No. 80653-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

vs.

LORETTA LYNN ERIKSEN, Petitioner.

BRIEF OF AMICUS CURIAE, LUMMI NATION

LUMMI NATION
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IDENTITY AND INTEREST OF AMICUS CURIAE

The Lummi Nation is a federally recognized tribe. It is a signatory to the Treaty of Point Elliott, which established the Lummi Reservation.[1] The powers and authority of its police officers are central issues in this matter.

An opinion issued by this Court on issues raised in this appeal may impact the Lummi Nation's ability to protect the health, safety, and welfare of its people. For example, if this Court were to reverse the lower courts, intoxicated drivers within the Reservation could evade detention and arrest by ignoring lawful direction to stop and by fleeing from police vehicles in order to reach the Reservation boundary. The number of high speed chases on the Reservation roads would be certain to increase and that would directly imperil the lives and safety of tribal members and others using Reservation roads.

STATEMENT OF THE CASE

The Lummi Nation adopts the statement of facts as set out in "Substantive and Procedural Facts" of the Whatcom County Prosecutor's brief, at pages 1 - 4.

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[1] 12 Stat. 927 (signed January 22, 1855 and ratified March 8, 1859). The boundaries were further delineated by Executive Order, Nov. 12, 1873 (Stats. At Large, vol. 12, p. 928).

ISSUES PRESENTED

1. Does the Lummi Nation have inherent retained sovereign authority to ensure that its members are protected from the danger of persons driving while intoxicated within the Lummi Reservation, by taking necessary and reasonable steps to ensure the apprehension and prosecution of the offender by the appropriate authorities?

2. If a Lummi tribal police officer initiates a stop of a non-Indian on the Reservation, but the motorist then drives off the Reservation, may the Lummi officer follow the vehicle to complete the stop and detain the driver until the arrival of authorities with jurisdiction to arrest a non-Indian?

3. Does a nondiscriminatory application of state law require the provisions of RCW 10.89.010 to apply to fresh pursuit by Lummi tribal police officers?

SUMMARY OF ARGUMENT

The issues in this case are narrow. The law is clear that tribal police officers do not have the authority to arrest non-Indians, and no party to this case contends otherwise. But the law is also clear that tribal police *do* have the authority to stop a non-Indian who has allegedly violated the law while on the Reservation, and to detain the non-Indian

until the person can be turned over to state authorities[2] to be charged and prosecuted. State v. Schmuck, 850 P.2d 1332 (1993), cert. denied, 510 U.S. 931 (1993). In other words, as in this case, the Lummi tribal police had the authority to detain Ms. Eriksen for alleged illegal conduct that took place on the Lummi Reservation, and the State had the authority to charge and prosecute her for that conduct taking place on the Reservation. This acknowledged legal principle is severely undercut by Ms. Eriksen's contention in this case that she can escape accountability for her actions by exiting the Reservation boundary before stopping.

This case arises because Ms. Eriksen was driving on the Lummi Reservation while allegedly intoxicated but did not stop on the Reservation when a Lummi tribal police officer activated the emergency lights on his patrol car.[3] She did not stop her vehicle until she had driven off the Reservation. The question presented is whether Ms. Eriksen has thereby freed herself from the possibility of prosecution for her criminal conduct while on the Reservation.

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[2] For the purpose of this brief, the term "state authorities" is intended to include county authorities who enforce state laws as part of their duties.

[3] The District Court held that the Ms. Eriksen had been stopped on the Reservation and detained off the Reservation. District Court Record at 74 (1/26/06). The defendant conceded that a stop occurs at the point in time when the police officer activated his lights to direct the motorist to pull over. Id. at 60 - 61.

The Lummi tribal police officer had the authority to follow and detain the driver in these circumstances, regardless of whether the driver turned out to be a non-Indian. The officer was exercising the Lummi Nation's inherent retained sovereign authority to protect its community from the danger of criminal activities, including persons driving while intoxicated. That sovereign authority extends to hot pursuit[4] outside of its Reservation of those persons who fail to stop when so directed by the officer while within the Reservation. The general rules of hot pursuit permit law enforcement officers to cross jurisdiction boundaries without violating the Fourth Amendment protections against unreasonable arrest. Additionally, Washington state law specifically authorizes fresh pursuit into Washington State, by an officer from a "duly organized state, county or municipal peace unit of another state," of a person who is believed to be driving while intoxicated. A nondiscriminatory application of RCW 10.89.010 would extend to the Lummi Nation Police Department.

ARGUMENT

I. The Lummi Nation Has the Inherent Retained Authority To Protect Its People by Detaining Persons Who Drive While Intoxicated Within Its Borders.

In this case, the Lummi Nation only defends the right to assert a minimal level of control over the conduct of a non-Indian in order to

[4] "Hot pursuit" and "fresh pursuit" are terms used interchangeably.

protect the health, safety, and welfare of its members and others present on the Lummi Reservation. The Nation is asserting a sovereign interest in the act of stopping and detaining any person who violates the law while on the Lummi Reservation, even if the tribal police officer cannot complete the stop until after the motorist has driven beyond the Reservation boundaries.

The Lummi Nation has inherent retained tribal sovereignty. This Court recognized that sovereignty in State v. Schmuck. Tribal sovereignty is not delegated by the federal government, but pre-exists the tribe's treaty with the federal government. "[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905). See United States v. Lara, 541 U.S. 193 (2004) (prosecution by both the federal government and tribe does not violate double jeopardy because tribe is exercising inherent sovereignty and not delegated federal authority). The 2004 decision in Lara is consistent with this Court's recognition of tribal sovereignty expressed in the 1993 Schmuck decision:

> This inherent authority is the source of an Indian tribe's power to create and administer an internal criminal justice system, Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir.1975), including "the inherent power to prescribe laws for their members and to punish infractions of those laws". Wheeler, 435 U.S. at 323, 98 S.Ct. at 1086.

Schmuck, 850 P.2d at 1336.

The starting point for examining a tribe's inherent sovereign power over non-Indians is the United States Supreme Court's decision in Montana v. United States, 450 U.S. 544 (1981). The Court in Montana stated that the general principles of inherent sovereign powers include the authority to regulate conduct of non-Indians when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. The Court recognized that these principles of inherent sovereignty have been relied upon in determining inherent tribal authority in criminal and civil matters. Id. at 565.

Both parties have briefed the relevance of the Schmuck case to the decision in this matter. In Schmuck, this Court held that, although the tribal police officers could not arrest a non-Indian malefactor, the tribal officers had the power to stop the person and prevent the person from proceeding on until a state official could assert jurisdiction. This Court applied the "health or welfare" criteria from Montana. Schmuck, 850 P.2d at 1341. This Court recognized that tribal police officers must act to protect the health and safety of its members by asserting this minimal level of control over non-Indians who violate the law within the Reservation boundaries.

This Court recognized in Schmuck that the health and safety concerns of the Nation are legitimately based on the danger posed to all persons on the Reservation if the tribal police do not have the authority to stop and detain drunk drivers.

> Allowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe.

Id.

The Court cited with approval the New Mexico Court of Appeals:

> To hold that an Indian police officer may stop offenders but upon determining they are non-Indians must let them go, would be to subvert a substantial function of Indian police authorities and produce a ludicrous state of affairs which would permit non-Indians to act unlawfully, with impunity, on Indian lands.

Id. at 1342 (Citation omitted). The Court also noted the ensuing danger if the non-Indian were to proceed off the Reservation:

> In this case, if the Suquamish Indian Tribe did not have the authority to detain, Schmuck would have been free to drive away with an alcohol level exceeding the limit for legal intoxication. In the 20 minutes it took for Trooper Clark to respond, Schmuck could have easily caused extensive property damage or seriously injured other motorists. *He also could have left the Reservation and eluded capture by the State.*

Id. (Emphasis added).

The Court anticipated the circumstances when a person would not stop in response to direction from a tribal police officer. The Court clearly

expected that the tribal police officer would and should have the power to enforce the stop. In particular, the Court referenced the danger if it were to find that a tribal police officer's authority to stop was restricted to that of a citizen with only a citizen's arrest capability:

> Potentially, DWI drivers would simply drive off or even refuse to stop if pulled over by a tribal officer with only a citizen's arrest capability

Id.

The Defendant argues in this case that the tribal police officer should have neither the authority of a law enforcement officer nor a citizen's arrest capability. But this Court in Schmuck recognized the need for a tribal police officer to have all the traditional powers of a law enforcement officer, including the power to enforce his attempt to stop and detain the non-Indian motorist.

The Defendant's brief addresses at length the level to which a tribe can regulate a non-Indian in criminal and civil matters, detailing cases regarding real estate, zoning, civil ligation between non-Indians, and taxation. (Appellant's Opening Brief at 6-15.) However, the issue in this case is not an assumption of jurisdiction by the Lummi Nation over a non-Indian. To the contrary, this case involves the mere detention of the non-Indian so that the State could assume jurisdiction.

The defendant cited Strate v. A-1 Contractors, 520 U.S. 438 (1997), as supporting her argument that the United States Supreme Court has excluded traffic safety as a sufficient "health and welfare" basis for inherent authority. (Appellant's Opening Brief at 11.) However, as the United States Supreme Court stated, the issue in that case was "distinctly non-tribal in nature" and it "arose between two non-Indians involved in a run-of-the-mill highway accident." Id. at 457. The Court specifically noted that the parties had an alternative forum in state court, and that the plaintiff was essentially forum-shopping into the tribal court. Id. at 459. The Court held, under the circumstances of that case, that the tribe did not have a sufficient interest to assert *regulatory and adjudicative* authority over the defendant. Id. at 459. The Court did not hold, as the defendant asserts, that traffic safety is not a sufficient health and welfare concern to the tribe to justify any exercise of sovereignty.

In this instance, the Nation is not trying to assert regulatory and adjudicatory authority. If anything, the Nation is assisting the State in asserting *its* regulatory and adjudicatory authority. The Nation also has a much greater sovereign interest in health and safety resulting from driving while intoxicated than it would have over a civil suit between two non-Indians involved in a commonplace highway traffic accident. The United States Supreme Court has directly and emphatically addressed the serious

health and safety risk resulting from driving while intoxicated. As early as 1957, the United States Supreme Court recognized that "[t]he increasing slaughter on our highways [caused by intoxicated drivers], most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." Breithaupt v. Abram, 352 U.S. 432, 439 (1957). More recently, the Court commented:

> The situation underlying this case - that of the drunk driver - occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy.

South Dakota v. Neville, 459 U.S. 553, 558 (1983).

The underlying health and welfare concerns relied upon in Schmuck regarding intoxicated drivers are equally present where offenders have motivation to evade tribal police contact until they reach the exterior boundaries of the Reservation.[5] The United States Supreme Court has recognized the dangers of eluding tribal police on roadways and engaging in other reckless behavior. In Scott v. Harris, the United States

[5] As noted by Chief Gary James in his affidavit, many of the non-Indians who drive on the Lummi Nation's roadways do so on a regular basis; few are casual one-time visitors. If a rule of law is announced stating that non-Indians could avoid culpability for violating Washington State law on the Lummi Reservation if they could "escape" off the Reservation, such a rule would quickly become common knowledge among those non-Indian drivers, giving some an incentive to flee off the reservation. (App. at A-1, Aff. of Gary James).

Supreme Court specifically rejected the notion that the police could protect the public by ceasing to pursue offenders:

> [W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness.

Scott v. Harris, 550 U.S. 372, 385-386 (2007).

The stop and detain authority of tribal police officers must necessarily extend under Schmuck to the continuous pursuit of on-reservation offenders across the Reservation boundaries. Otherwise, the alternative will be to create a safe haven beyond the Reservation boundaries that creates an incentive for reckless behavior within the Reservation in order to reach that barrier. This outcome raises the very health and safety concerns on Indian land that the Schmuck court unmistakably wished to avoid. The reality is that the Nation's health and safety concerns are not alleviated once a drunk driver leaves the Reservation. Rather, the Nation continues to have an interest in protecting against those who would dangerously elude to get to the Reservation boundaries. In order to protect against this risk, the Lummi tribal police must possess the inherent authority to stop, detain, and pursue off the

Reservation those who have allegedly violated state and tribal law while on the Reservation.

The Lummi Nation has the power of a sovereign to establish a law enforcement agency that has the authority to protect its members against violations of the law within its boundaries. The Lummi Nation takes the health, welfare, and protection of its community very seriously as shown by its establishment of a very professional, well-trained, and well-equipped police force.[6] The action of the tribal police officer pursuing an alleged violator off the Reservation to enforce a stop and holding that person to be arrested by another law enforcement agency is an exercise of that sovereign power.

II. The Rules of Hot Pursuit Permit Tribal Police Officers to Cross Jurisdiction Boundaries Without Violating the Fourth Amendment Protections Against Unreasonable Seizure.

"Hot pursuit" is a recognized exception to the general rule that an officer may not perform an arrest outside of the officer's jurisdiction without violating the Fourth Amendment to the United States Constitution. United States v. Jackson, 139 Fed. Appx. 83, 2005 WL 1566764 (10th Cir. 2005) sets out in detail this exception:

> Generally, a police officer's authority does not extend beyond his jurisdiction. Ross v. Neff, 905 F.2d 1349, 1354 (10th Cir.1990).

[6] The Lummi Police Department is more fully described in Part III of this brief and in the Affidavit of Chief Gary James. (App. at A-1.)

> "A warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause." Id. (citations omitted). For either to be permitted, exigent circumstances must be present. *Id.* One predetermined category of exigency is when an officer is found to be in hot pursuit of a suspect. See Welsh v. Wisconsin, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (citing United States v. Santana, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)). " Hot pursuit means some sort of a chase, but it need not be an extended hue and cry in and about (the) public streets." Santana, 427 U.S. at 42-43, 96 S.Ct. 2406 (internal quotation marks omitted). Hot pursuit occurs when an officer is in "immediate or continuous pursuit" of a suspect from the scene of a crime. Welsh, 466 U.S. at 753, 104 S.Ct. 2091; see also United States v. Schmidt, 403 F.3d 1009, 1013 (8th Cir.2005) (explaining that the government must demonstrate an "immediate or continuous pursuit" of the suspect from the scene of the crime in order for the warrantless arrest to fall within the hot pursuit exception to the warrant requirement).

Id. at 85-86.

Significantly, the hot pursuit rule was applied by the Ninth Circuit in the reverse of the circumstances in this matter. A sheriff's deputy followed a person onto Indian land to make a Terry-type[7] stop to determine whether the person was a tribal member. United States v. Patch, 114 F.3d 131 (9th Cir. 1997), cert. denied, 522 U.S. 983 (1997). The court held that the hot pursuit doctrine permitted the sheriff's deputy to follow the person, who was then driving on a state highway where the deputy had jurisdiction to arrest, to a location that was wholly in Indian country, which would be beyond the deputy's jurisdiction if it were the

[7] Terry v. Ohio, 392 U.S. 1 (1968).

situs of a crime committed by a tribal member. Id. at 134. It is noteworthy that the Lummi Tribal Court has also recognized the authority of a Whatcom County sheriff's deputy to come onto the Reservation in hot pursuit of a tribal member who had allegedly committed an offense outside the Reservation. Lummi Nation v. Scarborough, No. 2008-CRCO-2084 (Jan. 5, 2009) (App. at A-5).

A hot pursuit across jurisdiction lines is recognized under common law and does not cause the resulting stop to be unreasonable or to violate the Fourth Amendment of the United States Constitution.

III. A Nondiscriminatory Application of State law Requires the Fresh Pursuit Provisions of RCW 10.89.010 to Apply to Fresh Pursuit by Lummi Nation Tribal Police Officers.

The crux of the Defendant's argument is not that the stop violated the Fourth Amendment but that the Lummi Nation invaded the sovereignty of the State of Washington. The Whatcom County Prosecutor's Office and Ms. Eriksen apparently agree that RCW 10.89.010[8] does not grant a tribal police officer authority to conduct fresh

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[8]RCW 10.89.010, from the Uniform Act on Fresh Pursuit, provides:

Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest the person on the ground that he or she is believed to have committed a felony in such other state or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving shall have the same authority to arrest and hold such

pursuit outside of the tribe's Reservation. However, a nondiscriminatory application of that law gives such authority. The lower courts' decisions upholding the authority of the Lummi police officer to detain Ms. Eriksen may also be upheld on the basis that the officer was engaged in fresh pursuit as authorized by RCW 10.89.010. A lower court's decision may be upheld on appeal on any grounds adequately supported in the record. State v. Costich, 98 P.3d 795, 802 (Wash. 2004).

Under RCW 10.89.010, a state, county, or municipal peace officer from another state is authorized to arrest a person in Washington State if in fresh pursuit for a driving while intoxicated offense (among other offenses). "Fresh pursuit" is a recognized exception to the general rule that an officer may not perform an arrest outside of the officer's jurisdiction. RCW 10.89.010 codifies the law that such a stop does not violate the Fourth Amendment. (See discussion in Part II of this Argument.) The purpose of this law, which grants permission from one sovereign to enter into the sovereignty of another, is to protect the health, safety, and welfare of both jurisdictions by preventing the flight of

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person in custody as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he or she is believed to have committed a felony or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving in this state.

dangerous offenders between jurisdictions. This permission also protects against endangerment of the persons within the second jurisdiction. There is no rational basis upon which to not grant this permission equally to tribal police officers in the same circumstances.

The Ninth Circuit Court of Appeals has addressed a parallel situation. Cabazon Band of Mission Indians v. Smith, 388 F.3d 691 (9th Cir. 2004). The California traffic code limited the display or use of emergency light bars on top of vehicles to "authorized emergency vehicles," which were defined as those belonging to federal, state, county, or city law enforcement agencies. Otherwise, the display or use of the emergency light bars was a civil traffic violation. The county sheriff's department had repeatedly ticketed Cabazon tribal police officers for traveling over state land, between two non-contiguous parcels of their Reservation, with an emergency light bar attached to the tribal police car. The sheriff's department took the position that the Cabazon tribal police officers were committing state traffic offenses because their patrol cars were not authorized to have such a bar.

The Ninth Circuit held in Cabazon Band that the application of the California state statute was discriminatory and therefore preempted by Federal Indian law. Id. at 701. The Court relied upon the holding in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), that "tribal

activities occurring off reservation are subject to *nondiscriminatory* state laws absent an express federal law to the contrary." Id. at 698 (Emphasis added). The Court held that the tribal police department was similarly situated to the named federal, state, and local law enforcement agencies, and there was no rational distinction to justify the prohibition. Id. at 699, 700. The Court noted that the application of the California traffic code to Cabazon tribal police officers was hampering the duty of the tribal law enforcement agency to "serve and to protect the members of its Reservation community". Id. at 700. The Court pointed out that "every law enforcement jurisdiction shares the same obligation and purpose: to protect and serve their respective communities and citizens." Id. at 701.

Just as Cabazon required that the term "peace officer" under the California traffic code be extended to apply to tribal police officers, the permission granted under RCW 10.89.010 to a "duly organized state, county or municipal peace unit of another state of the United States" must be extended to tribal law enforcement agencies.

The Defendant takes the position that "any assertion of [inherent] tribal authority would be preempted by RCW 10.93.120." (Appellant's Opening Brief at 4.) This argument is wholly at odds with federal law as this Court recognized in the Schmuck decision: "The State does not have

authority to divest the Tribe of its sovereignty; tribal sovereignty can be divested only by affirmative action of Congress." 850 P.2d at 1343.

There is no rational basis under RCW 10.89.010 for a distinction as to tribal police officers when allowing fresh pursuit. The Lummi Nation Police Department has twenty-one law enforcement officers, including one Washington State certified Drug Recognition Expert, one Washington State certified canine officer, and one cross-deputized federal officer. Lummi tribal police officers have training comparable to that of state law enforcement officers. All Lummi Nation police officers are required to successfully complete either the Washington State Police Academy or the Federal Law Enforcement Training Academy, and complete the Basic Law Enforcement Equivalency Academy provided by the Washington State Criminal Justice Commission. (See App. at A-1, Aff. of Chief James.) All Lummi Nation police officers are federally required to graduate from a accredited basic law enforcement program, submit to a background check, a polygraph test and psychological evaluation; and have no prior felonies or domestic violence offenses. Id.

The Lummi Nation Police Department uses marked patrol cars equipped with emergency light bars, sirens, radar, radio communication, Mobil Data Terminals, and are essentially equivalent to patrol cars used throughout Washington State jurisdictions. Id.

The Lummi Nation Police Department uses the Whatcom County dispatch system in common with other police departments in Whatcom County. Id. The Lummi Nation Police Department has access to, and utilizes the numerous criminal databases: the Washington Crime Information Computer (WACIC), the National Crime Information Computer (NCIC), the Whatcom County criminal information system AS400, the Whatcom Exchange Network (WENET) and the City of Bellingham's criminal database also known as Long Arm. Id.

Ms. Eriksen suggests that RCW 10.92, adopted by the Washington legislature in 2008, has relevance to the issues raised in this case. She is incorrect. That chapter addresses the process for tribal police officers to become *general authority* Washington police officers. [9] That authority would allow a Lummi police officer to arrest for a crime committed anywhere within Whatcom County with no connection to the Reservation whatsoever. However, in this instance, the Lummi police officer was not acting or intending to act as a Washington police officer. He was engaged

[9] The defendant suggests at page 7 of her Reply Brief that Whatcom County has considered and rejected granting "fresh pursuit" authority to Lummi police officers as part of a discussion of deputization. The defendant cites no authority for her proposition. Ironically enough, on the subject of deputization, the Defendant argues in general terms both that 1) an Indian tribe may not engage in undefined "external relations" (Brief at 3; Reply Brief at 4); and 2) Whatcom County and the Lummi Nation have the power to enter into a deputization agreement (Brief at 4; Reply Brief at 7).

in fresh pursuit as a Lummi police officer. There is no parallel between the new requirements under RCW 10.92 for becoming a *general authority* Washington police officer, and the temporary infringement of sovereignty allowed under RCW 10.89.010 to other jurisdictions for *fresh pursuit.* RCW 10.89.010 does not require the officers of the other jurisdictions to become general authority Washington police officers in order to engage in fresh pursuit.

RCW 10.89.010 must be applied non-discriminatorily to tribal police officers. The goals of the Washington law are the same for cross-jurisdictional tribal law enforcement as for cross-jurisdictional law enforcement from other states: protection of the respective communities from dangerous offenses.

CONCLUSION

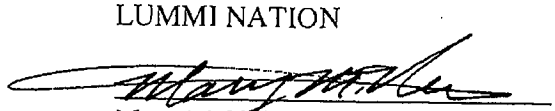
This Court's decision in Schmuck naturally extends to a holding that the power of a Lummi police officer includes the continuous pursuit of an alleged violator off the Reservation to enforce a stop commenced on the Reservation, and to hold that person to be arrested by another law enforcement agency. This extension is not based on public policy alone, but on the inherent retained sovereignty of the Lummi Nation to protect the health and welfare of its members. The reasonableness of hot pursuit

between jurisdiction lines is well recognized. RCW 10.89.010 codifies this principal by expressly granting authority to law enforcement agencies in other states. A nondiscriminatory application of that law requires application to fresh pursuit conducted by Lummi tribal police officers.

The Lummi Nation requests this court to UPHOLD the District Court and Superior Court in this matter, by ruling that the Lummi police officer was authorized to complete the stop of a non-Indian off of the Lummi Reservation for a violation occurring on the Reservation, and to hold the person for the arrival of state authorities.

DATED this 10th day of April, 2009

LUMMI NATION



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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent vs. LORETTA LYNN ERIKSEN, Petitioner	Case No.: 80653-5 AFFIDAVIT OF CHIEF GARY JAMES

STATE OF WASHINGTON)
) SS
WHATCOM COUNTY)

I, Gary James, swear that the following is true and correct to the best of my information and belief:

1. I am the police chief for the Lummi Nation Police Department.
2. The Lummi Nation Police Department has twenty-one law enforcement officers, including one Washington State certified Drug Recognition Expert, one Washington State certified canine officer, and one cross-deputized federal officer.

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3. All Lummi Nation police officers are required to successfully complete either the Washington State Police Academy or the Federal Law Enforcement Training Academy and the Basic Law Enforcement Equivalency Academy provided by the Washington State Criminal Justice Commission.

4. All Lummi Nation police officers are federally required to: graduate from a accredited basic law enforcement program; submit to a background check, a polygraph test and psychological evaluation; and have no prior felonies or domestic violence offenses.

5. The Lummi Nation Police Department uses marked patrol cars equipped with emergency light bars, sirens, radar, radio communication, Mobil Data Terminals, and are essentially equivalent to patrol cars used throughout Washington State jurisdictions.

6. The Lummi Nation Police Department uses the Whatcom County dispatch system in common with other police departments in Whatcom County.

7. The Lummi Nation Police Department has access to, and utilizes the following criminal databases: the Washington Crime Information Computer (WACIC), the National Crime Information Computer (NCIC), the Whatcom County criminal information system AS400, the Whatcom Exchange Network (WENET) and the city of Bellingham's criminal database also known as Long Arm.

8. Lummi Nation police officers respond to other agency assistance requests (backup calls) outside of the Lummi Reservation from other Whatcom County police departments. Other Whatcom County police departments respond to assistance requests inside the Lummi Reservation from the Lummi Nation Police Department.

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9. The Lummi Nation Police Department is the primary responder to all dispatch calls within the Lummi Reservation, regardless of Indian status, unless Whatcom County officials are specifically requested and no Indians appear to be involved.

10. The Whatcom County Sheriff's Office issues criminal and civil infraction books to the Lummi Nation Police Department and Lummi Nation police officers are allowed to cite non-Indians into Whatcom County District Court for all civil traffic infractions and some minor criminal traffic infractions, such as Driving without a License and Driving While License Suspended.

11. The Lummi Reservation is located on a peninsula and has many non-Indian residences. The reservation also contains the only public ferry and therefore only public access to Lummi Island, an island beyond the Lummi Reservation and home to many non-Indians. Therefore, many non-Indians who drive on the Lummi Nation's roadways do so on a regular basis and few are casual one-time visitors. If a rule of law is announced stating that that non-Indians could avoid culpability for violating Washington State law on the Lummi Reservation if they could "escape" off the Reservation, such a rule would quickly become common knowledge among those non-Indian drivers, giving an incentive to flee off the reservation. The Lummi Nation's roadways have regular foot, bicycle and vehicle traffic. A driver operating a motor vehicle at a high speed attempting to exit the Lummi Reservation, especially an intoxicated driver doing so, would pose a grave danger to these users of the Lummi Nation's roadways.

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Dated: April 9, 2009

GARY JAMES

SWORN to before me on this 9 day of April, 2009.

NOTARY PUBLIC in and for the State of Washington
My Commission expires: 3/1/09

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LUMMI TRIBAL COURT
LUMMI NATION

Lummi Nation,

vs.

KYLE SCARBOROUGH,
Defendant

Case No.: 2008-CRCO-2084

DECISION AND ORDER

This matter came before the Court on December 8, 2008 on the Defendant's Motion to Dismiss. Michael Ayosa, Lummi Nation Public Defender, represented the Defendant, Kyle Scarborough. Nathan Deen, Lummi Nation Prosecutor, represented the Nation. Both parties filed written briefs in this matter. After reviewing the briefs, the testimony, the relevant law, and hearing argument in the matter, this Court hereby issues the following:

DECISION AND ORDER

The facts of this case are largely undisputed. On June 22, 2008, Deputy Jason Nyhus of the Whatcom County Sheriff's Office received a call from dispatch reporting a theft of a case of beer from the AM/PM on Slater Road. Dispatch advised Deputy Nyhus of the suspect's description and the vehicle. After receiving the call, Deputy Nyhus observed a car matching the vehicle description heading west on Slater Road. Deputy Nyhus observed the vehicle pull into a driveway near a fireworks stand located east of a residence at 4897 Ferndale Road. There is no dispute that the vehicle pulled onto property that is individual trust land located within the exterior boundaries of the Lummi Reservation.

After pulling off the road, Deputy Nyhus turned on his spotlight and illuminated the suspect vehicle. The driver of the vehicle got out of the vehicle and ran away on foot; a passenger remained in the vehicle. Deputy Nyhus got out of his patrol car to contact the passenger in the vehicle. He spoke with female passenger and observed a case of beer in the back seat of the vehicle and under the passenger seat. As he was talking with the passenger, a Native American male came out of the residence and asked Deputy Nyhus what he was doing. The Native American male was identified later as the defendant, Kyle Scarborough. Deputy Nyhus asked him to stand back and he told Deputy Nyhus to get off his property. Deputy Nyhus testified that Mr. Scarborough was intoxicated and belligerent. Again, Deputy Nyhus told Mr. Scarborough to leave the area. Mr. Scarborough did not and, according to Deputy Nyhus's testimony, he continued to be belligerent and agitated and appeared to be coming toward Deputy Nyhus in an aggressive manner. Deputy Nyhus told him to stand back once more. Mr. Scarborough continued to yell at Deputy Nyhus and came toward him clenching his fists and assuming a fighting stance. Deputy Nyhus attempted to lead Mr. Scarborough away;

Mr. Scarborough balled up his fists and Deputy Nyhus testified that he believed he was in danger of being attacked.

Deputy Nyhus and another trooper from the State Patrol attempted to lead Mr. Scarborough to the ground; he continued to struggle and Deputy Nyhus deployed his taser three times to subdue Mr. Scarborough. Mr. Scarborough continued to struggle. Deputy Nyhus told Mr. Scarborough he was placing him under arrest for Obstruction. According to his testimony, about a minute elapsed from the time he stopped his patrol car to the ensuing struggle with Mr. Scarborough. There were no Lummi Law and Order officers on the scene until after Mr. Scarborough had been placed into custody. Officer Perez and Sergeant Long of Lummi Law and Order appeared on the scene afterwards and cited Mr. Scarborough for Obstructing a Public Servant and Resisting Lawful Arrest.

Mr. Ayosa brought this Motion to Dismiss arguing that the charges in this case must be dismissed because Deputy Nyhus had neither jurisdiction on tribal land to investigate criminal activity nor could he be considered as covered under Lummi Code of Laws 5.07.055 Obstructing a Public Servant as either a "Law Enforcement Officer" or as a "public servant." After reviewing the record in this matter, the Court finds that the central issue in this case is whether Deputy Nyhus, as an officer with the Whatcom County Sheriff's Office, was contemplated as a "Law Enforcement Officer" or "public servant" under the Lummi Code of Laws and if so, whether he was engaged in "official duties" when he encountered Mr. Scarborough.

LCL 5.07.055 states: "A person who knowingly . . . hinders, delays, or obstructs any public servant or Law Enforcement Officer in the discharge of his official powers or duties shall be guilty of an offense." The Defendant argues that "Law Enforcement Officer" means "Lummi Law and Order officer." He also argues that Deputy Nyhus does not qualify under the Code as a public servant. The Nation argues that "Law Enforcement Officer" should be given its plain meaning and read to include all officers, not just Lummi Law and Order officers. Title 9 of the Law and Order Code regulates the functions of tribal police. Throughout that section of the Code, Lummi Law and Order officers are referred to as "tribal police." LCL Chapters 9.01, 9.04. Chapter 9.05 places restrictions on "outside" Law Enforcement Officers. LCL 9.05.010 states "any law enforcement officer whether tribal, state, federal or other" shall report to the Lummi Law and Order building before entering the tribal center complex and inform Law and Order of his or her activities on the reservation.

Based upon Title 9, the Court finds that Law Enforcement Officer under the Code refers to any officer properly commissioned in his or her jurisdiction. There are many situations that can arise that would result in an officer from a jurisdiction other than Lummi being on the reservation. It stands to reason that

those officers should not be obstructed in carrying out their responsibilities any more than a Lummi officer. The secondary issue, then, is whether Officer Nyhus was prevented from carrying out "his official powers or duties." This is a much more complex question that runs central to the question of whether Deputy Nyhus was on the reservation and discharging his official duties when he and Mr. Scarborough's altercation began.

Lummi Law and Order Officer Perez cited (and released) Mr. Scarborough for obstructing Deputy Nyhus' as he attempted to conduct an investigation into whether the car he was pursuing was involved in a theft off the reservation. The Defendant argues that Deputy Nyhus had no authority to be on tribal lands and, therefore, could not be "discharging his official duties". The Court disagrees.

In general, state police officers do not have authority to act on tribal lands when Native individuals are involved. However, in this situation, the facts present a situation in which it was impossible for Deputy Nyhus to assess whether the particular individuals in the vehicle he was following were Native or not. He was partly unable to assess this due to Mr. Scarborough's interference. Although it was later determined that the driver of the vehicle was a Lummi tribal member, there was no way for Deputy Nyhus to know that one way or the other at the beginning of his pursuit of the vehicle. Under Public Law 280 and RCW 37.12.010, state criminal jurisdiction does not extend to Indians on Indian land; however, state jurisdiction does extend onto Indian lands when a non-Indian is involved in a crime, particularly when it takes place off the reservation. In this instance, Deputy Nyhus was attempting to investigate a crime that had taken place off the reservation by unknown individuals. He had no way of knowing whether those individuals were Lummi, non-Native Lummi, or non-Native. At the beginning of his investigation, Mr. Scarborough intervened. Based upon these set of facts, the Court finds that Deputy Nyhus was performing his official duties when Mr. Scarborough began arguing with him.

There is no question here that a state officer should request assistance from the tribal authority (Lummi Law and Order). Officer Nyhus informed dispatch that he was heading onto the reservation in pursuit of a vehicle matching the description of the vehicle involved in the theft. While he did not make a specific request for Lummi Law and Order, it is clear that Lummi Law and Order understood their assistance was requested because Officers Perez and Sergeant Long appeared at the scene and cited Mr. Scarborough. As Deputy Nyhus testified, the time between the vehicle stopping at the residence and Mr. Scarborough coming out of his residence and yelling at Deputy Nyhus was extremely brief. The Court is not willing to constrain investigation into criminal matters such that an officer is unable to pursue his investigation without the assurance that he is protected (and can protect himself) under the laws of the Lummi Nation. Without question, it is the preference of this Court that officers from foreign jurisdictions proceed onto the reservation

with the assistance and acquiescence of the Lummi Law and Order department; if they do not, however, have that assistance immediately and encounter the threat of violence or harm, they must be allowed to act to protect themselves and be confident that if interference results in obstruction of official duties, the Lummi Code of Laws serves to protect them.

Therefore, the Court **HEREBY DENIES THE DEFENDANT'S MOTION TO DISMISS.**

IT IS SO ORDERED.

DATED this 5 day of JAN, 2009.

Raquel Montoya-Lewis
Chief Judge, Lummi Tribal Court