NO. 90906-7

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

HOWARD SHALE,

Appellant.

# AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF THE STATE OF WASHINGTON



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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

**Other Authorities**

## I. INTEREST OF THE AMICUS

Appellant Shale argues that his criminal conviction should be reversed because state law is preempted or the State otherwise lacks jurisdiction over his failure to register as a sex offender.

The Attorney General has several interests that warrant filing this brief. First, the Attorney General defends the constitutionality and validity of state law, and this brief therefore addresses the validity of the state's sex offender registration law. Second, the Attorney General's Office has deep expertise in the complex jurisdictional issues that apply to Washington's Indian reservations. The State and tribes are best served by clear rules governing such issues. Therefore, this brief is offered to help the Court with established jurisdictional and preemption rules.

Finally, the Attorney General is interested in the principle that issues should be decided by this Court only when presented by a case. This principle is critical here, because Shale's arguments are broad and could have far-reaching implications. But there is no need for the Court to resolve those issues here because Shale's entire argument relies on a false premise. He claims that he was convicted for conduct while living within the Quinault reservation, but the record is undisputed that he was also living in Forks at the time of the crime. The Court can and should resolve the case on that basis without reaching Shale's expansive arguments.

## II. ARGUMENT

### A. The Trial Record Shows that Shale Committed the Crime of Failure to Register While Living in Forks

Shale's arguments attacking his guilty verdict are based on the premise that he was convicted for conduct occurring on the Quinault reservation. Not so. The criminal information and evidence concerned a crime that occurred off-reservation, in Forks.

#### 1. The Evidence at Trial Concerned Criminal Activity That Occurred in Forks, Washington

The superior court found Shale guilty after a bench trial on March 8, 2013. RP 3/8/13, at 18. The evidence for the trial was the court's review of police reports. RP 3/8/13, at 18, 23. Shale stipulated to admission of the reports, waived objections, and waived cross-examination of the reporting officers. RP 3/8/13, at 21-22. That evidence showed:

- On 10-1-12, Deputy Allen reported to Garrett that Howard Shale has been living with his father, Terry Shale, for 90 or more days. Terry Shale lives at 211 2nd Avenue #10, Forks, Washington.
- The address of Terry Shale is in Forks and Terry Shale registered that address with the state, as he is also a convicted sex offender.
- On 10-30-12, Deputy Allen went to 211 2nd Avenue #10, Forks, Washington and "personally contacted Howard [Shale], *who said he has lived there for at least three months.*"

*See* Jefferson County Sheriff's Office Incident Report and Supplemental Incident Reports dated 10-31-12 by Detective Barb Garrett (attached to

Police Report For Stipulated Bench Trial, filed Mar. 6, 2013, Jefferson County Cause No. 12-1-0094-0).

The criminal information alleged a crime "on or about" October 1, 2012. It alleges Shale's last known address (LKA) is 2nd Avenue in Forks. CP at 1. The information relies on the report of Shale's statement on October 30, 2012, where he said he had been living at his father's address *in Forks* for "at least three months." CP at 1. Similarly, the police report alleges "criminal activity . . . at: 2nd Avenue #10, Forks, WA." *See* Jefferson County Sheriff's Office Incident Report and Supplemental Incident Reports dated 10-31-12 by Detective Barb Garrett.

Shale was not charged with a crime on an Indian reservation. CP at 1-2. Therefore, the Court need not address application of state criminal laws to a Yakama Indian living on the Quinault reservation. A ruling on that issue would not provide a basis to reverse the conviction.

### 2. Trial Counsel Improvidently Argued About Application of State Criminal Law in an Indian Reservation

The issues Shale presents on appeal appear to be based on his trial counsel's motion to dismiss, which claimed Shale was living within the Quinault reservation. CP at 4. That motion offered no evidence. It ignored Shale's admission about living in Forks. The prosecutor's brief also failed to alert the judge that the charges were for a crime "on or about October 1, 2012"—the time Shale admitted he had been living in Forks. Thus, the

trial court unnecessarily addressed state criminal authority over a Yakama Indian living on the Quinault reservation. CP at 16 l. 26. But that ruling relied on an incorrect factual premise advanced by counsel.

This Court should not allow the mistakes below to force it into rendering what would be an advisory opinion on a complex topic. Given the actual charge and evidence, this Court has no reason to address if state law applies to a Yakama Indian living on the Quinault reservation.

## B. The State Registration Law is a Criminal Law Where the State's Authority Was Granted by the Federal Government in Public Law 280 and Exercised in RCW 37.12

Shale's legal theories also fail. Washington has authority to enforce a criminal law against non-Quinault Indians living within the Quinault reservation. That authority is granted by the federal law known as Public Law 280 and exercised in RCW 37.12.010. The Quinault Nation also has concurrent jurisdiction to enforce certain laws against nonmember Indians like Shale, but this concurrent jurisdiction complements, and does not displace, the State's jurisdiction as to nonmember Indians.

### 1. History of Public Law 280 and RCW 37.12

State criminal jurisdiction in Indian reservations in Washington was originally limited to crimes involving non-Indians. *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L. Ed. 869 (1882); *State v. Lindsey*, 133 Wash. 140, 233 P. 327 (1925). The federal government and

tribal governments had criminal jurisdiction over certain "on-reservation" crimes committed by Indians but that jurisdiction depended on the nature of the crime and tribal enrollment of victim and accused. *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153; General Crimes Act, 18 U.S.C. § 1152. This presented a number of problems. For example, the federal government could only prosecute a limited set of federal crimes. A tribal government could prosecute its own members, but with limitations, and it could not prosecute nonmembers.

Consequently, in 1953, Congress enacted Public Law 280 to address "the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); Pub. L. No. 83-280, 67 Stat. 588 (Aug 15., 1953). Sections 2 and 4 provided that five (later six) "mandatory" states would have "jurisdiction over offenses committed by or against Indians," and "jurisdiction over civil causes of action between Indians or to which Indians are parties," in certain Indian country in those states. Sections 6 and 7 allowed other states to assume criminal or civil jurisdiction "by affirmative legislative action." Washington exercised this "optional" power in 1957 and 1963.

In 1957, Washington adopted RCW 37.12.010 to assume civil and criminal jurisdiction over "all Indians and all Indian territory" if requested

by a tribe. Laws of 1957, ch. 240, § 2; *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966); *Tonasket v. State*, 84 Wn.2d 164, 166 n.2, 525 P.2d 744 (1974) (listing tribes that acted under the 1957 law). In 1963, the State amended RCW 37.12.010 to remove the tribal request requirement. Laws of 1963, ch. 36. *See, e.g., State v. Clark*, 178 Wn.2d 19, 308 P.3d 590 (2013) (RCW 37.12.010 jurisdiction over crime committed by Colville Indian on fee land within reservation); *State v. Comenout*, 173 Wn.2d 235, 267 P.3d 355 (2011) (RCW 37.12.010 jurisdiction to prosecute tribal members for offenses on off-reservation trust allotment), *cert. denied*, 132 S. Ct. 2402 (2012).

The 1963 law assumed criminal jurisdiction over all Indians and Indian country in the state, with the significant exception of "Indians when on their tribal lands or allotted lands within an established Indian reservation . . . ." Laws of 1963, ch. 36, § 1. For Indians on *their* tribal or allotted lands, the 1963 law only assumed jurisdiction in eight subject areas, such as compulsory school attendance, public assistance, or motor vehicles. *See* RCW 37.12.010(1)-(8).[1] The 1963 law also preserved jurisdiction assumed under the 1957 law. *Quinault Tribe of Indians*, 368 F.2d at 652. The United States Supreme Court upheld Washington's law

[1] *See, e.g., State v. Yallup*, 160 Wn. App. 500, 248 P.3d 1095 (2011) (under RCW 37.12.010, state had jurisdiction over criminal traffic offense committed by Yakama Indian on public road within Yakama reservation); *State v. Pink*, 144 Wn. App. 945, 185 P.3d 634 (2008) (felon in possession of firearm is not a crime related to operation of motor vehicles; state lacked jurisdiction under RCW 37.12.010).

in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

Congress amended Public Law 280 in 1968 to provide that any state that had not previously assumed criminal or civil jurisdiction over Indian country could do so only with the consent of the affected tribe. Pub. L. No. 90-284, §§ 401, 402, 82 Stat. 73, 78, 79 (codified as amended at 25 U.S.C. §§ 1321, 1322). The 1968 law did not disturb prior assumptions of jurisdiction, such as Washington's. *See* Pub. L. No. 90-284, § 403(b), 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)); *In re Estate of Cross*, 126 Wn.2d 43, 47, 891 P.2d 26 (1995).

The amicus brief of the Washington Association of Prosecuting Attorneys explains how state authority under the 1963 assumption of jurisdiction applies to Indians who not members of a tribe. In particular, the general assumption of jurisdiction in RCW 37.12.010 excepts only Indians on *their* tribal lands or *their* allotted lands. That exception has no application to Shale.

**2. As This Court has Previously Held, the State has Public Law 280 Jurisdiction Within the Quinault Reservation Under RCW 37.12.010**

The Quinault reservation was established by Executive Order in 1873. 1 Charles J. Kappler, *Laws and Treaties* 923-24 (1904) (Exec. Order Nov. 4, 1873). In 1958, the Governor's Office acted on a request to extend

state jurisdiction to the Quinault Nation and reservation. *State v. Bertrand*, 61 Wn.2d 333, 335, 378 P.2d 427 (1963). Governor Rosellini issued a proclamation assuming full state criminal and civil jurisdiction over "the Quinault Indian people, their reservation, territory, lands and country, and all persons being and residing therein." *Id.* at 336; *id.* at 341 (proclamation was valid notwithstanding questions about the authority of the body that requested it). This was followed by an unsuccessful and successful "retrocession" of some jurisdiction back to the United States.

In 1965, the Governor tried to revoke the 1958 proclamation and retrocede to the United States all jurisdiction except civil. *Quinault Tribe of Indians*, 368 F.2d at 652 n.3. The federal government did not accept the retrocession. *Comenout*, 84 Wn.2d at 198. But later, in 1968, Congress authorized the United States to "accept a retrocession" of state jurisdiction previously acquired under Public Law 280. Pub. L. No. 90-284, § 403, 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323); 33 Fed. Reg. 17339 (Nov. 21, 1968) (Exec. Order No. 11435, Secretary of the Interior authorized to accept retrocession). At the request of the Quinault Nation, Governor Evans issued a proclamation retroceding to the United States "jurisdiction exercised by the State of Washington over the Quinault Reservation *except as provided under* Laws of 1963, ch. 36

(RCW 37.12.010-060) . . . ." *Comenout*, 84 Wn.2d 192 at 198 (emphasis added). In 1969, the Secretary of the Interior accepted the same:

> Pursuant to the authority vested in the Secretary of the Interior by Executive Order No. 11435 (33 F.R. 17339), I hereby accept, as of 12:01 a.m., e.s.t, of the day following publication of this notice in the Federal Register, retrocession to the United States of all jurisdiction exercised by the State of Washington over the Quinault Indian Reservation, *except as provided under Chapter 36, Laws of 1963* (RCW 37.12.010-37.12.060), as offered on August 15, 1968, by proclamation of the Governor of the State of Washington.

34 Fed. Reg. 14288 (Sept. 11, 1969) (emphasis added).

The limits of this retrocession are significant and they defeat Shale's argument that, because of the 1969 retrocession, state courts lack criminal jurisdiction over any Indian within the Quinault reservation. Appellant's Opening Br. at 7, 10; *see* Appellant's Resp. to WAPA at 1. The above quoted language preserves from retrocession the jurisdiction exercised by Washington under Laws of 1963, ch. 36 (RCW 37.12.010-.060), and this Court has twice so held.

In 1974, this Court examined the question in depth and concluded that, after the 1969 retrocession, the State retains jurisdiction within the Quinault reservation in accordance with the 1963 assumption of jurisdiction in RCW 37.12.010. *Comenout*, 84 Wn.2d at 198. In 2011, this Court again observed that "the jurisdiction exercised by the State over the [Quinault] tribe pursuant to the 1963 statutory

amendment, RCW 37.12.010 through .060, was excepted from the retrocession." *Comenout*, 173 Wn.2d at 239-40. Accordingly, when analyzing state jurisdiction on the Quinault reservation, RCW 37.12 applies. As shown above and by WAPA, RCW 37.12 assumed jurisdiction over crimes by nonmember Indians.

### 3. The 1990-91 "*Duro* Fix" Amendment to 25 U.S.C. § 1301 did not Affect Public Law 280 Jurisdiction

In 1990, the United States Supreme Court squarely held that Indian tribes lack authority to criminally punish nonmember Indians. *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990). *Duro* arose in Arizona on a reservation where the state had never assumed jurisdiction under Public Law 280; this created the possibility that no government had authority to prosecute a nonmember Indian. *Duro*, 495 U.S. at 697 (majority), 705 n.3 (Brennan, J., dissenting). Congress responded with 25 U.S.C. § 1301(2) to define Indian tribal "powers of self-government" to include power "to exercise criminal jurisdiction over all Indians." Pub. L No. 102-137, 105 Stat. 646 (1991) (permanent legislation) (codified at 25 U.S.C. § 1301(2)). This is called the "*Duro* fix." Its history stresses that Con-gress intended to fill the void identified by *Duro* in states that had not assumed jurisdiction under Public Law 280. H.R. Rep. No. 102-261, at 5 (1991).

Citing no authority, Shale contends the *Duro* fix silently amended Public Law 280 and eliminated state authority to prosecute nonmember

Indians. Appellant's Opening Br. at 6-7. But Congress did not amend Public Law 280 and Congress did not purport to preempt any state laws with the *Duro* fix. Moreover, when the United States Supreme Court addressed the *Duro* fix, it stressed that "the change at issue here is a limited one" that "involves no interference with the power or authority of any State." *United States v. Lara*, 541 U.S. 193, 204, 205, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). The interpretation offered by Shale contradicts *Lara* and Congress by divesting the state of authority assumed under Public Law 280 and concurrently exercised after the *Duro* fix.

Shale also claims that tribal criminal authority over nonmember Indians under the *Duro* fix is exclusive and precludes concurrent state jurisdiction absent a federal law explicitly providing for "concurrent jurisdiction." Appellant's Resp. to WAPA at 1-3. His argument is contrary to authority. When Congress enacted the *Duro* fix, there was wide agreement that state jurisdiction under Public Law 280 is concurrent with tribal jurisdiction.[2] In the 24 years since the *Duro* fix, Washington and other Public Law 280 states have exercised concurrent jurisdiction with tribes

[2] *E.g.*, *State v. Schmuck*, 121 Wn.2d 373, 394-96, 850 P.2d 1332 (1993); *Cordova v. Holwegner*, 93 Wn. App. 955, 965, 971 P.2d 531 (1999) ("nothing in the text of Public Law 280 addresses the removal of tribal authority or precludes the possibility of concurrent jurisdiction"); Conf. of W. Att'ys Gen., *American Indian Law Deskbook* § 4:6, at 255 (2014); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev 1627 (1998); H.R. Rep. No. 102-261, at 5 (1991) ("delegation of Federal authority to state governments under Public Law 83-280 is generally concurrent with tribal government").

over nonmember Indians.[3] Moreover, courts in Washington and other states have rejected arguments that the *Duro* fix or *Lara* ruling divested states of authority over nonmember Indians within Indian reservations.[4] Thus, if the Court addresses the question raised by Shale, it should reject his argument that the state's jurisdiction over non-Quinault Indians within the Quinault reservation was affected by the *Duro* fix legislation.

### C. Even if State Sex Offender Registration is a Civil/Regulatory Law, It Applies to Shale Because States May Apply Civil Regulatory Laws to Nonmember Indians on a Reservation

Shale also contends that the sex offender registration crime is a civil/regulatory law, not a criminal statute. He observes that Public Law 280 does not authorize states to apply civil/regulatory laws to tribal members within their Tribe's reservation.[5]

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[3] *State v. Losh*, 755 N.W.2d 736 (Minn. 2008) (under Public Law 280, state had authority to enforce criminal/prohibitory traffic laws against a nonmember Indian); *Comenout*, 173 Wn.2d 235 (under Public Law 280, state had authority to prosecute tribal members for crimes off-reservation Quinault Indian trust allotment); *State v. Abrahamson*, 157 Wn. App. 672, 238 P.3d 533 (2010) (under Public Law 280, state had authority to prosecute Spokane Indian for offense at Tulalip reservation).

[4] *Bercier v. Kiga*, 127 Wn. App. 809, 820, 103 P.3d 232 (2004) (*Duro* fix did not affect state authority to require nonmember Indian to comply with state cigarette tax laws within an Indian reservation); *State v. Davis*, 773 N.W.2d 66, 70-72 (Minn. 2009) (*Duro* fix did not affect state authority to enforce civil/regulatory traffic laws against a nonmember Indian within an Indian reservation); *LaRock v. Wis. Dep't of Revenue*, 241 Wis. 2d 87, 102-04, 621 N.W.2d 907 (2001) (*Duro* fix did not affect state authority to tax income of a nonmember Indian within an Indian reservation).

[5] *See Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991) (Public Law 280 did not authorize state to enforce highway speed limit civil infraction against Colville member within Colville reservation); *cf. Yallup*, 160 Wn. App. at 508-09 (state implied consent law is criminal, not civil/regulatory, and enforceable against Yakama Indian on public road within Yakama reservation).

But Shale errs when he argues that Washington cannot enforce civil/regulatory laws against nonmembers. Again, his argument is contrary to authority. Courts uniformly treat nonmember Indians the same as non-Indians for purposes of state civil/regulatory authority.[6] States are presumed to have authority to apply civil/regulatory laws to non-tribal members, including Indians from other tribes, within Indian country unless Congress affirmatively preempts the state law.

### D. The Federal Sex Offender Registration Laws in 42 U.S.C. § 16901 do not Preempt State Registration Laws

Finally, Shale argues that the Sex Offender Registration and Notification Act (SORNA) establishes a federal scheme for regulation of sex offenders, and "grants state authority over sex offender registration within a reservation only if the tribe fails to create a tribal registry within a year of SORNA's enactment date." Appellant's Suppl. Br. at 5. Again, the

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[6] *See, e.g., Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 36-38, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999) (construction company owned by member of Blackfeet Tribe of Montana was subject to state tax for work on Indian reservations in Arizona); *Rice v. Rehner*, 463 U.S. 713, 720 & n.7, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1983) (upholding state regulation of liquor sales to nonmember Indians within Indian reservation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980) (state had authority to require nonmember Indians to pay state retail sales and cigarette taxes on purchases made within Indian reservations); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012) (Indians "within the Indian country of another tribe . . . are subject to non-discriminatory state laws otherwise applicable to all citizens of the state"); *State ex rel. Ariz. Dep't of Revenue v. Dillon*, 170 Ariz. 560, 564-66, 826 P.2d 1186 (Ct. App. 1991) (upholding state authority to tax Puyallup Indian doing business within an Arizona reservation); *State v. Davis*, 773 N.W.2d 66, 70-72 (Minn. 2009) (state authority to enforce civil/regulatory traffic laws against a nonmember Indian); *State v. R.M.H.*, 617 N.W.2d 55 (Minn. 2000) (same); *Bercier*, 127 Wn. App. at 820 (upholding state authority over nonmember Indian).

Court should not reach this issue because it does not concern Shale's conviction. Nor does it appear the argument was presented at the superior court. But if the Court addresses SORNA, it should not find preemption.

Shale's first SORNA argument merely restates his argument that sex offender registration crimes are civil/regulatory. As shown above in Part C, Shale's reliance on a civil/regulatory label is flawed. *See generally* Part C & note 7 *supra*.

Second, SORNA includes no congressional statement that tribal sex offender registration programs are intended to preempt parallel registration requirements by other jurisdictions. "[T]here is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993). Shale cites only 42 U.S.C. § 16927, but that section simply authorizes certain federally recognized Indian tribes to carry out SORNA functions. It does not provide for any preemption.

If anything, the statute cited by Shale is strong evidence against preemption of state registration laws. For example, the statute provides that tribes are "not required to duplicate functions . . . which are fully carried out by another jurisdiction or jurisdictions within which the territory of the tribe is located" and goes on to provide that tribes may use

cooperative agreements with other jurisdictions. 42 U.S.C. § 16927(b)(1), (2). For these provisions to function, Congress must have contemplated concurrent and overlapping authority by states and tribes, not exclusivity.

Nor should this Court find conflict preemption. There is no barrier to complying with both state and federal law. Indeed, SORNA contemplates multiple registrations. 42 U.S.C. § 16913(a) (requiring registration in "each jurisdiction" in which offender resides, works, or goes to school). Finally, but not least, there is little sense in finding preemption, because the public is best protected when both states and tribes may require sex offenders to be registered with law enforcement.

## III. CONCLUSION

The Court should not reach Shale's arguments. But, if the Court does address the issues raised by Shale, it should reject them as legally wrong.

RESPECTFULLY SUBMITTED this 29 day of December 2014.

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## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the foregoing Amicus Brief Of The Attorney General In Support Of The State Of Washington to be served via electronic mail and USPS on the following:

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State of Washington v. Shale Cause No. 90906-7

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