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STATE OF WASHINGTON

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NO. 44654-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

HOWARD SHALE,

Appellant,

BRIEF OF AMICUS CURIAE

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecuting attorneys of Washington State. They are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. *See* RCW 36.27.020(4). As such, they have a vital interest in a proper application of State's jurisdiction over crimes committed within or upon a reservation. The answer to the question raised by Howard Shale directly affects the validity and ability of the State to investigate and quickly apprehend sex offenders who prey upon residents and citizens who reside both within and outside of the boundaries of an Indian Reservation. *See generally* Laws of 1990, ch. 3, § 401 (Legislative intent statement for the Community Protection Act of 1990).

II. ISSUES PRESENTED

1. Whether the State of Washington has criminal jurisdiction over any crimes committed within the exterior boundary of the Quinault reservation?
2. Whether the State of Washington has criminal jurisdiction over a nonmember Indian¹ who commits a crime within the exterior boundary of the Quinault reservation?

¹The phrase "nonmember Indian" is used to refer to an enrolled member of an Indian tribe who resides or is conducting business on another tribe's reservation. *Bercier v. KIGA*, 127 Wn. App. 809, 813 n. 2, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005).

3. Whether the situs of the crime of failing to register as a sex offender is the sheriff's office?

III. AMICUS CURIAE'S STATEMENT OF THE CASE

The offense in this case, failing to register as a sex offender, occurred within "the County of Jefferson, State of Washington." CP 1, 4. The offense is a continuing one.²

The defendant, Howard Shale, asserts that he is a member of the Yakama Indian Nation. CP 4. Shale supports this assertion with a photocopy of an identification card, which assuming its truth, was issued by the Confederated Tribes and Bands of the Yakama Nation. CP 7. Shale produced no evidence, however, that he is an Indian in the racial sense.³

The parties in this case agree that the crime occurred within the Quinault reservation. *See* Appellant's Opening Brief at 2; Brief of Respondent at 1. The Quinault reservation consists of over 208,000 acres. Quinault Indian Nation, People of the Quinault, <http://www.quinaultindiannation.com/> (Last visited Aug. 11, 2014).

²*See generally State v. Green*, 156 Wn. App. 96, 230 P.3d 654 (2010) (each discrete violation of the obligations under the sex offender statute cannot be charged separately; the crime is ongoing and a continuing offense from the first violation until the individual is charged); *State v. Durrett*, 150 Wn. App. 402, 208 P.3d 1174 (2009) (unit of prosecution is the entire period of nonreporting); RCW 9A.04.132(4) ("Unless relieved of the duty to register pursuant to RCW 9A.44.141 and 9A.44.142, a violation of this section is an ongoing offense for purposes of the statute of limitations under RCW 9A.04.080.").

³A defendant who claims the State lacks criminal jurisdiction over him due to his status as an "Indian" "must show (1) that he is an Indian in the racial sense, and (2) that he is enrolled or affiliated with a tribe that is recognized by the United States and is individually subject to United States jurisdiction." *State v. Daniels*, 104 Wn. App. 271, 280, 16 P.3d 650 (2001).

Approximately 60,000 acres is fee patent land. Law Enforcement Coordinating Committee, Western District of Washington, *Indian Reservations of Washington State: Demographics and Criminal Jurisdiction*, at 29 (July 1992). The land status of the residence, fee patent or trust, where Howard John Evans Shale lived for more than one year was not established in the trial court as Shale contended that the State court lacked jurisdiction over any crime committed by any Indian within the exterior boundaries of the Quinault Reservation.⁴ See CP 4-8.

VI. ARGUMENT

Shale contends in his 10-page brief that post-*Duro*⁵ the State of Washington has no jurisdiction over any Indian within the Quinault reservation. Essentially, he claims that the post-*Duro* amendment modifies the grant of authority in Public Law 280. Alternatively, he argues that RCW 37.12.010 is ambiguous and the rule of lenity requires the court to presume exclusive tribal jurisdiction. Shale is mistaken for the reasons set forth below.

⁴The burden of establishing the status of the property, fee patent or trust, where Shale lived during the period of non-registration lay initially with Shale. See generally *State v. L.J.M.*, 129 Wn.2d 386, 395-96, 918 P.2d 898 (1996) (burden of contesting the State's assertion of jurisdiction requires the defendant to produce some evidence which could, assuming its truth, show that the alleged crime occurred on trust property).

⁵*Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990).

A. STATE COURTS HAVE JURISDICTION OVER MANY
CRIMES COMMITTED WITHIN THE QUINALT
INDIAN RESERVATION

Jurisdiction over criminal offenses committed in Indian country is a function of the severity of the offense, whether the offense is criminal or a civil infraction, the status of the land upon which the crime occurred, and whether the offender is an Indian or non-Indian. Frequently, two separate jurisdictions, tribal and state or tribal and federal, will have jurisdiction over the very same offense. The confusing tangle of jurisdiction which governs law enforcement in Indian country, has prompted one commentator to state that the subject of regulation of unusual activity on federal Indian reservations is one of the most intricate of Indian affairs issues. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. Kan. L. Rev. 387 (1974).

1. Washington State Court Jurisdiction in General

Washington state's criminal jurisdiction in Indian Country was initially limited to crimes committed by non-Indians against non-Indians, or "victimless offenses". E. g., *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S. Ct. 307, 90 L. Ed. 261 (1946); *Washington v. Lindsey* 133 Wash. 140, 233 P. 327 (1925) (violation of state prohibition laws). The state also generally had jurisdiction to try Indian offenders for crimes committed outside reservation boundaries. E.g. *State ex rel. Best v. Superior Court for*

Okanogan County, 107 Wash. 238, 181 P. 688 (1919); *State v. Williams*, 13 Wash. 335, 43 P. 15 (1895). But if the crime was by or against an Indian within the reservation, tribal jurisdiction or that expressly conferred on other courts by Congress remained exclusive. *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

In 1953 Congress enacted Public Law 280,⁶ which delegated to the state power to impose state laws, both civil and criminal, within the reservations. The criminal provision appears in 18 U.S.C. § 1162. Public Law 280 was enacted by Congress to deal with the lawlessness on some reservations, to reduce the economic burdens associated with federal jurisdiction on reservations, and to respond to a perceived hiatus in law enforcement protections available to tribal Indians. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 498, 99 S. Ct. 740, 760, 58 L. Ed. 2d 740 (1979); *Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S. Ct. 2102, 2106, 48 L. Ed. 2d 710 (1953).

⁶Public Law 280 impacted states differently. The federal government transferred all criminal law jurisdiction over Indians to some states. A number of other states, including Washington, assumed some criminal jurisdiction over Indians. A majority of states, however, still lack jurisdiction over Indians. See generally *Cohen's Handbook of Federal Indian Law*, § 6.04(3) (Nell Jessup Newton ed. 2012). Before a court can rely upon cases from another state, it must determine whether and to what extent that state may exercise any jurisdiction over Indians in Indian Country. See, e.g., *State v. Moses*, 145 Wn.2d 370, 37 P.3d 1216 (2002) (rejecting a Colorado case on the grounds that "Colorado and Washington have not taken similar approaches to concurrent state and tribal jurisdiction."); *State v. Harrison*, 238 P.3d 869, 877 n.3 (N.M. 2010) (citing Idaho case but explaining that, "unlike New Mexico, Idaho has assumed partial criminal jurisdiction over crimes committed by Indians in Indian country pursuant to Public Law 280").

The Washington Legislature initially reacted to Public Law 280 by obligating this state to assume civil and criminal jurisdiction over Indians and Indian territory, reservations, country and lands within the state if and when the tribe or its governing body adopted a resolution asking the state to do so. Laws 1957, chapter 240. A total of ten tribes initially asked the state to assume full criminal jurisdiction over their reservations. The state, however, subsequently adopted a mechanism for returning some of the criminal jurisdiction back to the tribes. *See generally* RCW 37.12.100 -.140.

In 1963, the Washington Legislature obligated the state to

... assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian 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, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways. . . .

RCW 37.12.010.

3

The structure of RCW 37.12.010 is complicated. It consists of a general rule, an exception and exceptions to the exception. This becomes clearer when some of the verbiage is pared away:

[A] [General Rule]

The state of Washington ... assume[s] criminal and civil jurisdiction over Indians and Indian territory ... within this state ...

[B] [Exception]

but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation ...

[C] [Exceptions to the Exception]

except for the following:

RCW 37.12.010.

The effect of RCW 37.12.010 was to assume civil and criminal jurisdiction over Indians and Indian territory within the state. But, except in eight listed subject matter areas, jurisdiction would not extend to Indians on trust or restricted lands unless the affected Indian tribe requested it. *State v. Flett*, 40 Wn. App. 277, 281, 699 P.2d 774 (1985). The Supreme Court upheld the constitutionality of this partial assumption of jurisdiction under Public Law 280. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979). Later federal court decisions, however, have narrowed the state's extension of civil jurisdiction within the eight listed subject matter areas. *See, e.g.*,

Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146 (1991), *cert. denied*, 503 U.S. 997 (1992) (State of Washington not allowed to enforce its speeding laws, which are civil infractions, upon public roads within the Colville Reservation).

Congress narrowed the state's power under Public Law 280 in 1968 with the passage of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1321. This statute provides that a state may not assume criminal jurisdiction without the consent of the tribe. The requirement of tribal consent, however, was not made retroactive, and any cessation of jurisdiction made prior to 1968 was not displaced. *State v. Hoffman*, 116 Wn.2d 51, 68-69, 804 P.2d 577 (1991), quoting *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 150-51, 104 S. Ct. 2267, 81 L. Ed.2d 113 (1984). In addition, land added after the 1968 amendment to a reservation that belongs to one of the tribes that previously yielded criminal jurisdiction to the state is still subject to full state criminal jurisdiction. *See State v. Squally*, 132 Wn.2d 333, 344, 937 P.2d 1069 (1997) (Nisqually reservation).

If a tribe has not requested or consented to the assumption of state jurisdiction, the title status or the property⁷ where the offense was committed

⁷This rule does not apply to a reservation that was entirely created after 1968. *See, e.g.*, Law Enforcement Coordinating Committee, Western District of Washington, *Indian Reservations of Washington State: Demographics and Criminal Jurisdiction*, at 31 (July 1992) (stating with respect to the Sauk Suiattle Reservation "The trust or fee nature of the land is irrelevant since this reservation was formed subsequent to 1968 and the membership

determines state authority to prosecute. If the property is tribal or allotted land within the reservation⁸ and is either held in trust by the United States or subject to a restriction against alienation imposed by the United States, the Washington courts do not have jurisdiction. “Tribal lands” for the purpose of applying state jurisdiction has been generally defined in *Someday v. Rhay*, 67 Wn.2d 180, 184, 406 P.2d 931 (1965), as “lands within the boundaries of an Indian reservation held in trust by the federal government for the Indian tribe as a community. . .” “[A]llotted land” (which is commonly known as “individual trust land”) is:

grazing and agricultural lands within a reservation, which are apportioned and distributed in severalty to tribal members, title to the allotted lands being held in trust and subject to restrictions against alienation for varying periods of time.

Somday, 67 Wn.2d at 184. Resolution of the jurisdictional issues usually requires a determination of whether the alleged offense occurred on fee or nonfee land. *Flett*, 40 Wn. App. at 283. Put conversely, state jurisdiction generally applies to all crimes committed by Indians upon fee simple property.

has never elected to come under state jurisdiction as permitted by Public Law 280 and the provisions of RCW 37.12.010 are inapplicable.”).

⁸The state also lacks criminal jurisdiction over an enrolled member of the Yakama Nation who commits a crime at the Maryhill Treaty Fishing Access Site. *See State v. Jim*, 173 Wn.2d 672, 273 P.3d 434 (2012).

2. Quinault Reservation in Particular

In *Comenout v. Burdman*, 84 Wn.2d 192, 525 P.2d 217 (1974), the Court considered and rejected a claim that the State of Washington had no jurisdiction over Quinault Indians residing on the Quinault Indian Reservation. The challenge to the state's jurisdiction was predicated upon the repudiation of the April 22, 1958, resolution of a body purporting to be the "Quinault Indian Tribal Council" that requested state jurisdiction over criminal and civil matters. *Id.*, at 196-97.

Former Governor Rosellini issued a proclamation revoking state jurisdiction over the Quinault Indian Tribe. This proclamation attempted to "retrocede" part of the jurisdiction of the State of Washington over the Quinault Indian Tribe to the United States Government. The United States, however, did not accept this retrocession. *Id.* at 198.

Former Governor Evans made a second attempt to retrocede the jurisdiction exercised by the State of Washington over the Quinault Reservation to the United States Government. *Id.* The United States accepted this retrocession, "except as provided under Chapter 36, Laws of 1963 (RCW 37.12.010-37.12.060)." 34 Fed. Reg. 14288 (Aug. 30, 1969). The State of Washington, therefore, may exercise jurisdiction within the Quinault Indian Reservation to the extent authorized by RCW 37.12.010. *Comenout*, 84 Wn.2d at 199, 201.

B. ONLY INDIANS WHO COMMIT CRIMES WITHIN THEIR
TRIBE'S RESERVATION ARE IMMUNE FROM STATE
COURT JURISDICTION

When Congress enacted Public Law 280 and when the Washington Legislature decided the scope of jurisdiction the state would assume over Indian County, the relationship between the various tribes⁹ was similar to the relationship between France and Germany or Japan and Australia. Each tribe is a separate sovereign, subject to distinct treaties. *See, e.g.*, Treaty with the Yakama and Other Indian Tribes, June 9, 1855, 12 Stat. 951 (Treaty of Camp Stevens); Treaty with Quinaielt and Other Indian Tribes, July 1, 1855, 12 Stat. 971 (Treaty of Quinault River). Each tribe has the right to adopt an appropriate constitution and bylaws that apply solely to that tribe. *See generally* 25 U.S.C. § 476.

Each tribe separately participates in legal proceedings. *See, e.g.*,

⁹In *Montoya v. United States*, 180 U.S. 261, 21 S. Ct. 358, 45 L. Ed. 521 (1901), the Supreme Court adopted a common-law test to determine whether a group constituted a tribe for purposes of the Indian Depredation Act of 1891. This federal statute allowed United States citizens to bring actions in the Court of Claims for property "taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States." Under the statute it became necessary, in each case, to determine whether the offender belonged to a band, tribe, or nation in amity with the United States. The court offered the following definition of the terms tribe and band:

By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design.

Montoya, 180 U.S. at 266.

United States v. Washington, 873 F. Supp. 1422, 1427 n. 1 (W.D. Wash. 1994) (“The Tribes active in this sub-proceeding are the following: the Tulalip, Puyallup, Squaxin Island, Makah, Muckleshoot, Upper Skagit, Nooksack, Nisqually, Lummi, Skokomish, Port Gamble S’Klallam, Lower Elwha S’Klallam, Jamestown S’Klallam, Suquamish, Yakama, and the Swinomish (hereinafter “The Tribes”). The Quinault, Quileute, and Hoh Tribes, all coastal Tribes, made appearances in the action; however, they were not active participants, and they sought no relief.”).

Each tribe negotiates separately with the State of Washington. *See, e.g.*, RCW 43.06.460 (governor authorized to enter into cigarette tax contracts with the Quinault Nation and a number of other tribes); RCW 43.06.466 (specific cigarette tax agreement with the Yakama Nation). Each tribe works separately with the federal government. *See, e.g.*, 40 CFR 49.10551 - 40 CFR 49.10561 (air quality plan for the Quileute Tribe of the Quileute Reservation); 40 CFR 49.11101 - 40 CFR 49.11110 (air quality plan for the Confederated Tribes and Bands of the Yakama Nation).

Each tribe controls separate territories. *See, e.g.*, 79 Fed. Reg. 12523 (Mar. 5, 2014) (proclaiming certain lands as reservation for the Muckleshoot Indian Tribe of Washington State); 79 Fed. Reg. 45456 (Aug. 5, 2014) (proclaiming certain lands as reservation for the Stillaguamish Tribe of Indians of Washington). When land is taken into trust by the federal

government, it is to the benefit of a single tribe—not all Indians. *See, e.g.*, 25 U.S.C. § 608(c) (directing lands to “be held in trust by the United States for the benefit of the Yakima [Yakama] Indian Nation”); 76 Fed. Reg. 377 (Jan. 4, 2011) (notice that the Assistant Secretary of Indian Affairs made a final agency determination to acquire approximately 151.87 acres of land into trust for the Cowlitz Tribe of Washington).

When Congress enacted Public Law 280 and when the Washington Legislature decided the scope of jurisdiction the state would assume over Indian County, tribal courts, at least as they are now composed, were virtually nonexistent. *See generally* S. O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L. Rev. 1 (1997) (most present day tribal courts date from the Indian Reorganization Act of 1934); A. Carr & S. Johnanson, *Extent of Washington Criminal Jurisdiction Over Indians*, 33 Wash. L. Rev. 289, 292 (1958) (as late as 1958, only 5 of the then 21 recognized Washington tribes had tribal court systems capable of handling criminal prosecutions). Those tribes that had robust court systems, were unable to exercise jurisdiction over nonmember Indians. *See Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990).

Against this backdrop, the Washington Legislature carefully crafted RCW 37.12.010 to be respectful toward a particular tribe’s sovereignty while addressing the lawlessness that gave birth to Public Law 280. In RCW

37.12.010 the State assumed jurisdiction over Indians except as “to Indians when on *their* tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States.” [Emphasis added.]. The plain meaning of this language is clear, a nonmember Indian who commits a crime upon a reservation is subject to state court jurisdiction. Since the enactment of RCW 37.12.010, no nonmember Indian has been exempted from state court prosecution for a crime committed within the exterior boundaries of a reservation.¹⁰

The balance struck by the Washington Legislature in RCW 37.12.010 of respecting tribal sovereignty by exempting tribal members but not nonmembers from state law appears throughout Indian law. Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class. While the Supreme Court held that States may not impose certain taxes on transactions of tribal members on the reservation because this would

¹⁰Shale does not identify such a case. This Court may, therefore, presume that there are none. *See generally State v. Young*, 89 Wn.2d 613, 574 P.2d 1171 (1978) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”). This assumption would be consistent with cases in which Washington courts held the state lacked criminal jurisdiction over a crime. *See, e.g., State v. Jim*, 173 Wn.2d 672, 273 P.3d 434 (2012) (Yakama Indian at the Maryhill Treaty Fishing Access Site, a plot of land set aside by Congress for the Yakama Nation and three other tribes to replace accustomed fishing grounds that were flooded when the Bonneville Dam was built); *Arquette v. Schneckloth*, 56 Wn.2d 178, 179-80, 351 P.2d 921 (1960) (Yakama Indian and offense committed within the Yakama reservation); *Wesley v. Schneckloth*, 55 Wn.2d 90, 93, 346 P.2d 658 (1959) (same).

interfere with internal governance and self-determination,¹¹ the same rationale did not bar taxation of nonmembers, even where they are Indians:

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 161, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

The Supreme Court reached a similar result in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). In *Montana*, the Court held that the Crow Tribe could regulate hunting and fishing by nonmembers on land held by the Tribe or held in trust for the Tribe by the United States. But this power could not extend to nonmembers' activities on land they held in fee. In so holding, the Court relied upon "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)).

¹¹See *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973).

This Court reached a similar conclusion in *Bercier v. KIGA*, 127 Wn. App. 809, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005). In *Bercier*, an American Indian, enrolled in the Fort Peck Indian Tribe in Montana, operated a smokeshop on the Puyallup Tribe's reservation. This nonmember Indian claimed that as an Indian licensed to do business on an Indian reservation, he should be exempt from Washington State excise taxes and related regulations. 127 Wn. App. at 813. Based upon the plain language of the relevant statutes and regulations, this Court held that the nonmember Indian smokeshop operator was subject to Washington taxes and regulations. *Bercier*, 127 Wn. App. at 816-18.

The nonmember Indian smokeshop operator, like Shale, contended that the post-*Duro v. Reina* amendment to 25 U.S.C. § 1301¹² compels a different result. *See Bercier*, 127 Wn. App. at 818-19. This Court rejected the argument, pointing out that the United States Supreme Court expressly limited the scope of this amendment and its recognition that a tribe may prosecute nonmember Indians for criminal conduct. *Bercier*, 127 Wn. App.

¹²In *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990), the Supreme Court held that an Indian tribe lacked jurisdiction over nonmember Indians who commit crimes within the tribe's reservation. In response, Congress amended the definition of "powers of self-government" to include "criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). This definition, applies to 25 U.S.C. § 1302. 25 U.S.C. § 1302(a)(1) ("No Indian tribe in exercising the powers of self-government shall –"). 25 U.S.C. § 1302(f) contains the following proviso: "(f) Effect of section. Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country."

at 818-19 n. 12 (quoting *United States v. Lara*, 541 U.S. 193, 205, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) (“[T]his case involves no interference with the power or authority of any State.” [Emphasis added by the Washington Court of Appeals])).

The fact that an Indian has already faced tribal court prosecution does not preclude a separate state court prosecution for the same conduct. *See United States v. Wheeler*, 435 U.S. 313, 316-17, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978) (the dual sovereignty doctrine allows a federal prosecution to follow a tribal prosecution); *State v. Moses*, 145 Wn.2d 370, 37 P.3d 1216 (2002) (Indian tribes are not among the sovereigns included within the meaning of RCW 10.43.040, the double jeopardy statute); *State v. Caliguri*, 99 Wn.2d 501, 511, 664 P.2d 466 (1983) (Washington follows the dual sovereignty doctrine with respect to double jeopardy). Shale’s assertion that the Quinault Indian Tribe could prosecute Shale for violating that tribe’s sex offender registration law¹³ does not deprive the state of jurisdiction for a violation of RCW 9A.44.132 committed on the Quinault reservation.

C. THE CRIME WAS COMMITTED OUTSIDE THE RESERVATION

The parties’ stipulation of the situs of the crime, at least to the extent it relates to a question of law, is not binding upon this Court. *See, e.g., State*

¹³Neither Shale’s appellate court brief nor his trial court pleadings include a copy of the relevant sections of the Quinault Indian Nation’s code.

v, *Vangerpen*, 125 Wn.2d 782, 792, 888 P.2d 1177 (1995) (“A stipulation as to an issue of law is not binding on this court; it is the province of this court to decide the issues of law.”).

Crimes may be committed at more than one situs. *See, e.g., State v. Dent*, 123 Wn.2d 467, 481, 869 P.2d 392 (1994) (holding that prosecution is proper in county where telephone calls were received in conspiracy case, and citing with approval a federal case holding that the prosecution would be proper in either county). This principle is particularly applicable when the crime involves the failure to perform a required action. In such cases, courts have repeatedly stated that “where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime.” *See, e.g., Johnston v. United States*, 351 U.S. 215, 220, 76 S. Ct. 739, 100 L. Ed. 1097 (1956) (venue for violations of the Universal Military Training and Service Act's civilian duty reporting requirements was proper in the jurisdiction where the draft registrants failed to report to duty rather than where they resided); *United States v. Clines*, 958 F.2d 578, 583 (4th Cir. 1992) (“The crime of failure to file returns is committed in the district or districts where the taxpayer is required to file the returns.”); *McKinney v. State*, 282 Ga. 230, 647 S.E.2d 44 (2007) (the place fixed for filing documents with the State Ethics Commission is the situs of the crime of failing to file the documents).

The plain language of RCW 9A.44.130 establishes that the crime of failing to register as a sex offender occurs at the office of the county sheriff to whom the initial registration must be made and to whom the sex offender is required to send a variety of written notifications. *See generally* RCW 9A.44.130(1)(a) (“shall register with the county sheriff”); RCW 9A.44.130(3)(a) (“Offenders shall register with the county sheriff within the following deadlines”); RCW 9A.44.130(4)(a) (“If any person required to register pursuant to this section changes his or her residence address within the same county, the person must provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address to the county sheriff within three business days of moving.”); RCW 9A.44.130(5)(b) (“A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff’s office, and shall occur during normal business hours.”). This conclusion is reinforced by the case law which establishes the State is not required to prove where the offender was actually living. *See, e.g., State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010) (a sex offender’s residential status is not an element of the crime of failure to register as a sex offender); RCW 9A.44.130(3)(b) (“The county sheriff shall not be required to determine whether the person is living within the county.”).

A county sheriff is required to maintain his or her office at the county seat. RCW 36.28.160. The Jefferson County seat is Port Townsend.¹⁴ Port Townsend lies outside the boundaries of the Quinault Indian Reservation.¹⁵

V. CONCLUSION

The state may exercise criminal jurisdiction over non-Indians and nonmember Indians who commit crimes within the exterior boundaries of a reservation.

Respectfully submitted this 12th day of August, 2014.



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¹⁴An appellate court may take judicial notice of geographic facts. *See, e.g., Bremerton School Dist. 100-C v. Hibbard*, 51 Wn.2d 226, 228, 317 P.2d 517 (1957) (“Mr. Williams did not live in Bremerton; he lived and worked in Seattle. (We may notice, judicially, that the two cities are separated by Puget Sound.”).

¹⁵*See* United States Geological Services, Map of Quinault Indian Reservation, <http://wa.water.usgs.gov/projects/quinault/maps.htm> (last visited August 12, 2014); United States Census, 2010 Census– Tribal Tract Reference Maps, Quinault Reservation http://www2.census.gov/geo/maps/dc10map/tribal_tract/r3040_quinault/DC10TT_R3040_001.pdf (last visited Aug. 12, 2014).

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DIVISION II

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STATE OF WASHINGTON

BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HOWARD JOHN EVANS SHALE,

Appellant.

NO. 44654-5-II

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 12th day of August, 2014, I served an electronic copy of this proof of service, the Motion for Leave to File Amicus Curiae Brief, and the Washington Association of Prosecuting Attorney's Brief of Amicus Curiae on the following persons at the following e-mail addresses:

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On the 12th day of August, 2014, I deposited in the mails of the United States of America, postage prepaid, copies of this proof of service, the Motion for Leave to File Amicus Curiae Brief, and the Washington Association of Prosecuting Attorney's Brief of Amicus Curiae to:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 12th day of August, 2014, at Olympia, Washington.


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