

By:

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INTRODUCTION

Comes now Appellant John A. Scudero, Jr., pursuant to this Court's *Response Brief Notice* of November 7, 2019, and hereby responds to the *Amicus Curiae Brief of Metlakatla Indian Community* (hereinafter "Amicus Brief") in a timely fashion, i.e. doing so by December 9, 2019.

As discussed herein, the Amicus Brief is correct in all aspects, as to the position of the Metlakatla Indian Community, and at a minimum Mr. Scudero's conviction must be reversed and the case remanded, with an order to dismiss all charges, since Mr. Scudero was fishing in an area wherein his vested commercial trade fishing rights have been reserved by Congress and President Wilson, for he and fellow members of the Metlakatla Indian Community/Tsimshian Nation/Tribe, to fish, under Federal Law. Thus, he was exercising proper off-reservation commercial fishing trade rights, as reserved by Congress in the Annette Island Reserve Act of March 3, 1981 (set out verbatim at Appellant's Reply Brief at footnote 3, page 3 and Amicus Brief at page iii), and by President Wilson's Proclamation of 1916 (set out verbatim in Appellant's Reply Brief at page 4), and the State of Alaska is precluded from criminalizing such conduct under the Limited Entry Fishery Permit statutes or otherwise.

The conviction must be reversed, and the case remanded for dismissal, because of such Federally "reserved rights" bar to prosecution of Mr. Scudero and in addition on the grounds that the District Court Judge improperly restricted Mr. Scudero from fully testifying in his own defense. The conviction and sentence should also be reversed for the other grounds set out in Mr. Scudero's briefing, including statewide indigenous aboriginal fishing

rights¹, but at a minimum should be reversed on those Federally “reserved rights” grounds as addressed by the Metlakatla Indian Community’s Amicus Brief.

While the Court may not need to technically reach the “aboriginal fishing rights issues”, if it simply reverses on the grounds Federally “reserved rights” discussed by the Amicus Brief, and remands for dismissal: In point of fact, Mr. Scudero, as did and do other members of the Metlakatla Nation² still possess all of their aboriginal fishing rights, statewide, which were not forfeited or waived, or impacted, by the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1603 (“ANCSA”), since the Metlakatla Indian Community/Tsimshian Indian Nation/Tribe was not a subscribing party to said act, or received any compensation or benefits as consideration to give up or forfeit those rights and they still have them.

DISCUSSION

The Amicus Brief filed by Christopher Lundberg (*pro hac vice*), and Curtis W. Martin, on behalf of the Metlakatla Indian Community is absolutely right in all aspects.

Given the history of the Metlakatla Indian Community/Tsimshian Indian Nation/Tribe, including their historical, commercial trade fishing, and the congressional history, legislative history, and other history of the Tsimshian Indian Nation/Tribe, their

¹ See, in particular, Appellant’s Reply Brief at pages 3-13.

² As set out in the record below, and in the record and briefing in other cases, as to these issues, regarding Mr. Scudero, he is a blood line descendent of the “Tsimshian Nation/Tribe” who have had and still possess indigenous aboriginal historical commercial trade and barter fishing rights, exercising those rights for thousands of years, which were not extinguished, bargained away, or waived or forfeited under ANCSA. The Metlakatla Indian Community/Mr. Scudero are part of the “Tsimshian Nation/Tribe”.

Annette Islands reservation for the exclusive use of the Metlakatla Indians/Natives, with reserved, off-reservation fishing rights is a "sanctuary and not a cage".

The Island(s) and 3,000 feet waters around there, are exclusive fishing waters, but the Tsimshian Nation/Tribe have reserved rights to fish in all necessary "off-reservation" waters.

As set out in said Amicus briefing, all of the members of the Metlakatla Indian Community, including Mr. Scudero, are fully vested with all off-reservation fishing and trade rights necessary to fulfill the purpose of the sanctuary/reservation. See, *Confederated Tribes of Chehalis*, 96 F.3d 334, 342-3 (9th Cir. 1996), cited in Amicus Brief at page 2³.

The scope of the Metlakatla Indian Community/Tsimshian Nation/Tribe's commercial trade fishing rights based upon history, traditional use and other relevant considerations as set out in *Confederated Tribes of Chehalis*, establish that prosecution of Mr. Scudero by the State of Alaska, is barred, as where Mr. Scudero was fishing and harvesting fish, were areas he and other members of the Metlakatla Indian Community/Tsimshian Nation/Tribe had, and have, vested rights to do so, and his actions in that regard, similar to actions of any member of the Metlakatla Indian Community/Tsimshian Nation/Tribe cannot be criminally regulated, prohibited or prosecuted by the State of Alaska, under the State of Alaska Limited Entry Act or otherwise.

³ Well prior to the State of Alaska Limited Entry Fisheries Program/Statutes and in fact well prior to Alaska Statehood, the Metlakatlans had their own "self-sustaining" cannery on their island, which they supported (as were their reserved rights to do so), by fishing in "off-reservation waters" (including Areas 1 and 2), which they could reach, fish and return from in a day. They (and Mr. Scudero), still at a minimum, have the right to do so.

Those rights which were reserved by Congress and President Wilson “for the purpose of establishing a self-sustaining and permanent community” [Amicus Brief at page 2], i.e. “for the Metlakatians (a fishing people who had historically engaged in commercial fishing trade)” [*Id.*], encompassed the activity of Mr. Scudero in the area he was fishing and harvesting fish for which he was improperly prosecuted⁴.

The United States District Court of Alaska, and the United States Court of Appeals for the Ninth Circuit, ultimately held, as stated in the Amicus Brief at page 4 that “the Territory could not interfere with the reserved rights of the Metlakatians”. Amicus Brief at page 4 citing *Territory v. Annette Island Packing Co.*, 6 Alaska 585, 611 (D. Alaska 1922), *aff’d* sub nom. *Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923).

The Amicus Brief is also correct in citations as to the two United States Supreme Court cases holding that the “statute creating the Annette Island Reserve also reserved a fishing right” [Amicus Brief at page 4], i.e. *Alaska Pacific Fishers Company v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918), and *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 82 S. Ct. 552, 7 L.Ed. 262 (1962). As discussed in the Amicus Brief at pages 4-5, the Supreme Court recognized that the Metlakatians had all the appropriate commercial trade fishing rights necessary to fulfill the Annette Island Reserve purpose (which include commercial trade fishing rights on necessary adjacent off-reservation waters), which included

⁴ See, in particular Amicus Brief at pages 3 and 4 with a block quote as to the “mutual understanding of the United States and the Community as to the communities off-reservation fishing rights” with a block quote reference to the Answer to Complaint in Intervention by the Secretary of the Interior on behalf of the people of the Annette island Reserve, in *Territory of Alaska v. Annette Island Packing Company*, No. 2023-A (District Court for the District of Alaska, April 4, 1921).

their own subsistence needs as well as operating a commercial cannery and commercial fishing activity.

As the Amicus Brief properly states:

...
[T]he Supreme Court acknowledged that Metlakatians were a fishing people who “could not sustain themselves” without fishing rights. The Court held that “the use of the adjacent fishing grounds was equally essential” to the purpose of the Annette Islands Reserve, which the Court viewed as providing Metlakatians with the means to become self-sustaining. *Id.* In *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 82 S. Ct. 552, 7 L.Ed. 262 (1962), the Supreme Court also recognized that the Metlakatians depended on fishing for their livelihood and that Congress had reserved their fishing rights by creating the Annette Islands Reserve [Amicus Brief at page 4-5].
...

See, also footnote 2 to Amicus Brief which properly distinguishes *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), and cites *Atkinson v. Haldene*, 569 P.2d 151, 156 (Alaska 1977), as to the unique “reserved rights” status of the Metlakatla Indian Community/Tsimshian Nation/Tribe.

Thus, it is crystal clear that at a minimum, this Court must reverse and remand for dismissal, since equally at a minimum, as stated in the Amicus Brief at page 1, Mr. Scudero’s activity was protected where he was fishing, i.e. as to the “fishing areas currently designated by the Alaska Department of Fish and Game as Areas 1 and 2”.

Accordingly, this Court must reverse and remand with an order to dismiss based upon the Federally “reserved rights” discussed in the Amicus Brief.

Moreover, as set out in Mr. Scudero’s own briefing, in fact, the rights of the Metlakatla Indian Community/Tsimshian Nation/Tribe/Mr. Scudero are even broader than that, since they have statewide indigenous aboriginal rights to fish and use fish for trade and

bartering and other commercial purposes, in addition to subsistence, and those rights were never extinguished under the Alaska Native Claims Settlement Act⁵. The very existence of the ANCSA, and the settlement(s), recognized aboriginal rights by Alaskan Native Nations/Tribes. The other Native Nations/Tribes bargained away and gave up their rights as a quid pro quo of the Alaskan Native Settlement Claims Act benefits, including cash and land, but the Metlakatla Indian Community/Tsimshian Nation/Tribe never did so and still have all their full rights⁶.

Note that, in prior cases where Mr. Scudero was prosecuted, undersigned counsel lodged with the Court, exhaustive video documentation from many Metlakatla Indian Community elders (most of now which are deceased), which established both the scope and the breath of the Metlakatla Indian Community's indigenous aboriginal rights, as well as the fact that those rights were not extinguished in ANCSA as the Metlakatla Indian Community/ Tsimshian Nation/Tribe did not agree to, or "sign-up for" ANCSA and made a conscious decision not to do so and refused to do so, preserving and protecting their rights. Mr. Scudero and Mr. Weidner have been trying to have this Court reach these crucial issues for approximately 30 years, but the State dismissed in the first case(s) to moot those cases in light of the overwhelming evidence⁷. Those video tapes may well still be in the

⁵ See, Appellant's Reply Brief at footnote 9, page 8, et. seq., as to ANCSA Section 4(c), 43 U.S.C. § 1603 (c).

⁶ See, discussion in Appellant's Reply Brief at page 3-13.

⁷ See, footnote 8, page 7-8 of Appellant's Reply Brief.

The Tsimshian Nation, including the Metlakatla Natives, have an oral history that goes back thousands of years and is passed on from elder to elder. This includes for instance information not only as to their traditional hunting and fishing grounds but information as to the "great flood" presumably coexistent with Noah. As a part of

possession of the Superior and/or the District Court in Juneau, and if need be located (the lower Court in this case was asked to do so and have an evidentiary hearing and/or take judicial notice and consider that evidence and refused)⁸.

Note further, that as set out in footnote 1 of the Amicus Brief, litigation is anticipated by the Metlakatla Indian Community “in the near future that will seek to restore the full scope of the Community’s reserved fishing rights”, and further, “In that lawsuit, the Community will present substantial evidence from the late nineteenth and early twentieth centuries showing that the Metlakatlans, the Federal Government, and the Territory of Alaska all recognized the Community’s off-reservation fishing rights”.

While that litigation will be forthcoming, it will most likely dovetail with undersigned counsel’s prior State of Alaska prosecution presentation(s) referenced above (*See*, footnote 7, *supra*), as well as Mr. Scudero’s position in this matter. However, it is not necessary to have any additional evidence now in that regard, since based upon the record below and the

the initial defense of Mr. Scudero in a prior matter, Mr. Weidner traveled to Metlakatla and videotaped much of this history being recited by Tsimshian Nation elders, many of whom are now deceased. Those video tapes were submitted to the trial court in that prior matter, and the case was dismissed. In the instant case the trial court was likewise requested to take judicial notice of those proceedings. R. 000363. Mr. Scudero filed a Notice of Formal Offer of Proof in Case Nos. 1JU-93-1590CR; 1JUS93-1620CR; 1JU-S94-52CR and included therein, several videotaped interviews with elders concerning historical fishing rights. The Notice of Formal Offer of Proof was filed in the trial court in this matter. R. 000018-24. Nonetheless, the Metlakatla Indian Community has a tradition of relating events through an oral history. R. 000302-303. Mr. Scudero was present during the taped conversations with the elders and could recite the history on that basis in supplemental testimony before the trial court on remand, or to supplement the record before this Court.

⁸ *See*, footnote 13, at page 10 of Appellant’s Reply Brief as to record cite to R-000018-24 as to said refusal.

briefing, and especially the position articulated by the Amicus Brief, this Court should reverse and remand for a dismissal with an order stating that neither Mr. Scudero or any members of the Metlakatla Indian Community can be prosecuted for fishing without a limited entry permit for any of the species traditionally harvested in any of the area of their vested reserved off-reservation commercial trade fishing rights, which at a minimum, include Areas 1 and 2 (where Mr. Scudero was fishing)⁹.

The Court may wish to also recognize that the scope and breath of the Metlakatla Indian Community/Tsimshian Nation/Tribe's rights to fish are broader, i.e. throughout the State of Alaska, given their indigenous aboriginal rights, which have never been revoked or given up.

CONCLUSION

Mr. Scudero's activities were properly exercised and protected and may not be prosecuted by the State of Alaska given the Federally reserved necessary "off-reservation" fishing rights of the Metlakatla Indian Community/Tsimshian Nation/Tribe, including the members of the Metlakatla Indian Tribe and the Metlakatla Indian Community, of which Mr. Scudero is a lineal blood member. In point of fact, they were also protected since he was exercising vested indigenous aboriginal rights to fish and engage in bartering and commercial trade fishing activities that were never extinguished by the Alaska Native Claims Settlement Act or any other law or treaty.

⁹ As properly stated in the Amicus Brief in its Conclusion [Amicus Brief at page 5] "the Metlakatla Indian Community has a reserved non-exclusive right to fish outside of the Reserve under the *Chehalis* framework". Those rights to fish include rights for Mr. Scudero in this case.


Not only did the Court err in precluding Mr. Scudero from testifying to his proper defense, but the record is sufficient that the defense must be granted as a matter of fact, and must be honored by this Court as a matter of law, and there must be a dismissal with an order for full dismissal below, based upon the Federally necessary reserved rights discussed in the Amicus Brief.

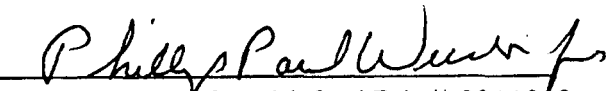
In addition, the Court should rule that such result flows from the indigenous aboriginal rights issues, all of which the Metlakatla Indian Community/Tsimshian Nation/Tribe/Mr. Scudero have in full.

Quite simply, the State of Alaska cannot prosecute Mr. Scudero or any other members of the Metlakatla Indian Community/Tsimshian Nation/Tribe for fishing where they are exercising their rights reserved by Congress or their vested and non-extinguished/non-waived indigenous aboriginal rights.

Note, that by this Court recognizing and honoring the rights of Mr. Scudero and the Metlakatla Indian Community/Tsimshian Nation/Tribe, to fish, there will be very minimal impact on Limited Entry Fishing, given the unique rights and position of Mr. Scudero and the Metlakatlans as opposed to other fishers/Natives.

RESPECTFULLY SUBMITTED this 9th day of December 2019.


Phillip Paul Weidner, ABA # 7305032


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IN THE SUPREME COURT FOR THE STATE OF ALASKA

JOHN A. SCUDERO, JR.,)

Appellant,)

v.)

Supreme Court No.: S-17549

STATE OF ALASKA,)

Appellee)

Superior Court No. 1KE-14-00672CR

Court of Appeals No. A-12729

CERTIFICATE RE: TYPEFACE AND POINT SIZE

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I herby certify, pursuant to Alaska Rule of Appellate Procedure 513.5(c)(2), that the typeface used in *Response of Appellant to Amicus Curiae Brief of Metlakatla Indian Community* filed on behalf of Appellant, is 13-point Garamound and is proportionally spaced.

RESPECTFULLY submitted this 18th day of December 2019.

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