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Supreme Court Moves Washington in the Wrong Tribal Direction

By Gabriel Galanda and Amber Penn-Roco

In March, the Washington Supreme Court handed down *State v. Shale*, moving our state in the wrong direction on the subject of tribal criminal jurisdiction.[1] The Court held that the State possessed jurisdiction over a crime committed by an Indian, in Indian Country, because the Indian was not a member of the tribe on whose reservation lands the crime allegedly occurred.

Like some of the Court's preceding Indian criminal law decisions, *Shale* moves against prevailing local and national policy that seeks to restore — not further erode — tribal criminal authority over criminal actors in Indian Country.

The Case

In *Shale*, the defendant was an enrolled member of the Confederated Tribes and Bands of the Yakama Nation, who was convicted of raping a child. After being released from prison, the defendant moved to Seattle, where he registered as a sex offender with King County.

By 2012, the defendant moved onto the Quinault Indian Nation's reservation, which traverses a pocket of remote Jefferson County along the coast. The State prosecuted and eventually convicted the defendant for failing to register as a sex offender in Jefferson County. Shale asserted that the State lacked jurisdiction to prosecute him, as the charged crime was committed on the Quinault Reservation and thus beyond state jurisdiction.

The jurisdictional facts of the case were left rather unclear despite guidance from the U.S. Supreme Court that "[t]he ownership status of Indian land ... may sometimes be a dispositive factor" in matters of tribal jurisdiction.[2] The Court explained that during a joint investigation by Jefferson County and Quinault Nation police, "One officer" — it is unclear which — "went to Shale's father's home, which *may* have been in Clallam County, and spoke to Shale himself."[3] The Quinault officer also "went to the Quinault reservation in Jefferson County ... and [learned] that Shale ha[d] been living on the reservation for approximately a year."[4]

Although Shale's trial testimony and the police reports "suggest" he was dividing his time between the two residences — meaning in two different counties *and* two different sovereign jurisdictions — the Court left that pivotal jurisdictional fact to guesswork.[5] Further, because it was unclear whether Shale possibly "resided on fee, trust or allotment land" on the Quinault Reservation, the Court "assume[d] without deciding that he was living on trust or allotment land within the tribe's jurisdictional boundaries at the relevant time."[6]

Ultimately, after an extensive discussion of Washington's counterpart to federal Public Law 280 — whereby in 1963 the State unilaterally assumed certain criminal and civil jurisdiction over Indians in Washington Indian Country — and the State's progressive retrocession of that authority in favor of tribal governments that began in 1968, the *Shale* Court held that "the federal government accepted retrocession of state jurisdiction over members of the Quinault Indian Nation only while on their Quinault Reservation."[7] As Shale was not a member of the Quinault Indian Nation, jurisdiction over him had not been retroceded by the State. Accordingly, the Court determined that the State possessed the power to prosecute him.

The Mistake

The Court's opinion is primarily based on its wholly mistaken belief that when Public Law 280 was passed by Congress in the 1950s and enacted and amended by Washington in the 1960s, "neither this state nor the federal government would have understood that one tribe's court could have jurisdiction over members of another tribe."[8] To reach that conclusion, the Court relied upon *Duro v. Reina*, 495 U.S. 676 (1990), where the U.S. Supreme Court held a tribe no longer possessed the authority to prosecute a "nonmember Indian."

However, Congress enacted new legislation that effectively overruled *Duro*, as affirmed by the U.S. Supreme Court in *United States v. Lara*, 541 U.S. 193 (2004). The *Duro* "fix" legislation was passed less than six months after the *Duro* decision was issued.[9] The *Shale* Court conceded that *Duro* was not good law earlier in its opinion, but later relied on *Duro* to argue that the State had jurisdiction insofar as the retrocession of state authority did not extend to nonmember Indians.[10]

The *Shale* Court failed to appreciate federal legislative history of the *Duro* fix, which expressly indicated that both Congress and the president understood

that tribes have *always* had inherent jurisdiction over nonmember Indians. The congressional legislative history from the *Duro* fix makes it clear that "tribes have *retained* the criminal jurisdiction over nonmember Indians and this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations."[11]

"[T]he assumption in Congress has *always* been that tribal governments do have such jurisdiction, and federal statutes reflect this view."[12] Further, "Tribal Governments retain all powers of self-government except those which have been explicitly divested by the Congress. Congress has never acted to divest tribal governments of this authority."[13]

Indeed, a tribe's ability to govern the conduct of both member and nonmember Indians in Indian Country has been recognized by the federal government as far back as the 1800s.[14] Historically, it has been Congress's "consistent practice" to "leav[e] to Indian tribes the task of punishing crimes committed by Indians against Indians" and there is a "congressional presumption that tribes had power over all disputes between Indians regardless of tribal membership."[15] As the *Lara* Court explained, what Congress has recognized is an "'*inherent*' tribal power ... to prosecute nonmember Indians."[16] In other words, tribes have possessed such power forever.

More broadly, it is prevailing federal and state policy to enhance tribal governments' criminal jurisdiction over people in tribal territories. In 2010, Congress passed the Tribal Law and Order Act, expanding the punitive abilities of tribal courts, including enhanced sentencing authority over member and nonmember Indian defendants.[17] Congress found that "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country."[18] In 2013, Congress's Violence Against Women Act included provisions that restored tribal criminal jurisdiction over acts of domestic violence committed by non-Indians in Indian Country.[19]

Meanwhile, in 2012, the Washington Legislature passed a law that allows tribes to petition the governor to have the State retrocede from "all or part" of the criminal and civil jurisdiction it usurped from the tribes in 1963 under Public Law 280.[20] In 2014, Gov. Jay Inslee signed a proclamation supporting the Yakama Nation's efforts toward state retrocession from over 1.2 million acres of Yakama Nation lands in Washington; the U.S. Department of the Interior Secretary is expected to authorize that retrocession soon.[21] These new federal and state laws demonstrate a national trend to enhance, not derogate, tribal authority over crimes committed in Indian Country, especially those committed by Indians.

Shale, in contrast, moves Washington in the opposite direction. The Court focused on RCW § 37.12.010, which provides that the State's criminal jurisdiction "shall not apply to Indians when on *their* tribal lands."[22] The Court adopted a narrow interpretation of that phrase to limit a tribe's jurisdiction over "their" lands to include only acts committed by the tribe's own members.[23]

To do so, the Court made an archaic distinction between member and nonmember Indians vis-à-vis tribal criminal jurisdiction. The court also failed to apply the U.S. Supreme Court-prescribed canon of construction that any ambiguity in a statute must be resolved in favor of Indians, as it has done in the recent past.[24]

Moreover, the Court ignored its own related precedent, specifically *State v. Jim*, 173 Wn.2d 672 (2012), where the three words "their tribal lands" did not prevent the Court from ruling that the State lacked jurisdiction over an Indian fishing on a treaty fishing access site on the Columbia River that Congress has designated for the benefit of four tribes. There, the Court construed "their tribal lands" to benefit each of those tribes and their members interchangeably.[25]

The Court's conclusion in *Jim* makes sense given the reality that Indians of various tribes routinely live and work together on any given tribal lands. In support of the *Duro* fix, Congress recognized that nonmember Indians "own homes and property on reservations, are part of the labor force on the reservation, and frequently are married to tribal members" and that they "receive the benefits of programs and services operated by the tribal government," necessitating tribal criminal jurisdiction over nonmembers.[26]

The same logic could have been deployed, or at least discussed, in *Shale* to assess tribal court criminal power. Instead, the *Shale* Court entirely failed to consider the reality of life in Indian Country, resulting in a myopic outcome.

The Concern

Shale is the latest in a line of regressive tribal criminal jurisdiction rulings by the state Supreme Court.[27] For example, in *State v. Eriksen*, 172 Wn.2d 506 (2011), the Court curiously reversed itself to hold that tribal police officers in hot pursuit of a drunk-driving suspect do not have the authority to stop and detain him once he leaves the reservation. There, the justices admitted that their decision "create[d] serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border."

In *State v. Clark*, the Court examined the State's ability to search on-reservation tribal trust land with respect to a crime committed by an Indian off his reservation.[28] There, despite the fact that the tribe had codified procedures for a "State to obtain a tribal warrant in addition to a state warrant," because the tribal law did not precisely spell out "the way the State executes its own process" on Indian lands, the Court held that "the State does not infringe tribal sovereignty by searching reservation lands" in disregard of that codified tribal law.[29]

Underlying the Court's Indian criminal jurisprudence is a mix of paternalism and misunderstanding. On the one hand, the *Shale* Court speculated that the Quinault Indian Nation "may welcome the State's assistance in prosecuting unregistered sex offenders."[30] That may be true, but it is not for the State to say what tribal governments may or may not welcome. In fact, it was the State's unilateral assumption of jurisdiction over Indians in Indian Country in 1963 that caused the jurisdictional maze that is P.L. 280 jurisdiction in Washington, and in turn caused "a significant negative impact on the ability to provide public safety to Indian communities."[31]

On the other hand it is the Court's mistaken notion that tribal governments are somehow intent to "frustrate[] the State's ability to punish those who break the law."[32] In *Shale*, the Court presumed that the Quinault Indian Nation "made the deliberate decision" not to prosecute the defendant based merely on the fact that a tribal officer's assistance in the State's criminal investigation — one that did not even clearly conclude where the crime occurred — did not yield a tribal prosecution.[33] Likewise, during

oral argument in *Clark* two years ago, one justice cited dicta by Justice Scalia in *Nevada v. Hicks*, 533 U.S. 353, 364 (2001), to imply that Washington tribes are content to serve as an "asylum for fugitives from justice."

Congress understands that tribes want to eradicate sex offenders, wife beaters and other criminals from their homelands, and the U.S. Supreme Court has affirmed tribal jurisdiction to do so. More importantly, the Washington Legislature and Gov. Inslee share that understanding, or they would not have trusted tribes, like the Yakama Nation, to reassume authority over their lands upon the State's retrocession therefrom. Our State's highest court "should not unnecessarily ignore state policies" — meaning prevailing, not archaic, state policies — "when fashioning a remedy."[34]

To be sure, deterring crime throughout Washington and empowering tribal justice systems are not mutually exclusive state policies. In fact, the 29 tribal sovereigns in our state aspire to exactly both of those goals.

In all, it is now time for the Washington Supreme Court to move in a common direction with other lawmakers and sovereigns in our state — toward the restoration of tribal criminal authority over bad actors on Indian lands. ■

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[1] No. 90906-7, slip op. at 16 (Wash. S. Ct. Mar. 19, 2015).

[2] *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).

[3] *Shale*, No. 90906-7, at 2 (emphasis added).

[4] *Id*.

[5] *Id*.

[6] *Id*. at 10.

[7] *Id*. at 15.

[8] *Id*.

[9] Act of Nov. 5, 1990, §§ 8077(b)–(d), 104 Stat. 1892–1893 (temporary legislation until September 30, 1991); Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation).

[10] *Shale*, No. 90906-7, at 15–16.

[11] H.R. Rep. No. 102-61, p. 5 (1991) (emphasis added).

[12] S. Rep. No. 102-168, p. 3 (1991) (emphasis added).

[13] 137 Cong. Rec. S5223–24 (daily ed. Apr. 25, 1991) (statement of Sen. Inouye).

[14] *See* 137 *id*. (citing *Duro*) (Brennan, J., dissenting)).

[15] *Id*.

[16] *United States v. Lara*, 541 U.S. 193, 199 (2004) (emphasis in original).

[17] Pub. L. No. 111-211, 124 Stat. 2258 (2010).

[18] *Id*., § 202.

[19] Pub. L. No. 113-4, 127 Stat. 54 (2013).

[20] RCW § 37.12.160(1).

[21] Wash. Gov. Proclamation No. 14-01 (2014).

[22] *Shale*, No. 90906-7, at 9–10.

[23] *Id*. at 15.

[24] *State v. Eriks*en, 170 Wn.2d 209 (2010) ("*Eriksen I*") (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943), *superseded* by 172 Wn.2d 506 (2010) ("*Eriksen II*").

[25] *State v. Jim*, 173 Wn.2d 672 (2012).

[26] 137 Cong. Rec. S5223–24 (daily ed. Apr. 25, 1991) (statement of Sen. Inouye).

[27] *See generally* "Washington Tribal/State Relations Evolving, But Further Work Is Needed," Bar Bulletin, December 2013 ("Hopefully, our state Supreme Court will carefully consider this State's new policy of Indian relations when next crafting a remedy that affects the inherent rights of both of our state's sovereigns.").

[28] 308 P.3d 590 (2013).

[29] *Id*. at 596–97.

[30] *Shale*, No. 90906-7, at 13.

[31] *See generally* Pub. L. No. 113-4, *supra*, § 202.

[32] *Clark*, 308 P.3d at 596.

[33] *Shale*, No. 90906-7, at 13.

[34] *Karcher v. Daggett*, 466 U.S. 910, 911 (1984) (Stevens, J., concurring).