

No. 44654-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Howard Shale,

Appellant.

Jefferson County Superior Court Cause No. 12-1-00194-0

The Honorable Judge Keith Harper

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
STATEMENT OF FACTS AND PRIOR PROCEEDINGS	2
ARGUMENT	3
The state does not have criminal jurisdiction over any Indians on the Quinault Reservation.	3
A. Standard of Review	3
B. The Quinault Tribal Court and the Federal Courts have exclusive criminal jurisdiction over all Indians on the Quinault Reservation.	3
CONCLUSION	10

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Bryan v. Itasca Cnty., Minnesota</i> , 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).....	4
<i>Duro v. Reina</i> , 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) ..	6, 7
<i>Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation</i> , 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).....	4
<i>Montana v. Blackfeet Tribe of Indians</i> , 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985).....	9
<i>N.L.R.B. v. Pueblo of San Juan</i> , 276 F.3d 1186 (10th Cir. 2002).....	9
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).....	7
<i>United States v. Lara</i> , 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004).....	6, 7

WASHINGTON STATE CASES

<i>Sprint Spectrum, LP v. State, Dep't of Revenue</i> , 174 Wn. App. 645, 302 P.3d 1280 (2013).....	9
<i>State v. Comenout</i> , 173 Wn.2d 235, 267 P.3d 355 (2011) <i>cert. denied</i> , 132 S.Ct. 2402 (U.S. 2012).....	3
<i>State v. Jim</i> , 173 Wn.2d 672, 273 P.3d 434 (2012)	3, 4, 5, 7, 8, 10
<i>State v. Olney</i> , 117 Wn. App. 524, 72 P.3d 235 (2003).....	8
<i>State v. Pink</i> , 144 Wn. App. 945, 185 P.3d 634 (2008).....	4, 5, 8

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 3 4

U.S. Const. Art. VI..... 4

WASHINGTON STATUTES

RCW 37.12.010 4, 5, 7, 8, 9, 10

OTHER AUTHORITIES

136 Cong. Rec. H13556-01, 1990 WL 206923 7

18 U.S.C. § 1162..... 4

25 U.S.C § 1321 4

25 U.S.C § 1323..... 4, 5

25 U.S.C. § 1301 6, 7

25 U.S.C. § 1324..... 4

25 U.S.C. § 1903 7

Pub.L. No. 83–280 4, 5, 6

ASSIGNMENTS OF ERROR

1. The trial court lacked jurisdiction because Mr. Shale is a member of a federally recognized Indian tribe and his offense occurred on the Quinault reservation.
2. The trial court erred by finding Mr. Shale guilty and sentencing him for failure to register as a sex offender.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction entered by a court lacking jurisdiction is void. Here, the trial court lacked jurisdiction, because Mr. Shale is a member of a federally-recognized Indian tribe and his offense occurred on the Quinault reservation. Is Mr. Shale's Judgment and Sentence void for lack of jurisdiction?
2. State criminal jurisdiction over Indians on reservation land derives from federal law. Under federal law, tribal criminal jurisdiction applies to member and nonmember Indians. Did the trial court err by finding that the state had criminal jurisdiction over nonmember Indians on tribal land?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Shale is an enrolled member of the Confederated Tribes and Bands of the Yakama Nation. RP (02/08/13) 4; Ex. 1. Additionally, Mr. Shale is eligible to become an enrolled member of the Quinault Indian Nation and has lived for some time with his grandmother on the Quinault reservation. RP (03/08/13) 25. Mr. Shale is registered as a sex offender with the Quinault tribal sex offender registry. CP 4.

The state charged Mr. Shale in Jefferson County Superior Court with failure to register as a sex offender. CP 1-2. At a pre-trial hearing, the state did not dispute that the alleged offense took place on the Quinault tribal reservation. RP (02/08/13) 8; CP 8-12.

Mr. Shale moved to dismiss the case for lack of jurisdiction. RP (02/08/13) 4-5; CP 3-7. Mr. Shale argued that only the Quinault tribal court or the federal courts have jurisdiction over offenses committed by registered members of a federally-recognized tribe on the Quinault reservation. RP (02/08/13) 4, 6-8; CP 13-15. The prosecution argued that state courts have jurisdiction over such offenses. RP (02/08/13) 9; CP 10. The court accepted the state's argument and held that it did have jurisdiction over Mr. Shale. CP 16-19.

Mr. Shale stipulated to the police reports and the court found him guilty at a bench trial. RP (03/08/13) 23; CP 20. Mr. Shale specifically reserved his right to appeal the jurisdictional question. RP (03/08/13) 18. This timely appeal follows. CP 29.

ARGUMENT

THE STATE DOES NOT HAVE CRIMINAL JURISDICTION OVER ANY INDIANS ON THE QUINULT RESERVATION.

A. Standard of Review.

Whether the state has criminal jurisdiction in Indian Country presents a question of law reviewed *de novo*. *State v. Jim*, 173 Wn.2d 672, 678, 273 P.3d 434 (2012).

B. The Quinault Tribal Court and the Federal Courts have exclusive criminal jurisdiction over all Indians on the Quinault Reservation.

Washington State has limited authority over Indian country. *Jim*, 173 Wn.2d at 678. The state derives its limited criminal jurisdiction over Indian land from federal law. *Id.* at 682. Generally, “[s]tates ... lack ... criminal jurisdiction over Indians within Indian country, absent federal legislation specifying to the contrary.” *State v. Comenout*, 173 Wn.2d 235, 238, 267 P.3d 355 (2011) *cert. denied*, 132 S.Ct. 2402 (U.S. 2012). The supremacy clause and the federal government’s plenary power over Indian affairs limit the state’s authority in Indian Country. U.S. Const.

Art. VI, cl. 2, Art. I, § 3, cl. 8; *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Bryan v. Itasca Cnty., Minnesota*, 426 U.S. 373, 376, n. 2, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). Thus, analysis of state jurisdiction over Indians in Indian Country requires reconciliation of state law and federal law. *See e.g. Jim*, 173 Wn.2d at 678.

In 1953, Congress passed Public Law 280 (PL 280), which gave most states, including Washington, the option of assuming criminal jurisdiction over Indians in Indian country. Pub.L. No. 83–280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321, 1323, 1324 (2010)); *Jim*, 173 Wn.2d at 679. Congress subsequently amended PL 280 to require tribal consent to state criminal jurisdiction. *See* 25 U.S.C §§ 1321, 1323; *Jim*, 173 Wn.2d at 679.

The Washington legislature responded to PL 280 by passing RCW 37.12.010 (the jurisdiction assumption statute), which grants the state criminal jurisdiction over Indians in Indian country. *State v. Pink*, 144 Wn. App. 945, 951, 185 P.3d 634 (2008). The jurisdiction assumption statute provides, however, that:

...such an assumption of jurisdiction shall not apply to Indians when on their tribal or allotted lands within an established reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked...

RCW 37.12.010.¹ RCW 37.12.021, in turn, provides a mechanism for tribes to request that the state assume criminal or civil jurisdiction over Indians on tribal land.

The Quinault tribe asked the state to assume criminal jurisdiction over Indians on its reservation soon after the passage of the jurisdiction assumption statute. *Pink*, 144 Wn. App. at 951-52. Shortly thereafter, however, the Quinault tribe petitioned for retrocession to regain tribal jurisdiction over Indians on Quinault land. *Id.*² The federal government accepted the Quinault retrocession petition in 1969. *Id.*

1. RCW 37.12.010 must be reconciled with federal law, which treats member and nonmember Indians identically.

Because Washington state's claim to criminal jurisdiction in Indian country derives its authority from PL 280, courts must construe the state jurisdiction assumption statute within the bounds of the federal law. *Jim*, 173 Wn.2d at 682.

¹ RCW 37.12.010 also claims mandatory state jurisdiction over eight subject areas not applicable here.

² 25 U.S.C. § 1323 authorizes the United States Secretary of the Interior to accept retrocession of all or any portion of a state's criminal jurisdiction over Indian country.

In 1990, Congress amended PL 280 to explicitly provide that Indian tribes have inherent criminal jurisdiction over both enrolled tribal members (member Indians) and those enrolled in a different federally-recognized tribe (nonmember Indians). The amendment states that:

“powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*; 25 U.S.C. § 1301 (emphasis added).

This amendment was passed in response to a U.S. Supreme Court decision holding that Indian tribes did not have criminal jurisdiction over nonmember Indians. *United States v. Lara*, 541 U.S. 193, 197-98, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (*citing Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990)).

The legislative history to this amendment (often called the “*Duro* amendment”) makes clear that congress interpreted its action as codification of long-standing law rather than creation of a new jurisdictional rule. The House Conference Report on the amendment, for example, provides that “[s]uch recognition is consistent with the plenary power over Indian affairs that is vested in the Congress under Article I, section 3, clause 8 of the United States Constitution, and with two hundred years of Federal law enacted by the Congress which recognizes the

jurisdiction of tribal governments over [all] Indians in Indian country.”

136 Cong. Rec. H13556-01, 1990 WL 206923.

The *Duro* amendment conforms with the federal law’s identical treatment of member and nonmember Indians in Indian country. *See e.g. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) (holding that tribal court does not have jurisdiction over non-Indians but making no distinction between member and non-member Indians); 25 U.S.C. § 1903 (defining “Indian Child” to include nonmember Indians and “Indian Child’s Tribe” to mean the tribe with which the child has the most contacts, rather than that with which he/she is enrolled).

As outlined above, federal law recognizes inherent tribal criminal jurisdiction – not state jurisdiction – over crimes committed by all Indians in Indian country. 25 U.S.C. § 1301; *Lara*, 541 U.S. at 197-98. Thus, the jurisdiction assumption statute can only authorize state criminal jurisdiction over non-Indians in Indian country.³ RCW 37.12.010; *Jim*, 173 Wn.2d at 682. Because the Quinault tribe retroceded state jurisdiction in 1969, state courts no longer have criminal jurisdiction over either member or nonmember Indians on the Quinault reservation.

³ A tribe can also request that the state assume criminal jurisdiction over Indians on tribal land. RCW 37.12.010.

The Yakama Nation is a federally recognized Indian tribe. *State v. Olney*, 117 Wn. App. 524, 526, 72 P.3d 235 (2003). Mr. Shale is an enrolled member of the Yakama Nation. RP (02/08/13) 4; Exh. 1. The state did not have jurisdiction to charge Mr. Shale with an alleged offense taking place on the Quinault reservation.

The trial court decided that the use of the word “their” in the jurisdiction assumption statute refers only to members of the tribe upon whose reservation an alleged offense occurred. CP 16-19.⁴ The lower court’s reasoning conflicts with federal law.

Mr. Shale is a registered member of a federally-recognized tribe. RP (02/08/13) 4; Ex. 1. His alleged offense occurred in Indian Country. RP (0/08/13) 8; CP 8-12. The state did not have the authority to charge him. Mr. Shale’s conviction must be reversed and the case dismissed for lack of jurisdiction. *Jim*, 173 Wn.2d at 688.

2. RCW 37.12.010 is ambiguous and must be construed in favor of tribal sovereignty.

Courts must liberally construe ambiguities in the law “in order to comport with tribal notions of sovereignty and with the federal policy of

⁴ The trial court in Mr. Shale’s case held that *Pink* interpreted the word “their” in RCW 37.12.010 to refer only to members of the tribe upon whose reservation an alleged offense occurred. CP 16-19. The issue of jurisdiction over nonmember Indians, however, was not before the court in *Pink*. 144 Wn. App. 945. The *Pink* court had no reason to interpret the statutory phrase “their tribal or allotted lands” and did not purport to do so. *Id.*

encouraging tribal independence.” *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1190 (10th Cir. 2002) (internal citations omitted); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985).

A statutory provision is ambiguous if it is subject to more than one reasonable interpretation. *Sprint Spectrum, LP v. State, Dep't of Revenue*, 174 Wn. App. 645, 302 P.3d 1280 (2013).

The jurisdiction assumption statute provides that the state’s assumption of criminal jurisdiction in Indian country “shall not apply to Indians when on their tribal or allotted lands within an established Indian reservation.” RCW 37.12.010. This statutory provision is ambiguous because it has at least two possible interpretations. *Sprint Spectrum*, 174 Wn. App. 645. First, it could provide state jurisdiction over everyone but enrolled Quinault members on the Quinault reservation. Alternatively, the provision could mean that the state does not have criminal jurisdiction over any Indians on an Indian reservation.

Because the phrase “Indians when on their tribal or allotted lands within an established Indian reservation” is ambiguous, it must be interpreted in favor of tribal sovereignty. RCW 37.12.010; *Pueblo of San Juan*, 276 F.3d at 1190. That is, it must be construed to mean that the

state lacks jurisdiction over all Indians on reservations: both members and nonmembers.

Mr. Shale's conviction must be reversed and the case dismissed for lack of jurisdiction. *Jim*, 173 Wn.2d at 688.

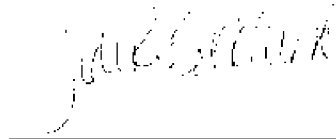
CONCLUSION

Because Mr. Shale is a member of a federally recognized Indian tribe, the state did not have jurisdiction to charge him with an alleged offense taking place in Indian Country. Washington's statute regarding state criminal jurisdiction over Indian Country must be reconciled with federal law. Federal law treats member and nonmember Indians the same for jurisdictional purposes. Thus, state lacks jurisdiction over all Indians on the Quinault reservation, including Mr. Shale. In the alternative, RCW 37.12.010 is ambiguous and the court must interpret it in favor of tribal sovereignty.

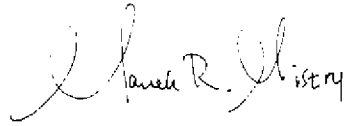
Mr. Shale's conviction must be vacated and the case dismissed for lack of jurisdiction.

Respectfully submitted on September 3, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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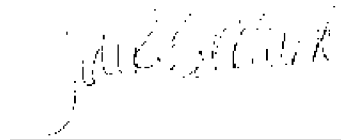
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 3, 2013.



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