18-1081

No. 18-

FEB 14 2019

IN THE

Supreme Court of the United States

CURTISS WILSON,

Petitioner,

v.

HORTON'S TOWING, A WASHINGTON CORPORATION; UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an Indian Tribe have authority under the second exception of *Montana v. United States*, 450 U.S. 544 (1981), to forfeit automobiles owned by non Native Americans for violation of tribal drug laws while on tribal land?

2. If so, does the Tribe have authority to seize a motor vehicle off reservation if it has probable cause to believe that the automobile previously contained illegal drugs while on tribal lands?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Curtiss Wilson, a resident of Washington State, is the petitioner in this Court. He was the appellant in the United States Court of Appeals for the Ninth Circuit.

Horton's Towing, a Washington corporation, is the respondent in this Court and was the respondent before the United States Court of Appeals for the Ninth Circuit.

The United States of America was a respondent before the United States Court of Appeals for the Ninth Circuit. Petitioner is not seeking certiorari to review the portion of the Ninth Circuit's opinion ratifying the substitution of the United States for Officer Brandon Gates.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Curtiss Wilson respectfully requests that this court grant a writ of certiorari to review the order denying petitioner's petition for rehearing entered on November 16, 2018 and the judgment and opinion of the United States Court of Appeals for the 9th Circuit entered October 9, 2018.

OPINIONS BELOW

The order of the United States District Court for the Western District of Washington granting summary judgment and dismissing the case (Pet. App. 21a-36a) is reported at 2016 WL 1221655 (March 29, 2016).

The opinion of the United States Court of Appeals for the 9th Circuit affirming the dismissal (Pet. App. 1a-18a) is reported at 906 F.3d 773 (9th Cir. October 9, 2018).

Petitioner's petition for rehearing was denied on November 16, 2018 (Pet. App. 37a-38a).

JURISDICTION

The opinion of the United States Court of Appeals for the 9th Circuit affirming the dismissal of petitioner's tort claim was issued on October 9, 2018. Petitioner's petition for rehearing was denied on November 16, 2018. Petitioner's petition is timely filed. This court has jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor shall be deprived of life liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT X provides

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

PRELIMINARY STATEMENT

The instant case is one of four cases in which automobiles owned by non Native Americans were seized and held for forfeiture by tribal police officers for violation of tribal drug laws. In three of the four cases, the automobiles were ordered forfeited by the Swinomish Indian Tribal Court for violation of tribal drug laws. The cases are Candee Washington v. Washington State Department of Licensing, 199 Wash. App. 1039 (Div. 1, 2017) rev. denied 189 Wn2d 1040 (2018) and Jordynn Scott v. Doe Department of Licensing, 199 Wash. App. 1039 (Div. 1, 2017) rev. denied 189 Wn2d 1040(2018) and Susan Pearson (sic) Pierson v. Director of Department of Licensing and Andrew Thorne, Swinomish tribal police officer, 2016 WL 3386798, (Western District of Washington, June 20, 2016). Pearson was adjudicated by John C. Coughenour, United States District Judge who also adjudicated the instant case.

In the Washington and Scott cases, the Swinomish Tribe was able to sell the cars and have the certificates of title transferred to the buyer at public auction. In the Pearson case, the motor vehicle was not sold because as a result of the Washington and Scott cases, the Washington State Department of Licensing agreed not to honor tribal orders of forfeitures in the future to change certificates of title to automobiles to avoid entry of an injuction againt it.

This was pointed out to the 9th circuit court in oral argument in the instant case. Washington's Superior court rule, Cr 82.5 (c) provides that tribal judgments are enforceable in Washington unless the Washington Superior Court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington.

In all of the above cases, the Swinomish tribe did not file its forfeiture judgments in the Superior Court pursuant to CR 82.5. In the Washington case, her automobile was seized on tribal land, a parking lot at the Swinomish Tribe's Casino. In the case of Jordynn Scott and Susan Pearson, the automobiles were seized on a state road inside the Swinomish Tribe's reservation. Counsel of record in this case also represented Candee Washington, Jordynn Scott and Susan Pearson.

In the instant case, petitioner Wilson's truck was returned to him by the Lummi Nation after approximately four months after which this conversion lawsuit was filed

against Brandon Gates in his individual capacity for his seizure of Wilson' truck in Bellingham and against Horton's for releasing the truck to Gates in the Whatcom County Superior Court.

The instant case was selected for a certiorari application because Curtiss Wilson's truck was seized in Bellingham, Washington miles away from the Lummi Reservation, raising in petitioner's view a case which is similar to Lewis v. Clarke, -- U.S. ---, 137 S.Ct. 1285, 1289, 197 L.Ed.2d 631 (April 25, 2017) because of the conflict between Washington's sovereignty to adjudicate torts committed inside Washington and Indian sovereignty.

STATEMENT OF THE CASE

There are misstatements of fact which distort the analysis applied by the 9th Circuit Court of Appeals in its decision. Those misstatements are the statements of fact in the circuit court's opinion affirming that the Lummi police officer Grant Assink seized petitioner's truck for forfeiture on the night of his DUI arrest on the Lummi reservation. Such is not the case.

In the 9th circuit's opinion, in the SUMMARY short synopsis of the court's decision, is found the following statement, "After a search of the truck revealed marijuana, the truck was seized and the tribal court issued a notice of civil forfeiture." The mistakes of fact are first, the truck was not seized for forfeiture by Lummi police officer Grant Assink on the night of petitioner's arrest for DUI and, second, the tribal court did not issue a notice of civil forfeiture.

These mistakes are repeated in the first paragraph of the circuit court's decision where the court wrote the following:

> This appeal concerns the seizure of Plaintiff Curtiss Wilson's truck by Brandon Gates, a police officer of the Lummi Indian Tribe. After visiting a casino on the Lummi reservation, *Wilson was stopped by Lummi police and found with marijuana in his truck. Citing a violation of tribal drug laws, the Lummi Tribe issued a notice of civil forfeiture and took possession of Wilson's truck.* see Appendix A 2a.

Actually, the decision to forfeit Wilson's truck was made the day after Wilson was arrested for DUI when the Notice of Seizure and Intent to Institute Forfeiture of Wilson's truck was prepared and signed by another Lummi police officer, Brandon Gates, a police officer whose duties include enforcement of the tribe's drug laws. Gates took his Notice of Seizure and Intent to Institute Forfeiture form and travelled off reservation into Bellingham , where he presented it to Horton's Towing, which had possession of the truck, and in response thereto, Horton's released Wilson's truck to Gates who took the truck back to the Lummi reservation. Appellant's Excerpts of Record at 23.

For reasons hereinafter stated, these misstatements of fact undermine the correctness of the 9th circuit's decision. The facts in the record show the Washington State Superior Court had jurisdiction over a tort committed inside Washington by a tribal police officer tort feasor in his individual capacity and the non Indian

owned Horton's Towing Company. The 9th circuit's holding requiring Wilson to refile his tort claim against Horton's in the Lummi tribal court conflicts with Lewis v. Clarke, Smith Plumbing Company v. Aetna Casualty 149 Ariz. 524 (1986); cert. denied 479 U. S. 987, 107 S. Ct. 578, 93 L.Ed2d 581 (1986); see also White Mountain Apache v. Smith Plumbing Company 856 F2d 1301 (9th Cir. 1988). and infringes upon Washington's sovereignty and the authority granted to the States under the 10th amendment.

Later in the court's opinion, in the FACTUAL AND PROCEDURAL BACKGROUND section, the circuit court corrected its first mistake of fact that Wilson's truck was seized on the night of his arrest for forfeiture for violation of the Tribe's drug laws.

> On October 22, 2014, Plaintiff Curtiss Wilson drove his 1999 Dodge Ram pickup to a casino located on the Lummi Indian Reservation.1 After drinking at the casino, Wilson travelled onto a Washington state road crossing through the reservation. Wilson was stopped on this road by Grant Assink, a Lummi tribal police officer, who suspected that Wilson was driving while intoxicated.
>
> Officer Assink searched Wilson's pickup truck and found several containers of marijuana inside. Officer Assink then alerted the Washington State Patrol, who arrested Wilson for driving under the influence. At the direction of the Washington State Patrol, Horton's Towing impounded the truck and towed it off the reservation.

> The next day, the Lummi Tribal Court issued a "Notice of Seizure and Intent to Institute Forfeiture." The notice cited Section 5.09A.110(d)(2) of the Lummi Nation Code of Laws, which prohibits the possession of marijuana over one ounce, as the grounds for civil forfeiture. Lummi Tribal Police Officer Brandon Gates presented Horton's Towing with the forfeiture notice, and Horton's Towing released the truck to Officer Gates. see Appendix A 3a, 4a.

The second mistake of fact, namely, that it was the Lummi Tribal Court that issued a "Notice of Seizure and Intent to Institute Forfeiture" was never corrected. The record clearly shows that the Notice of Seizure and Intent to Institute Forfeiture form was prepared and signed by Lummi police officer Brandon Gates, a Lummi police officer whose duties including enforcement of the tribe's drug laws.

Both mistakes of fact were presented to the circuit court in petitioner's petition for rehearing which was denied without comment.

Both mistakes of fact are critical to the resolution of the case. Petitioner argued before the United States District Court that the Lummi tribal police officer Gates falsely represented that Wilson's truck was seized for forfeiture for violation of the Lummi Drug Code on the night of Wilson's arrest for DUI on the Lummi reservation. Actually the record shows that the Notice for the Seizure and Forfeiture of Wilson's truck was prepared and signed by Gates who represented that Grant

Assink, the Lummi tribal officer who stopped Wilson and called the Washington State Patrol to arrest him for DUI had in fact seized Wilson's truck for forfeiture on the Lummi reservation on the night of Wilson's arrest for DUI. That written statement of Gates was false as was the succeeding paragraph that Lummi police officer Assink "gave permission to the Washington State Patrol to impound the truck." None of this is true.

The record shows that Wilson subpoenaed Gates to testify in a pretrial hearing in his criminal DUI case to establish that Gates had written false statements of fact in his forfeiture notice to establish a false factual basis to seize and forfeit Wilson's truck. After the Lummi tribe appeared in the Washington state criminal prosecution and quashed the subpoena by the assertion of Indian sovereignty, the criminal prosecution against Wilson in the Whatcom County Disrict Court was dismissed because Whatcom County District Judge Matt Elich ruled Wilson's confrontation right to call Gates as a witness was abridged; see State v. Youde, 174 Wash. App. 873, 875, 301 P.3d 479, 480 (2013).

Because this case was before the United States District Court on review of a summary judgment order, all inferences flow in favor of petitioner. All of the above professions of fact by petitioner are true. Petitioner pointed out that Assink testified that he did not seize Wilson's truck for forfeiture; see Reply Brief of Appellant, page 4.[1]

1. In footnote 3 of the 9th circuit's opinion, the court wrote, "Plaintiff argues that the bad faith exception has been triggered. However because this argument was made below but not raised in Plaintiff's Opening brief, we deem it waived." Court of Appeals opinion at page 7. Petitioner presents these mistakes

The fact that the Lummi tribe's seizure of the truck for forfeiture did not take place on the Lummi Reservation, but rather the Indian forfeiture was commenced upon seizure of the truck from Horton's Towing in Bellingham is very relevant to resolution of the question of whether Washington sovereignty was violated by the Lummi tribe's seizure of Wilson's truck in Bellingham and, for that reason, Washington courts have jurisdiction over Horton's for its conversion of his property by releasing his truck to the Lummi Police officer Gates.

SUMMARY OF ARGUMENT

Certiorari should be granted because the Ninth Circuit's decision is in conflict with Lewis v. Clarke, __ U.S. ___, 137 S. Ct. 1285 , 197 L.Ed2d 631 (2017) which envisions state court tort suits for money damages against tribal employees for torts committed in the state off reservation. The tort system authorized in Lewis v. Clarke granted Wilson an automatic right to seek redress for money damages against Brandon Gates in his individual capacity in Washington State court. Had not the United States intervened and certified Gates as a federal employee acting within the scope of his 25 USC 5321 Self Determination Contract, Gates in his individual capacity would have remained a named defendant. Lewis v. Clarke provided authority to withstand any assertion of Indian sovereignty, requiring the remand of the Wilson's conversion tort suit against Gates in his individual

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of fact to support his argument that the Lummi Tribal forfeiture proceedings commenced the day after the petitioner's arrest for DUI in Bellingham, not on the Lummi Reservation as represented by Gates in ER 23.

capacity case back to tribal court. As in Lewis v. Clarke, the attempt of Indian tribes and insurance companies representing non Indian defendants, like Horton's, to draw the tort litigation back to tribal court or outright dismiss it, should have failed. Horton's assertion of Indian sovereignty as a defense to Wilson's tort claim for money damages fails because Horton's lacks standing to assert the defense of Indian sovereignty and also because of no adverse effect to Indian sovereignty. The insurance company defending Horton's should pay the judgment.

Respectfully, Horton's lacked standing before the announcement of Lewis v. Clarke to assert tribal sovereignty as a defense. See pages 6, 15 and 16 of appellant's opening brief in which petitioner cited Smith Plumbing Company v. Aetna Casualty 149 Ariz. 524 (1986); cert. denied 479 U. S. 987, 107 S. Ct. 578, 93 L.Ed2d 581 (1986); see also White Mountain Apache v. Smith Plumbing Company 856 F2d 1301 (9th Cir. 1988). Wilson argued before the United States Disrict Court and the 9th Circuit that Horton's lacked standing to assert tribal sovereignty, which is a personal defense available to the tribe, not Aetna Insurance Company, nor to the insurance company which insures Horton's. The 9th circuit court in its opinion did not address Smith Plumbing, ratified by White Mountain Apache, holding that Aetna Insurance lacked standing to assert Indian sovereignty as a defense because Indian sovereignty is a defense personal and available only to the tribe, not insurance companies. Thus the 9th circuit court decision is, in the opinion of Wilson's counsel, in conflict with other decisions of the 9th circuit court, specifically White Mountain Apache v. Smith Plumbing Company, supra, and Smith Plumbing Company v. Aetna Casualty. Neither the District Court or the 9th Circuit addressed the

relevance or lack of relevance of White Mountain Apache v. Smith Plumbing Company and and Smith Plumbing Company v. Aetna Casualty in their opinions.

It was not possible for petitioner to advance the Lewis v. Clarke argument in either his opening or reply brief because Lewis v. Clarke was decided on April 25, 2017 after all of the briefing had been completed.Petitioner's petition for rehearing before the 9th Circuit, which was primarily based upon Lewis v. Clarke, was denied without comment.

ARGUMENT

This case meets the criteria for review because the Ninth Circuit's decision is in conflict with Lewis v. Clarke, 137 S. Ct. 1285 (April 25, 2017), Smith Plumbing Company v. Aetna Casualty 149 Ariz. 524 (1986); cert. denied 479 U. S. 987, 107 S. Ct. 578, 93 L.Ed2d 581 (1986); see also White Mountain Apache v. Smith Plumbing Company 856 F2d 1301 (9th Cir. 1988). It is also important for this court to grant certiorari because the forfeiture of automobiles owned by non Native Americans for violation of tribal drug laws is most likely ongoing throughout the country and, so far state and federal courts, have not acted to restrain this illegal practice of Indian tribes; see Miners Electric v. Muscogee Creek Nation, 464 F. Supp.2d 1130 (N. D. Okla. 2007), 505 F.3d 1007, rev. on grounds of Indian sovereignty, 10th Cir, (2007); Candee Washington v. Washington State Department of Licesning, 199 Wash. App. 1039 (Div. 1, 2017) rev. denied 189 Wn2d 1040 (2018) and Jordynn Scott v. Doe Department of Licensing, 199 Wash. App. 1039 (Div. 1, 2017) rev. denied 189 Wn2d 1040(2018) and Susan Pearson (sic) Pierson v. Director of

Department of Licensing and Andrew Thorne, Swinomish tribal police officer, 2016 WL 3386798, (Western District of Washington, 2016).

Lewis v. Clarke is a landmark Supreme Court decision. It holds that an Indian tribal employee who commits a tort while acting within the scope of his employment as a tribal employee off reservation is liable to suit in state court for the tort because the tribal employee is sued in his individual capacity. The Supreme Court opinion discusses the underpinnings of individual capacity liability. A tort suit for money damages against the tribal employee working within the scope of his employment in his individual capacity does not implicate Indian sovereign immunity. Thus in Lewis v. Clarke, the tribal employee driver was liable to suit in Connecticut Superior Court for the tort of negligent operation of a motor vehicle. The negligent tort of the tribal motor vehicle driver took place off reservation inside Connecticut.

Lewis v. Clarke is material to scrutiny of the 9th circuit's decision. The 9th Circuit upheld the District Judge's abstention in favor of comity to the Lummi Tribe. Wilson perceives this tribal interest to be whether the Lummi tribe's ordinance authorizing the seizure and forfeiture of automobiles owned by non Native Americans for violation of tribal drug laws is within the authority of an Indian tribe. If the Lummi Nation has a possible legitimate legal principle, here the Indian tribes' inherent authority under the second exception of Montana v. United States, 450 U.S. 544 (1981) to enact its tribal forfeiture ordinance and enforce it off reservation by the seizure of suspect motor vehicles owned by nonnative Americans, then the tribe has "colorable jurisdiction" thus mandating exhaustion first through the Indian courts.

Petitioner asserts the "colorable jurisdiction" standard is inapposite because Wilson's suit is a suit for money damages. A separate independent ground to repel any application of Indian sovereign immunity to this case is the fact that Wilson's truck was not seized for forfeiture on the night of his arrest on the Lummi reservation but rather the Indian forfeiture of the truck commenced upon seizure of the truck in Bellingham ---- which is off reservation.

Generally accepted principles of forfeiture law provide that the forfeiture commences upon seizure of the property for forfeiture. Seizure and possession of the res of forfeiture is essential to acquiring jurisdiction over the res.

Washington 's forfeiture statute, RCW 69.505.505, provides for commencement of forfeiture upon seizure of the motor vehicle, see RCW 69.50.505 (c). The federal court discussion of forfeiture reaches the same result; see *Scarabin v. Drug Enforcement Admin.* 966 F.2d 989, 994 (5th Cir.1992),

In the United States District Court, Wilson argued that the seizure took place in Bellingham and not on the Lummi Indian reservation. Petitioner insists the dispositive legal question to be resolved is the question expressly avoided by the District Court in footnote 4 of its opinion, i.e. " A secondary question could be whether the 1999 Ram Pickup was lawfully seized by the Lummi Nation Officer Brandon Gates by his service of the Lummi Nation forfeiture process upon Horton's outside the territorial limits of the Lummi Nation." This dispositive legal question can be decided by the state or federal court

hearing Wilson's conversion claim against Horton's.[2] The District Court's analysis and the analysis of the 9th circuit court of appeals requiring exhaustion would be stronger had the Lummi police officer seized the truck on the night of the arrest and the Lummi Nation kept possession of the truck but, in this case, the seizure of the truck first took place inside Washington rendering this case on all fours with Lewis v. Clarke. Because this is a review of a summary judgment order, petitioner is entitled to all of the inferences of fact.

The sole foundation upon which an Indian tribe could assert civil jurisdiction over property owned by non Native Americans, is the second exception under Montana v. United States 450 U.S. 544 (1981). The 9th Circuit stated in its opinion:

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2. The merits of the initial defense raised here by Horton's, was that because Horton's released the truck under its belief that the service of the Lummi Notice of Forfeiture compelled it to release Wilson's truck to the Lummi police. Horton's argued this provided a legal defense to the tort suit for conversion against it. How a state or federal court would address a tort suit against a tribal employee in his/her individual capacity is addressed in Lewis v. Clarke where the Supreme Court cites Kentucky v. Graham 473 U.S. 159 (1985) for the premise that sovereign immunity for tribal employees is no broader than the common law immunities for state and federal employees. See Lewis v. Clarke, 137 S. Ct. at 1292. This means for example had Gates remained as a defendant in his individual capacity in the tort suit, whether the Lummi forfeiture statute would be a defense would be decided on the same legal basis as other governmental police officers have available, i.e., qualified good faith immunity applicable to all other police officers. The state or federal forum hearing the tort lawsuit would decide this issue. It would not remand back to the tribal court so it would have the first opportunity to rule on this issue.

> Off tribal lands, however, a tribe generally lacks such authority unless one of the two exceptions set forth in Montana applies. *Id.* at 898. First, a tribe may exercise control over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565, 101 S.Ct. 1245. Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. 1245.

In Montana, the Crow Indian tribe argued that its inherent authority provided a legal basis to regulate hunting activities of non tribal members on fee patent land (state land) inside the Crow reservation. The Crow tribe lost. Montana cannot and does not support any Indian claim that an Indian tribe can legally authorize its police to travel off reservation to seize private property of non Native Americans.[3] No theory of Indian sovereignty can authorize, under any circumstances, Indian police traveling outside an Indian reservation to seize private

3. Notice that in Miners Electric v. Muscogee Creek Nation, 464 F. Supp.2d 1130 (N. D. Okla. 2007), 505 F.3d 1007, rev. on grounds of Indian sovereignty, 10th Cir, (2007) the Indian police did not travel off reservation to seize Miners' very expensive Hummer automobile. Instead the tribe waited for the unsuspecting owner to return to the reservation to pay a civil infraction ticket when the Creek Indian police seized the Hummer. The seizure and forfeiture was commenced on the Indian reservation.

property of non Native Americans. Tribal police must comply with Washington law, CR 82.5, which requires a tribal court judgment be filed in the Washington State Superior Court for review to determine the adequacy of the tribal court's jurisdiction over the person and subject matter jurisdiction.

Petitioner reaffirms and restates that no theory of Indian sovereignty can authorize ***under any circumstances*** Indian police traveling outside an Indian reservation to seize private property of non Native Americans. Such action conflicts with state sovereignty and the rights guaranteed to the states under the 10th amendment.

CONCLUSION

As was documented in oral argument before the 9th circuit, the instant case was just one of many tort cases brought by non Native Amercians whose automobiles were seized by tribal police, forfeited and sold at public auction. Candee Washington, for example, lost her expensive SUV automobile to the Swinomish Tribal police, who had title changed into its name and used the expensive SUV. Ms. Washington committed no criminal act under US and Washington state law but the automobile was subject to forfeiture because the possesion by any occupant of a motor vehicle of any illegal drug, whether the owner is aware of this fact or not, is subject to forfeiture under Swinomish Tribe's Criminal Code Chapter 10 Offenses Involving Controlled Substances including 4-10.050, see Appendix F-Swinomish Tribe, Title 4- Criminal Code. The Swinomish Indian Tribes' forfeiture law, is draconian and far more severe than any comparable state or federal forfeiture statute.

Justice Thomas, concurring in the judgment in Lewis v. Clarke. remarked "I remain of the view that tribal immunity does not extend to suits arising out of a tribe's commercial activities conducted beyond its territory, 137 S.Ct. at 1294 (Thomas, J. concurring). The seizure of Wilson's truck was off the reservation. There is no authority to support the proposition that an Indian tribe by virtue of its inherent authority under Montana can use this tribal authority to seize property outside the Indian reservation. The 9th Circuit's endorsement of the inherent authority of Indian tribes under the second exception under Montana to justify seizure of property owned by non Native Americans off reservation is unprecedented. The 9th Circuit's opinion effectively overrules State v. Eriksen, 172 Wn2d 506 (2011) which held the Lummi Tribe's inherent authority did not justify the pursuit and stop of a motorist followed off the reservation by tribal police for commission of a traffic offense while on the Indian reservation.[4]

The holding advanced by the district court and the 9th circuit opinion has no limiting principle. The 9th circuit decision endorses a practice where tribal police do not seize the motor vehicle for forfeiture while it is located inside the Indian reservation, but release it. Then later, tribal police travel off reservation, seize the motor vehicle, and serve a tribal Notice of Forfeiture upon the party in

4. Eriksen was controversial, generating law review articles on the extent of inherent authority to justify assertion of Indian authority off reservation; Fleeing East from Indian Country: State v. Eriksen and Tribal Inherent Sovereign Authority to Continue Cross-Jurisdictional Fresh Pursuit, 87 Wash. Law Rev. 1251; see also Fresh Pursuit from Indian Country: Tribal Authority to Pursue Suspects onto state Land, 129 Harv. L. Rev. 1686.

possession of the motor vehicle. The decision to forfeit and the legal notice justifying the seizure off reservation here is one made by the Lummi Tribe's executive branch of government, the decision of a tribal police officer. The Lummi Tribal Court is not involved in this decision and even if it were, it is immaterial to the result because no tribal court can authorize under any circumstances Indian police traveling outside an Indian reservation to seize private property of non Native Americans.

The legacy of the 9th circuit's decision is the endorsement of the practice, perhaps ongoing by Indian tribes throughout the country, of the seizure and forfeiture of automobiles owned by non Native Amercians, including the power to enforce its tribal drug forfeiture law against non Native Americans by traveling off reservation and seizing motor vehicles.

This pernicious illegal practice which deprives non Native Americans of their private property continues. It is ongoing in other parts of the country outside of Washington state; see Miners Electric v. Muscogee Creek Nation, supra. This exercise of tribal authority by the seizure of private property off reservation also deprives citizens of redress in state courts and abridges the jurisdiction of state courts and thereby conflicts with the sovereign power of states to adjudicate tort claims committed within state jurisdiction. This practice is also in violation of the rights granted to the States under the 10th amendment.

For the above reasons, Petitioner asserts that this case meets the extraordinarily high standard for review by this Honorable Court. Petitioner requests that the

court grant certiorari, reverse the 9th circuit court and reinstate petitioner's conversion claim against Horton's Towing; or alternatively remand for reconsideration in light of Lewis v. Clarke and Smith Plumbing Company v. Aetna Casualty, supra. and White Mountain Apache v. Smith Plumbing Company supra.

Dated this 14th day of February, 2019 at Bellingham, Washington.

Respectfully submitted,

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