDICTIONAL DEFECT.

Mr. Moses argues that the State of Michigan, Isabella County's assertion of criminal jurisdiction in his case does in fact constitute a radical jurisdiction defect, because said actions by Isabella County are in violation of the U.S. Constitution, the Treaties of 1855, and 1864, and applicable federal law. As more fully set forth in Plaintiff-Appellant's original brief, the assertion of criminal jurisdiction in his case does violate:

(1). The U.S. Constitution's, Bill Of Rights, Amendments, IV, V, VI, and XIV, because the unlawful imposition and application of the holdings of Bennett, 195 Mich. App. 455; 491 N.W.2d 866, which Defendant-Appellee asserts permits and sanctions criminal jurisdiction over Indian persons on the Federal Isabella Indian Reservation, are color of law civil rights violations pursuant to Title 42 U.S.C. 1983.

(2). The U.S. Constitution's, Art. I, Sec. 8(3), Commerce Clause; Art. II, Sec. II, Treaty Clause; and Article VI, clause 2, Supremacy Clause, because the unlawful application of the

holdings of Bennett, 195 Mich. App. 455; 491 N.W.2d 866, in fact diminishes or changes the boundaries of the Federal Isabella Indian Reservation. On this point, Mr. Moses asserts that only the United State Congress has the power to set, diminish or change the boundaries of a Federal Indian Reservation. Solem v. Bartlett, 465 U.S. 463, 104 S.Ct. 1161 (1984).

(3). The Treaties of 1855, and 1864, because it is under these Treaties that the Federal Isabella Indian Reservation, with certain and described boundaries, was created. Application of the holdings of Bennett, 195 Mich. App. 455; 491 N.W.2d 866, in Mr. Moses' case unlawfully interprets said Treaties of 1855, and 1864, and said decision does not recognize the boundaries of the Federal Isabella Indian Reservation as set forth therein for purposes of asserting lawful criminal jurisdiction thereon. Choctaw Nation of Indians v. United States, 318 U.S. 423, 432; 63 S.Ct. 672 (1943) (finding, Indian treaties must be construed "so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.").

(4). Title 18 U.S.C. 1151, 1152, and 1153, where said statutes define who is an Indian person for purposes of asserting criminal jurisdiction, what crimes may be prosecuted by the federal government or the tribes, and what is "Indian Country" for purposes of establishing criminal jurisdiction thereon. Under Section 1151, "Indian Country" includes: "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, (*emphasis not original*) and, including rights-of-way running through the reservation..." See Williams v. Lee, 358 U.S. 217, 219-220 (1959) (...but if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive).

In their Brief, Defendant-Appellee relies upon the Affidavit of Dr. James Clifton to support their argument that the swamp land in question is not part of the Federal Isabella Indian Reservation and it therefore not Indian Country. Appellee's Brief p. 20. Mr. Moses respectfully responds that Dr. James Clifton is now deceased. Dr. Clifton cannot, therefore, be cross examined on any statements that he may have attested to at the time (May 2, 1993) of his submission. As a consequence, Mr. Moses respectfully requests that this Honorable Court not rely on said Affidavit to establish any factual basis for making a determination herein.

Mr. Moses argues that Isabella County's assertion of criminal jurisdiction in his case contravenes express legal requirements in existence at the time of their act or omission. Moreover, the findings of the Price Court clearly state that *habeas corpus* relief is not prohibited by MCL Section 600.4310(3), where the convicted person alleges jurisdictional defects. People v. Price, 23 Mich. App. 633, 669, 179 N.W. 2d 177, 1808 (1970). Indeed, Isabella County's desire to retain criminal jurisdiction over Indian persons on the Federal Isabella Reservation must be supported by substantive law. In the present case it is not. Here, an unlawful application of criminal jurisdiction in contravention of the U.S. Constitution, the Treaties of 1855, and 1864, and federal law and judicial opinions cited above constitute radical jurisdictional defects. Such defects render Mr. Moses' conviction in the Isabella County Trial Court void. See Ex Parte Siebold, 100 U.S. 371, at 376 (1880) (finding that the only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rending its proceedings void). See, In re Belt, 159 U.S. 95; 15 S.Ct. 987, (1895); In re Hamilton, 51 Mich.174, 16 N.W. 327, (1883); Ex parte Allen, 139

Mich. 712, 103 N.W. 209 (1905); In re Stone, 295 Mich. 207, 294 N.W. 156, (1940); and People v. McCager, 367 Mich. 116, 116 N.W.2d 205, (1962) (holding, *habeas corpus* relief involves a civil proceeding, and the purpose of such proceeding is to cause the release of persons illegally detained, and to inquire into the authority of law by which said person is deprived of his or her liberty interest).

In summary, Mr. Moses argues that Isabella County has a duty to follow judicial precedent, apply and enforce the U.S. Constitution, the Treaties of 1855, and 1864, and applicable federal law under Title 18 U.S.C. 1151, 1152, and 1153. Further, that assertion of lawful criminal jurisdiction over a defendant in any court of law is an express legal requirement. In fact it is the first pre-requisite upon which all other lawful actions and decisions of a court are based. If the Isabella County Trial Court, or any court, does not have both subject matter and personal jurisdiction over the defendant, and then renders a decision in such a case, how can it then be said that such actions were not radical in their defect? How can it be said that such decision is not void as a matter of law? The jurisdictional defects in Mr. Moses case are radical, and *Habeas Corpus* is the proper method to bring it to this Honorable Court's attention. It is for these reasons, and as more fully set forth in Plaintiff-Appellant's original brief, that Plaintiff-Appellant respectfully requests this Honorable Court reject Defendant-Appellee's argument.

CONCLUSION AND REQUEST FOR RELIEF

Mr. Moses is member of the Saginaw Chippewa Indian Tribe of Michigan. His Tribe is recognized by the United States of America. The United States of America did enter into government to government Treaties with his Tribe, and which did result in the creation of the Federal Isabella Indian Reservation. Since the last Treaty of 1864, the U.S. Congress has not

diminished the boundaries of the Federal Isabella Reservation. The United States Congress did again recognize the Saginaw Chippewa Indian Tribe where they did first permit, and then did approve, said Tribe's reorganization under the Indian Reorganization Act, 25 U.S.C. 476 et seq., (48 Stat. 984, codified as amended by Act of June 15, 1935, 49 Stat. 378).

The swamp land upon which Mr. Moses is alleged to have committed his crime is within the exterior boundaries of the Federal Isabella Indian Reservation. Under Title 18 U.S.C. 1151, all land within the Reservation boundaries, and regardless of patent, are for purposes of asserting criminal jurisdiction over *Indian* persons thereon, either federal or with his Tribe. Thus, the findings of the Indian Claim Commission are not dispositive on the issue of who may assert lawful criminal jurisdiction on the Federal Isabella Indian Reservation.

Mr. Moses asserts that *habeas corpus* is the proper and lawful method by which he may challenge his incarceration and loss of freedom. Assertion of criminal jurisdiction in his case by the State of Michigan constitutes a radical jurisdictional defect where such assertion did violate the express legal requirements of the U.S. Constitution, federal law, and federal judicial opinions cited above and in his original Brief. It is for these reasons that Mr. Moses respectfully requests that this Honorable Court grant his request for a Writ of *Habeas Corpus.* Mr. Moses requests any other relief that he is entitled to under law or equity, and as set forth in his original Brief.

WHEREFORE, Scott William Moses, Plaintiff-Appellant respectfully submits his Reply Brief To Defendant-Appellee's, Isabella County Prosecutor's Brief Opposing Plaintiff-Appellant's Complaint For Writ of *Habeas Corpus.*

Respectfully submitted, Dated: April 25, 2006

William L. Antrobius (P56721), Attorney For Plaintiff-Appellant