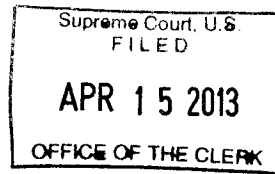


12-1251

No. _____



In The
Supreme Court of the United States

----- ♦ -----
TROY BUTLER,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

----- ♦ -----
On Petition for Writ of Certiorari to the Montana
Supreme Court

----- ♦ -----
PETITION FOR A WRIT OF CERTIORARI

----- ♦ -----
Jason Armstrong
Jennifer Wendt Bordy
Counsel of Record
611 West Main Street
Bozeman, Montana 59715
(406) 587-2084
(406) 922-2224 (fax)
armstronglaw@mac.com
Attorneys for Petitioner
=====

BLANK PAGE

QUESTION PRESENTED FOR REVIEW

This Court determined in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338, 103 S. Ct. 2378, 2388-89, 76 L. Ed. 2d 611 (1983), that the Navajo Nation is a sovereign nation and has sole jurisdiction over its wildlife when this Court held, “[T]he Tribe’s authority to regulate hunting and fishing preempts State jurisdiction.”

The New Mexico Supreme Court decision, *State v. Warner*, 71 N.M. 418, at 421-22, 379 P.2d 66, at 68-69 (1963), is directly on point in this matter. In *Warner* the New Mexico Supreme Court held that New Mexico state courts do not have jurisdiction over criminal offenses involving non-Indians and either Indians or Indian property.

The question presented is whether the justice of the peace, presiding over a court of no record, exercised jurisdiction over a sovereign nation in contravention of *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338, 103 S. Ct. 2378, 2388-89, 76 L. Ed. 2d 611 (1983), and federal statutes conferring jurisdiction solely on the Navajo Nation by preventing Petitioner from hunting in the Navajo Nation.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND ORDERS ENTERED IN CASE ...	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT.....	9
I. The Montana Supreme Court's Affirmation of the District Court's - and Justice Court's - Assertion of Montana Jurisdiction Into the Navajo Nation Violates This Court's Decision in <i>New Mexico v. Mescalero Apache Tribe</i> as well as United States Code.....	9
II. This Case Represents a Recurring Question of Exceptional Importance Warranting the Court's Immediate Resolution.....	12
CONCLUSION.....	15

TABLE OF CONTENTS -- Continued

APPENDICES

December 4, 2012, Opinion of the Montana Supreme Court, <i>State v. Butler</i>	App. 1
March 13, 2012, Montana Fifth Judicial District Court Judgment, and Order Finding Violation of Probation and Imposition of Suspended Sentence.....	App. 7
January 19, 2012, Montana Fifth Judicial District Court Order Denying Motion to Vacate Revocation and Condition of Sentence and for Hearing.....	App. 10
April 1, 2011, Beaverhead County Justice Court Order Revoking Suspended Sentences.....	App. 20
March 15, 2010, Beaverhead County Justice Court Judgment/Order.....	App. 25
January 15, 2013, Order of the Montana Supreme Court (Denying Petition for Rehearing).....	App. 29
§ 87-1-102, M.C.A.....	App. 31
18 U.S.C. § 1162.....	App. 32
September 26, 2011, Notice of Appearance for Jennifer Bordy.....	App. 35

TABLE OF AUTHORITIES

Cases

<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983).....	i, 9, 10, 11, 12
<i>Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. State of Mont.</i> , 750 F.Supp. 446, 448 (D. Mont. 1990).....	9, 10
<i>Menominee Tribe of Indians v. U.S.</i> , 391 U.S. 404 (1968).....	12, 14
<i>Quenchan Tribe of Indians v. Rowe</i> , 350 F.Supp. 106 (S.D. Cal. 1972).....	12, 13
<i>State v. Butler</i> , 2012 MT 278N, ____ Mont. ____, ____ P.2d ____, 2012 WL 601827.....	1
<i>State v. Warner</i> , 71 N.M. 418, 379 P.2d 66 (1963).....	i, 12, 13
<i>U.S. v. Cleveland</i> , 503 F.2d 1069 (9th Cir. 1974).....	12, 13
<i>U.S. v. Greyfox</i> , 727 F.Supp. 727 (D.Or. 1989).....	12, 14

TABLE OF AUTHORITIES -- Continued

Federal Statutes

18 U.S.C. § 1151.....	2, 11
18 U.S.C. § 1162.....	3, 14, App. 32
18 U.S.C. §1165.....	3, 11
28 U.S.C. § 1257 (a).....	2

State Statutes

§ 2-1-102, M.C.A.	3
§ 87-1-102, M.C.A. (2009).....	4, 5, 6, App. 31
§ 87-3-304, M.C.A.....	4, 5

BLANK PAGE

PETITION FOR WRIT OF CERTIORARI

Petitioner Troy Butler petitions the Court for a Writ of Certiorari to review a final judgment of the Montana Supreme Court affirming the district and justice court orders asserting Montana jurisdiction into the Navajo Nation.

OPINIONS AND ORDERS ENTERED IN CASE

Except for the opinion of the Montana Supreme Court entered on December 4, 2012, none of the other orders and opinions were published. They are all included in the appendices and necessary for this Court's review.

The opinion of the Montana Supreme Court was not reported but is available at *State v. Butler*, 2012 MT 278N, ____ Mont. ____, ____ P.2d ____, 2012 WL 601827. The Montana Supreme Court entered its Order denying the Petition for Rehearing on January 15, 2013. App. 29.

The Beaverhead County Justice Court entered its Order Revoking Suspended Sentences (also denying the Motion to Dismiss which raised the jurisdiction issue) on April 1, 2011. App. 7. The District Court of the Montana Fifth Judicial District entered its Order Denying Motion to Vacate Revocation and Condition of Suspended Sentence and for Hearing on January 19, 2012. App. 10. It

entered Judgment and Order Finding Violation of Probation and Imposition of Suspended Sentence on March 13, 2012, basing its decision on the fact that Petitioner was prevented from hunting in the sovereign Navajo Nation and again re-imposing such prohibition. App. 7.

JURISDICTION

The renegade Montana Supreme Court entered its decision on December 4, 2012. Petitioner filed a Petition for Rehearing that was denied on January 15, 2013. App. 29. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1151:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, 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-way running through the same.

18 U.S.C. § 1162:

App. 32

18 U.S.C. § 1165:

Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined under this title or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

§ 2-1-102, M.C.A.:

The sovereignty and jurisdiction of this state extend to all places within its boundaries as

established by the constitution, excepting such places as are under the exclusive jurisdiction of the United States.

§ 87-1-102(1), M.C.A. (2009):

App. 31

§ 87-3-304, M.C.A. (2009):

(1) Every resident and nonresident must have obtained permission of the landowner, the lessee, or their agents before taking or attempting to take nongame wildlife or predatory animals or hunting on private property.

(2) Except for hunting big game animals on private property, a person who violates this section shall, upon conviction for a first offense, be fined an amount not to exceed \$25.

STATEMENT OF THE CASE

On February 8, 2010, Mr. Butler was charged in Beaverhead County, Montana, with two counts of Hunting Without Landowner Permission, in violation of § 87-3-304, M.C.A. The sentencing statute in effect at the time of the sentencing was § 87-1-102, M.C.A. (2009). He pled guilty to both counts on March 5, 2010. Justice of the Peace Candy Hoerning ("Hoerning") orally pronounced sentence and then entered a written Judgment/Order on March 15. App 25. Hoerning sentenced Mr. Butler pursuant to § 87-1-102, MCA (2009). Paragraph 4 of the written Judgment/Order provided in part that, "[T]he Defendant, TROY G. BUTLER, shall lose his privileges to hunt, fish and/or trap in the State of Montana, and/or compact states, to run concurrent with the loss of privileges imposed in the State of Utah until December 15, 2019." App. 25. (Emphasis in original.)

On January 11, 2011, the State filed a Petition for Revocation of Suspended Sentence based upon Mr. Butler's alleged participation in a coyote hunt taking place on sovereign Navajo Nation land located outside of the State of Montana. On March 16, 2011, the Justice Court found that Troy violated the sentence and a condition of that sentence – that he not hunt anywhere at anytime with anyone – by hunting on sovereign Navajo Nation land. The court pronounced sentence again at the conclusion of the revocation hearing and stated that Mr. Butler could not hunt anywhere at anytime with the condition

that he not hunt with anyone. The court entered a written Order Revoking Suspended Sentences on April 1, 2011. App. 20.

On March 16, 2011, Mr. Butler appealed to the District Court for review. Thereafter, Mr. Butler filed a brief arguing that the sentence preventing him from hunting anywhere at anytime or with anyone exceeded the scope of the court's sentencing authority under § 87-1-102, M.C.A (2009).

On November 8, 2011, the District Court held a hearing on the appeal during which time the Court heard testimony regarding the sentence that Hoerning imposed and then re-imposed on Mr. Butler following his revocation hearing.

The question that Mr. Butler put to the District Court in his brief was whether the sentence imposed by Hoerning – at the first sentencing hearing and again at the revocation hearing – was legal. Hoerning testified, because she presides over a court of no record, that her oral pronouncement of the sentence was that Mr. Butler "shall not hunt anywhere, any time, period."

On January 19, 2012, the District Court issued a written order. App. 10. The Court held that it could not review the legality of the sentence imposed at the original sentencing – or again at the revocation hearing – because there was no specific authority for such review, that the standard was *de*

novo, and that the time for review had run. The Court set a date for a revocation hearing.

On March 6, 2012, the District Court held a hearing on the Petition to revoke. The Court revoked Mr. Butler's sentence based on the determination that Mr. Butler hunted coyote on sovereign Navajo Nation land, outside of the state of Montana, in violation of Hoerning's oral sentence and condition of sentence that Mr. Butler could not hunt anywhere, at anytime, with anyone. The District Court then orally pronounced that Mr. Butler could not hunt game or non-game animals, fish, birds, amphibians, reptiles, or anything with a heartbeat, including lawyers. The Court went on to state that it was not imposing any sentence more stringent than that imposed by the Justice Court but simply re-imposing that which Hoerning imposed in the first instance.

The District Court issued a written Judgment and Order on March 13, 2012. App. 7. The District Court reiterated that Mr. Butler is, "prohibited from hunting, trapping, and fishing anywhere or accompanying anyone doing so until December 15, 2019."

Mr. Butler timely filed an appeal with the Montana Supreme Court arguing that the sentences issued by the courts below were illegal because they invaded the sovereignty of the Navajo Nation and exceeded the courts' jurisdictional authority as authorized by Montana law.

The Montana Supreme Court neglected to rule on the primary issue of jurisdiction, held that Mr. Butler was hunting in New Mexico despite a stipulation by the State that Mr. Butler was actually inside the Navajo Nation, and held that the hunting restriction was a reasonable condition of his sentence.

Mr. Butler timely filed a Petition for rehearing on the basis that the Montana Supreme Court: 1) Rested its decision upon the incorrect fact that Mr. Butler hunted in New Mexico when he did not; 2) That the Montana Supreme Court either ignored the question of whether or not the Justice Court and then the District Court had the power - the jurisdiction - to prevent Mr. Butler from hunting on Navajo Nation soil or tacitly approved of the extension of power of the Montana courts to jurisdictions outside of Montana; and 3) the Montana Supreme Court's decision conflicts with the sentencing statute's limitation on a sentencing courts power to impose restriction on a defendant outside of the state of Montana.

On January 15, 2013, the Montana Supreme Court denied the Petition for Rehearing. App. 29.

REASONS FOR GRANTING THE WRIT

- I. The Montana Supreme Court's Affirmation of the District Court's - and Justice Court's - Assertion of Montana Judicial Authority Into the Navajo Nation Violates This Court's Decision in *New Mexico v. Mescalero Apache Tribe* As Well As United States Code.

The Montana Supreme Court has again decided to ignore United States Supreme Court case law directly on point and allow a sentencing court to impose its jurisdiction into the Navajo Nation in contravention of established precedent, U.S. code, and despite that fact that the Navajo Nation located, in part, in New Mexico

This Court has held, and the District Court for the State of Montana has recognized, that Indian tribes have control over the resources on their land, including wildlife. *See, e.g. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337, 103 S.Ct. 2378, 2388, 76 L.Ed.2d 611 (1983) and *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. State of Mont.*, 750 F. Supp. 446, 448, (D. Mont. 1990). In *Confederated Salish*, the District Court held that:

The Montana Supreme Court acknowledged this exclusive right of the Tribes to hunt and fish within the exterior boundaries of the

Reservation in *State v. McClure*, 127 Mont. 534, 268 P.2d 629 (1954), and the Court of Appeals for the Ninth Circuit also recognized the importance of these particular treaty rights in *Bd. of Control of Flathead, et al. Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir.1987), *cert. denied*, 486 U.S. 1007, 108 S.Ct. 1732, 100 L.Ed.2d 196 (1988), and in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.1982) *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982).

750 F. Supp. 446, 448.

In *Mescalero* this Court held:

[T]he Tribe's authority to regulate hunting and fishing preempts State jurisdiction. It is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State. The tribal authority to regulate hunting and fishing by nonmembers, which has been repeatedly confirmed by federal treaties and

laws and which we explicitly recognized in *Montana v. United States, supra*, would have a rather hollow ring if tribal authority amounted to no more than this.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 338, 103 S. Ct. 2378, 2388-89, 76 L. Ed. 2d 611 (1983).

In this case, the Montana Justice and District Courts have determined that a non-member may not hunt in the Navajo Nation thereby supplanting the Nation's jurisdiction and "effectively nullify[ing] the Tribe's authority to control hunting and fishing on the reservation." The Montana Supreme Court has done exactly what this Court warned against in *Mescalero* and in so doing has again run afoul of existing Supreme Court case law.

The decision by the Montana Supreme Court also calls into question the authority of 18 U.S.C. §§ 1151 and 1165, which, respectively, defines Indian country and confers jurisdiction over hunting and fishing in Indian country to the tribe of that Indian country. Thus, the non-citable opinion of the Montana Supreme Court violates this Court's precedent, violates United States Code, and gives carte blanche jurisdiction to sentencing courts in Montana where once those courts were appropriately curtailed by statute. Thus, people in Montana could be subjected to unrestrained world-wide judicial fiat in a state where most people believe that hunting is a God given right.

II. This Case Represents a Recurring Question of Exceptional Importance Warranting the Court's Immediate Resolution.

With its decision, the Montana Supreme Court has signaled that every sentencing court in the state of Montana can assert jurisdiction into the Navajo Nation. Not including district courts, there are over 150 courts handling these types of misdemeanors, many of which are courts of no record. Therefore, without intervention by this Court, the prospect of Montana courts asserting jurisdiction into places it does not belong is staggering. Reversing the Montana Supreme Court's decision would be consistent with this Court's authority, United States Code, and other relevant authority including *State v. Warner*, 71 N.M. 418, 379 P.2d 66, (1963), *Quechan Tribe of Indians v. Rowe*, 350 F. Supp. 106, 110 (S.D. Cal. 1972), *U.S. v. Cleveland*, 503 F.2d 1067 (9th Cir. 1974), *U.S. v. Greyfox*, 727 F.Supp. 727, (D.Or. 1989), and *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 411, 88 S. Ct. 1705, 1710, 20 L. Ed. 2d 697 (1968).

The holdings in *Mescalero*, *supra*, and *Warner*, *supra*, are particularly instructive here. *Mescalero* involved the State of New Mexico, one of the states in which the Navajo Nation is located. In *Warner*, 71 N.M. at 421-22, 379 P.2d at 68-69, the New Mexico Supreme Court held that New Mexico

state courts do not have jurisdiction over criminal offenses involving non-Indians and either Indians or Indian property. Consequently, and given that the wildlife within the boundaries of the Navajo Nation is the property of the Navajo Nation, *Mescalero* and *Warner* together demonstrate that a sentencing court in Montana has no authority at all to tell a non-member whether they can hunt in the Navajo Nation or not. Montana's assertion of judicial authority into the Navajo Nation constitutes an illegal sentence and demonstrates an unbridled judicial power-grab. It stands to reason that if a state court in which the Navajo Nation is located does not have criminal jurisdiction over this type of situation, then there is no way a Montana court can issue a ruling preventing a Montanan from hunting in the Navajo Nation.

Likewise, in California, if an Indian tribe has been given the right to control the licensing and regulation of hunting and trapping in its boundaries, where state law conflicts with Indian law the state law is unenforceable on Indian land. See *Quechan Tribe of Indians*, 350 F. Supp. at 110.

Reversing the Montana Supreme Court's decision would also comport with Ninth Circuit decisions regarding jurisdiction. In *Cleveland*, *supra*, the appellate court held that the state in which an Indian reservation is situated has exclusive jurisdiction over crimes committed by non-Indians as against non-Indians on an Indian reservation. While *Cleveland* involved a felonious

violent crime, it stands to reason - in distinguishing the case *sub judice* case from *Cleveland* - that because the alleged event involved a non-Indian in the Navajo Nation and Indian property, only the Navajo Nation has jurisdiction over this matter.

In Oregon, the court determined that because tribal court had authority to try a nonmember Indian for violation of the tribal criminal hunting laws, the federal court was without jurisdiction to try the nonmember for violating a federal statute that prohibited entering onto Indian land for hunting purposes. *Greyfox, supra*.

Finally, according to 18 U.S.C. § 1162, a tribe's jurisdiction to regulate hunting, fishing, and trapping preempts state law when such jurisdiction is properly conveyed by treaty. *See, e.g., Menominee Tribe of Indians*, 391 U.S. at 411, 88 S. Ct. at 1710.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully Submitted,

Jason Armstrong
Jennifer Wendt Bordy
Counsel of Record
611 West Main Street
Bozeman, Montana 59715
(406) 587-2084
(406) 922-2224 (fax)
armstronglaw@mac.com
Attorneys for Petitioner

BLANK PAGE