No. 80499-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

GERALD CAYENNE,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

United States Supreme Court Cases

Statutes

Other Authorities

A. SUMMARY OF ARGUMENT

Consistent with federal law, this Court has held that because the rights regarding on-reservation fishing reserved to the Chehalis Tribe in the Executive Order creating its reservation, the State cannot limit f the exercise of those rights by tribal members on the reservation except for limited and necessary conservation measures.[1]

As a condition of his sentence, the superior court barred Mr. Cayenne, a registered member of the Chehalis tribe, from owning gill nets on or off the reservation, without regard to whether such an infringement was a necessary conservation measure. The Court of Appeals, concluded the trial court lacked the authority to restrict Mr. Cayenne's exercise of his on-reservation fishing rights.[2]

Thus the question for this Court is whether a state court may regulate a tribal member's protected aboriginal right to fish on this reservation. As made clear in Mr. Cayenne's brief to the Court of Appeals the answer to that question is no. This Court need not decide the broader question urged upon it by the State, in both its petition and amicus brief in support of the petition, that the State has jurisdiction to enforce criminal laws and sentences against

[1] State v. Stritmatter, 102 Wn.2d 516, 688 P.2d 499 (1984).
[2] State v. Cayenne, 139 Wn.App. 114, 124, 158 P.3d 623, 628 (2007).

tribal members on reservations. If, however, the Court elects to reach this broader question, the Court of Appeals properly recognizes the limitations on state authority with respect to protected aboriginal rights on Native American reservations.

B. ISSUE PRESENTED

Where members of a nontreaty tribe have an exclusive and individual right to fish on the reservation subject only to necessary conservation restrictions, does a state sentencing court have the authority to restrict a tribal member's exercise of that right in the absence of a finding it is a necessary conservation measure?

C. SUMMARY OF CASE

Mr. Cayenne was arrested after officers with the Washington Department of Fish and Wildlife observed him twice setting a gill net in the Chehalis River in an area off the Chehalis Reservation. 2/28/06 RP 7-17.

Mr. Cayenne is an enrolled member of the Chehalis Tribe. 2/28/06 RP 22. Gill nets are sold "by the bail[]" by the tribe for use on the Chehalis Reservation. 3/1/06 RP 5.

The State charged Mr. Cayenne with two counts of first degree unlawful use of nets to take fish. CP 8-9. A jury convicted

him of one count but was unable to reach a verdict on the second. CP 14-15.

The Judgment and Sentence provides that as a condition of his sentence Mr. Cayenne "shall not own any gill net." In its oral ruling the trial court elaborated "I am going to prohibit you from having a net as a condition of this. No gill nets." 3/1/06 RP 5. When defense counsel sought clarification of whether that prohibition applied on the Chehalis Reservation as well, the court responded

> I am going to make it a condition that he have no gill nets period. I don't know that they are going to catch him on the reservation. I don't know what I would do with - - I don't think he should have a gill net. I think he has forfeited the right to do that.

Id.

Relying on decisions of this Court and the United States Supreme Court, the Court of Appeals reversed this condition of sentence to the extent it purported to apply on the Chehalis Reservation. Cayenne, 139 Wn.App. at 124.

D. ARGUMENT

1. THE OPINION OF THE COURT OF APPEALS FOLLOWS THE DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT IN RECOGNIZING THE LIMITATIONS ON STATE AUTHORITY TO REGULATE THE ON-RESERVATION ACTIONS OF NONTREATY TRIBAL MEMBERS WITH RESPECT TO THE EXERCISE OF THEIR HISTORICAL RIGHT TO FISH

The Court of Appeals concluded

> . . .we hold that the prohibition against possessing gill nets is void as unenforceable.
> We affirm the crime-related prohibition as it applies to State land. But we vacate the crime related prohibition to as it purported to extend . . . to fishing within the Chehalis Indian Reservation.

Cayenne, 139 Wn.App. at 124. As the court recognized, the ability of a state court to regulate fishing by a tribal member on the reservation, is substantially different than the enforcement of other crime-related prohibitions on a reservation, to the extent they may apply at all.

Unlike other reservations in Washington created by treaties, the Chehalis Reservation was created by two executive orders, one in 1864 and the second in 1886. See, Confederated Tribes of the Chehalis Reservation, et al. v. United States, 96 F.3d 334, 338-39 (9th Cir. 1996), cert denied, 520 U.S. 1168 (1997); Stritmatter, 102

Wn.2d at 516 (citing 1 Indian Affairs, Laws, and Treaties, 901-04 (Kappler ed. 1904)). The Chehalis, as a non treaty-tribe, do not enjoy an off-reservation right to fish. Confederated Tribes of the Chehalis Reservation, 96 F.3d at 343. However, the 1886 executive order creating the Chehalis Reservation provides that the land forming the reservation is "set apart . . . for the use and occupation" of the tribe. Stritmatter, 102 Wn.2d at 520 (citing Indian Affairs, Laws, and Treaties, at 904). The Supreme Court has interpreted such language in other similar executive orders as reserving an exclusive on-reservation fishing right. Alaska Pac. Fisheries v. United States, 248 U.S. 78, 88-90; 39 S.Ct. 40, 63 L.Ed. 138 (1918); Menominee Tribe v. United States, 391 U.S. 404, 405-06; 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). The nature of this right is defined by its exercise prior to creation of the reservation. Stritmatter, 102 Wn.2d at 520-21.

Because the Chehalis Tribe has historically fished for both subsistence and commercial purposes, Stritmatter concluded the State's ability to regulate the tribe's exclusive on-reservation rights was extremely limited and "must be a necessary conservation measure and must also be the least restrictive means available for preserving area fisheries from irreparable harm." 102 Wn.2d at 522

(citing United States v. Michigan, 653 F.2d 277, 279 (6th Cir.), cert. denied, 454 U.S. 1124 (1981)); compare, Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 175, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) (Puyallup III) (recognizing that in light of treaty language reserving the right of tribal members to fish "in common with all the citizens of the Territory" tribe could not claim exclusive right to fish "at all usual and accustomed" places)). Thus, while members of treaty tribes have a right to fish off the reservation not enjoyed by members of nontreaty tribes, the latter enjoy an exclusive on-reservation right not shared by the former.

The State bears the burden of proving any regulation of fishing rights by Native Americans is a necessary conservation measure. Antoine v. Washington, 420 U.S. 194, 207, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975). Finally, the fact that Stritmatter reversed the criminal conviction of a tribal member, convicted for violating a regulation which the Court found improperly infringed upon the tribe's fishing rights, demonstrates that the exclusive right to fish is a personal right of individual tribal members and not just of the tribe collectively.

The Supreme Court has said "it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the

Federal Government, not the States." Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). Only in "exceptional circumstances [may] a State . . . assert jurisdiction over the on-reservation activities of tribal members." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32, 103 S. Ct. 2378; 76 L. Ed. 2d 611 (1983). In such circumstances "state laws may be applied to Indians [only if] such application [does not] interfere with reservation self-government or impair a right granted or reserved by federal law." Organized Village of Kake v. Egan, 369 U.S. 60, 75, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

As a product of federal law, the Executive Orders creating the reservation, the Chehalis have an exclusive right to fish upon the reservation. Stritmatter, 102 Wn.2d at 520-22; see also; Alaska Pac. Fisheries, 248 U.S. at 88-90 (construing similarly worded Executive Order); and Menominee Tribe, 391 U.S. 405 n.2 (construing similar treaty language). Even if RCW 9.94A.505(8) is generally applicable to others, because its application of state law to Mr. Cayenne in this case unquestionably "impairs a right . . . reserved by federal law," a right to fish on the reservation which was neither granted nor negotiated away by treaty. Application of

the condition of sentence in this case would allow a restriction of that right for a non conservation purpose and without any showing of necessity. The Court of Appeals properly vacated the condition of sentence to the extent it applies to Mr. Cayenne's right to fish on the Chehalis Reservation. This Court should affirm that decision.

In affirming the decision on this basis, the Court need not delve into the broader question of whether state court's may generally enforce crime-related prohibitions against tribal members on the reservation. Regardless of whether other theoretical crime-related prohibitions which do not seek to limit treaty or aboriginal rights may be enforced, it is clear that a limitation on fishing by Mr. Cayenne on the reservation may not. The State implicitly acknowledges as much in its amicus brief when it states

> The Court might at first blush assume that a sentencing prohibiting possession of gillnet is related to Indian fishing rights. The court of appeals does not pin its ruling to fishing rights.

Amicus Brief at 9. Thus, amicus acknowledges what Mr. Cayenne has always contended, state efforts to regulate treaty and federally recognized aboriginal rights are different than other state regulations.

Affirming the decision of the Court of Appeals on this narrow ground does not lead to the parade of horribles which the State conjures in its petition. The State posits the Court of Appeals ruling bars enforcement of a "'no contact with young children' condition by a convicted child molester" who invites children to accompany him to a national park or onto Fort Lewis. Petition at 4. As such an order could not possibly affect a treaty or protected aboriginal right there would be no bar to its enforcement or for sanctions for its violation. The same is true of the State's hypothetical of a drug court participant consuming illegal drugs at a Idaho sporting event, Petition at 4-5, unless the State is suggesting such a right exists at Idaho sporting events.

Whatever other on- -reservation activity the State may arguably regulate, it cannot regulate Mr. Cayenne's right to fish on the Chehalis Reservation. This, Court need not go beyond this simple holding to affirm the decision of the Court of Appeals.

2. FEDERAL CASES DEFINING FEDERAL JURISDICTION AND AUTHORITY ON INDIAN RESERVATIONS DO NOT REQUIRE NOR PERMIT A DIFFERENT RESULT IN THIS CASE

As argued Mr. Cayenne's answer, the State cannot rely on federal cases defining federal jurisdiction on Indian reservations as a basis for expanding state jurisdiction.

Among the sources of federal jurisdiction over criminal acts by tribal members are: (1) the Indian Major Crimes Act, 18 U.S.C. § 1153; (2) 18 U.S.C. § 1152 (applying federal enclave law to Indian reservations); and (3) the long-recognized jurisdiction of offenses for which federal jurisdiction exists regardless of whether an Indian is involved, See e.g., F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 116, 4 L. Ed. 2d 584, 80 S. Ct. 543 (1960). Thus, aside from the statutory jurisdiction, federal statutes of general applicability apply to Indians on reservations unless "there exists some treaty right which exempts the Indian from the operation of the particular statutes in question." United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1975).

This relatively broad federal authority on reservations does not apply equally to the question of State jurisdiction; "it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Confederated Tribes of Colville Indian Reservation, 447 U.S. at 154.

> "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." [White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).] When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land . . . .

Nevada v. Hicks, 533 U.S. 353, 362, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

Mr. Cayenne does not now contend the State lacked the authority to prosecute him for the offense of unlawful fishing, as that offense occurred off the reservation and the Chehalis Tribe does not have a treaty right to such fishing.

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (citing inter alia, Puyallup Tribe v. Department of Game, 391 U.S. 392, 398, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968); Organized Village of Kake, 369 U.S. at 75-76; Tulee v. Washington, 315 U.S. 681, 683, 62 S.Ct. 862, 86 L.Ed.2d 1115 (1942)). Under Hicks, the State certainly has a strong interest of regulating such behavior. But the fact that the State had the

authority to prosecute and impose a sentence upon Mr. Cayenne does not, as the State believes, lead inescapably to the conclusion that authority allows abridgement of treaty or protected aboriginal rights.

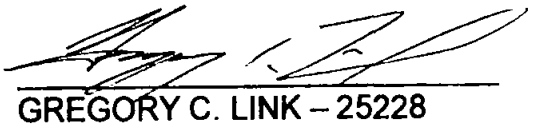
Caselaw has made clear the State of Washington's interest with respect to the fishing rights of Chehalis members on the reservation is extremely limited, as the tribal members possess an "exclusive. . . fishing right[] within the reservation." Stritmatter (citing Alaska Pac. Fisheries, 248 U.S. 78; and Menominee Tribe, 391 U.S. 404). The State's interest in enforcing its fish and game laws has never permitted it to reach onto the reservation, for anything other than necessary conservation measures. Puyallup III, 433 U.S. at 175; Antoine, 420 U.S. at 207; Stritmatter 102 Wn.2d at 522. These cases implicitly recognize that absent a showing of necessity, a state's general interest in regulating fishing is fully realized by the general and equal application of its fishing regulations to activities in waters under the State's control, and against nontribal members on the reservation. The State's interest in imposing a purely punitive limitation on the exercise of Mr. Cayenne's aboriginal right to fish is minimal if it exists at all.

Regulation of Mr. Cayenne's ability to fish on the reservation does not further a legitimate State interest off the reservation, and thus the State's regulatory interest is minimal at best. Hicks, 533 U.S. at 362. The opinion of the Court of Appeals properly strikes the balance between these interests and limits the prohibition to off-reservation activities. Cayenne, 139 Wn.App. at 124.

E. CONCLUSION

For these reasons, this Court should affirm the opinion of the Court of Appeals striking the condition of such which unlawfully seeks to regulate Mr. Cayenne's right to fish on the Chehalis Reservation.

Respectfully submitted this 23rd day of May, 2008.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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	)	
PETITIONER,	)	
	)	
v.	)	COA NO. 80499-1
	)	
GERALD CAYENNE,	)	
	)	
RESPONDENT.	)	

DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 23RD DAY OF MAY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	HAROLD S. MENEFEE, DPA KATHERINE LEE SVOBODA GRAYS HARBOR CO. PROSECUTOR'S OFFICE 102 W. BROADWAY AVENUE, ROOM 102 MONTESANO, WA 98563-3621	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	PAMELA BETH LOGINSKY, DPA WA ASSN OF PROSECUTING ATTORNEYS 206 10TH AVENUE SE OLYMPIA, WA 98501	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	JAY D. GECK DEPUTY SOLICITOR GENERAL 1125 WASHINGTON ST. SE OLYMPIA, WA 98504	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF MAY, 2008.

X_____