No. 80499-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

GERALD CAYENNE,

Respondent.

RESPONDENT'S ANSWER

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A. IDENTITY OF RESPONDENT

Because it fails to present any issue warranting review by this Court, Respondent, Gerald Cayenne, urges this Court to deny the State's petition for review in this matter

B. OPINION BELOW

Consistent with federal law, this Court in State v. Stritmatter, 102 Wn.2d 516, 688 P.2d 499 (1984) held that because of the rights regarding on-reservation fishing reserved to the Chehalis Tribe in the Executive Order creating its reservation, the State cannot limit exercise of those rights other than for limited and necessary conservation measures. As a condition of his sentence, the trial court barred Mr. Cayenne, a registered member of the Chehalis tribe, from owning gill nets on or off the reservation, without regard to whether such an infringement was a necessary conservation measure. The Court of Appeals, consistent with Stritmatter and numerous decisions of the Untied States Supreme Court, agreed with Mr. Cayenne and concluded the trial court lacked the authority to restrict Mr. Cayenne's exercise of his on-reservation fishing rights. State v. Cayenne, __ Wn.App. __, 158 P.3d 623, 628 (2007).

C. ISSUE PRESENTED

Where members of a nontreaty tribe have an exclusive and individual right to fish on the reservation subject only to necessary conservation restrictions, does a sentencing court have the authority to restrict the exercise of the that right by a tribal member in the absence of a finding that it is a necessary conservation measure?

D. SUMMARY OF CASE

Mr. Cayenne was arrested after officers with the Washington Department of Fish and Wildlife observed him twice setting a gill net in the Chehalis River in an area off the Chehalis Reservation. 2/28/06 RP 7-17.

Mr. Cayenne is an enrolled member of the Chehalis Tribe. 2/28/06 RP 22. Gill nets are sold "by the bail[]" by the tribe for use on the Chehalis Reservation. 3/1/06 RP 5.

The State charged Mr. Cayenne with two counts of first degree unlawful use of nets to take fish. CP 8-9. A jury convicted him of one count but was unable to reach a verdict on the second. CP 14-15.

The Judgment and Sentence provides that as a condition of his sentence Mr. Cayenne "shall not own any gill net." In its oral

ruling the trial court elaborated "I am going to prohibit you from having a net as a condition of this. No gill nets." 3/1/06 RP 5. When defense counsel sought clarification of whether that prohibition applied on the Chehalis reservation as well, the court responded

> I am going to make it a condition that he have no gill nets period. I don't know that they are going to catch him on the reservation. I don't know what I would do with - - I don't think he should have a gill net. I think he has forfeited the right to do that.

Id.

Relying on decisions of this Court and the United States Supreme Court, the Court of Appeals reversed this condition of sentence to the extent it purported to apply on the Chehalis Reservation. Cayenne, 158 P.3d at 628.

For the first time in a motion to reconsider filed by a special deputy prosecutor from the Washington Association of Prosecuting Attorneys, and aped in its present petition for review, the State takes issue with the conclusion that the superior court lacks authority to enforce a nonconservation-based fishing regulation within the boundaries of the Chehalis reservation. In the motion for reconsideration the special deputy prosecutor faulted the Court of Appeals for failing to appreciate "the subtleties and difficulty of

Indian law." Motion for Reconsideration at 1-2. Yet the special deputy prosecutor's petition, like the motion to reconsider, proceeds to ignore one of the central and less-subtle points of Indian law, i.e., the fundamental difference between federal and state jurisdiction on Indian reservations. The special deputy prosecutor also fails to appreciate the significant difference between treaty and nontreaty tribes with respect to on-reservation fishing.

Having failed to respect these important distinctions, the special deputy prosecutor urges this Court to review the Court of Appeals decision and posits that Washington courts have jurisdiction to impose conditions of sentence which prohibit or regulate on-reservation fishing of nontreaty tribal members so long as the statute which authorizes conditions of sentence is of general applicability. The special deputy prosecutor is incorrect and this Court should deny the Petition for Review.

E. ARGUMENT

1. THE COURT'S OPINION DOES NOT ANNOUNCE A NEW RULE, RATHER IT FOLLOWS THE DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT IN RECOGNIZING THE LIMITATIONS ON STATE AUTHORITY TO REGULATE THE ON-RESERVATION ACTIONS OF NONTREATY TRIBAL MEMBERS WITH RESPECT TO THE EXERCISE OF THEIR HISTORICAL RIGHT TO FISH

Unlike other reservations in Washington created by treaties, the Chehalis Reservation was created by two executive orders, one in 1864 and the second in 1886. See, Confederated Tribes of the Chehalis Reservation, et al. v. United States, 96 F.3d 334, 338-39 (9th Cir. 1996), cert denied, 520 U.S. 1168 (1997); Stritmatter, 102 Wn.2d at 516 (citing 1 Indian Affairs, Laws, and Treaties, 901-04 (Kappler ed. 1904)). The Chehalis, as a non treaty-tribe, do not enjoy an off-reservation right to fish. Confederated Tribes of the Chehalis Reservation, 96 F.3d at 343. However, language in the 1886 executive order creating the Chehalis Reservation provides that the land forming the reservation is "set apart . . . for the use and occupation" of the tribe. Stritmatter, 102 Wn.2d at 520 (citing Indian Affairs, Laws, and Treaties, at 904). The Supreme Court has interpreted such language in other similar executive orders as

reserving an exclusive on-reservation fishing right. Alaska Pac. Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918); Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). The nature of this right is defined by its exercise prior to creation of the reservation. Stritmatter, 102 Wn.2d at 520-21.

Because the Chehalis Tribe has historically fished for both subsistence and commercial purposes, Stritmatter concluded the State's ability to regulate the tribe's exclusive on-reservation rights was extremely limited and "must be a necessary conservation measure and must also be the least restrictive means available for preserving area fisheries from irreparable harm." 102 Wn.2d at 522 (citing United States v. Michigan, 653 F.2d 277, 279 (6th Cir.), cert. denied, 454 U.S. 1124 (1981)); compare, Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 175, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) (recognizing that in light of treaty language reserving the right of tribal members to fish "in common with all the citizens of the Territory" tribe could not claim exclusive right to fish "at all usual and accustomed" places). Thus, while members of treaty tribes have a right to fish off the reservation not enjoyed by members of

nontreaty tribes, the latter enjoy an exclusive on-reservation right not shared by the former.

The State bears the burden of proving any regulation of fishing rights by Native Americans is a necessary conservation measure. Antoine v. Washington, 420 U.S. 194, 207, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975). The opinion of the Court of Appeals in this case does nothing more than recognize this substantial limitation on the state's authority to regulate the actions of Mr. Cayenne, a member of the Chehalis tribe, to exercise his historical right to fish on the Chehalis reservation. See, Opinion at 8, n.8.

The court properly recognized the limitations on the trial court's authority with respect to Mr. Cayenne's exercise of his right to fish on the reservation. There is no basis to accept review under RAP 13.4.

2. CONTRARY TO THE STATE'S ASSERTIONS, FEDERAL COURTS OF APPEALS CASES DEFINING FEDERAL JURISDICTION AND AUTHORITY ON INDIAN RESERVATIONS DO NOT REQUIRE NOR PERMIT A DIFFERENT RESULT IN THIS CASE

The special deputy prosecutor posits that the State can enforce laws of general applicability on the Chehalis reservation. Petition at 9-11. In support of this claim the State relies principally

on federal cases defining federal jurisdiction on Indian reservations. and upon a single Washington case which concerned state jurisdiction off the reservation.

Initially, Mr. Cayenne has never asserted on appeal that the state lacked jurisdiction to prosecute him for his actions off the reservation. Indeed, both this Court and United States Supreme Court have made clear that such jurisdiction exists:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (citing inter alia, Puyallup Tribe v. Department of Game, 391 U.S. 392, 398, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968); Organized Village of Kake v. Egan, 369 U.S. 60, 75-76, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962); Tulee v. Washington, 315 U.S. 681, 683, 62 S.Ct. 862, 86 L.Ed.2d 1115 (1942)).

State v. Olney, the only Washington case cited by the special deputy prosecutor to support the State's expansive view of its jurisdiction, concerned the prosecution of tribal members for actions off the reservation. 117 Wn.2d 524, 72 P.3d 235 (2003).

Olney properly recognized the State's jurisdiction for acts occurring off the reservation. Id. at 529. This recognition of jurisdiction is neither in dispute here nor supportive of the special deputy prosecutor's claim of state jurisdiction on the Chehalis reservation.

In dicta, Olney does cite to a series of federal cases for the proposition that state laws of general applicability can apply to tribal members. 117 Wn.App. at 530 (quoting United States v. Gallaher, 275 U.S. 784, 788-89 (9th Cir. 2001)). But the cases cited by Olney, and relied upon by the State in its motion to reconsider, concern only federal jurisdiction. In fact, the quoted portion of Gallaher in Olney addresses "**federal** laws of general applicability." (Emphasis added.) Olney, 117 Wn.App. at 530 (quoting Gallaher, 275 F.3d at 789).

Among the sources of federal jurisdiction of criminal acts by tribal members are; (1) the Indian Major Crimes Act, 18 U.S.C. § 1153; (2) 18 U.S.C. § 1152 (applying federal enclave law to Indian reservations); and (3) the long-recognized jurisdiction of offenses for which federal jurisdiction exists regardless of whether an Indian is involved, See e.g., F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 116, 4 L. Ed. 2d 584, 80 S. Ct. 543 (1960). Thus, aside form the statutory jurisdiction, federal statutes of general applicability

apply to Indians on reservations unless "there exists some treaty right which exempts the Indian from the operation of the particular statutes in question." United States v. Burns, 529 U.S. F.2d 114, 117, (9th Cir. 1975).

This relatively broad federal authority on reservations does not, as the dicta in Olney and the special deputy prosecutor surmise, apply equally to the question of State jurisdiction. The Supreme Court has said "it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Washington v. Confederated Tribes of [illegible] 447 U.S. 134, 154, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). Only in "exceptional circumstances [may] a State . . . assert jurisdiction over the on-reservation activities of tribal members." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32, 103 S. Ct. 2378; 76 L. Ed. 2d 611 (1983). In such circumstances "state laws may be applied to Indians [only if] such application [does not] interfere with reservation self-government or impair a right granted or reserved by federal law. Organized Village of Kake, 369 U.S. at 75.

As a product of federal law, the Executive Orders creating the reservation, the Chehalis have an exclusive right to fish upon

the reservation. Stritmatter, 102 Wn.2d at 520-22; see also; Alaska Pac. Fisheries, 248 U.S. 78, and Menominee Tribe, 391 U.S. 404 (1968) (construing similarly worded Executive Orders). Even if RCW 9.94A.505(8) is generally applicable to others, because it would interfere with a right reserved to Mr. Cayenne by federal law, it cannot support the sentencing condition in this case.

In fact, unlike the broad federal criminal jurisdiction on Indian reservations, the State of Washington does not have criminal jurisdiction on the Chehalis Reservation. Such jurisdiction was expressly retroceded to the tribe in 1989. See, RCW 37.12.100; RCW 37.12.120; 54 Fed. Reg. 19959 (1989).

Olney and the special deputy prosecutor wrongly rely on cases delineating federal criminal jurisdiction to justify an improper expansion of state jurisdiction. In addition, since Olney concerned acts occurring off the reservation, its holding cannot be construed as allowing the state laws of general applicability to apply on a reservation. Indeed, if that were so, all Washington criminal laws, which are of course of general applicability, would be enforceable by the State against tribal members on the Chehalis Reservation in direct conflict with Supreme Court precedent and the State of

Washington's retrocession of its jurisdiction of such matters to the Chehalis Tribe.

In light of the foregoing, this Court should reject the special deputy prosecutor's effort to expand state jurisdiction to allow state laws of general applicability to apply to the on-reservation actions of tribal members and deny the State's petition for review.

F. CONCLUSION

The Court of Appeals properly concluded the sentencing court could not restrict Mr. Cayenne's ability to fish on the Chehalis reservation. The State's petition does not present any basis to review this ruling under RAP 13.4 and the Court should deny the petition.

Respectfully submitted this 21st day of August, 2007.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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	)	
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v.	)	COA NO. 80499-1
	)	
GERALD CAYENNE,	)	
	)	
RESPONDENT.	)	

DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 21ST DAY OF AUGUST, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER OF RESPONDENT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	HAROLD S. MENEFEE, DPA	(X)	U.S. MAIL
	GRAYS HARBOR CO. PROSECUTOR'S OFFICE	( )	HAND DELIVERY
	102 W. BROADWAY AVENUE, ROOM 102	( )	_____
	MONTESANO, WA 98563-3621		

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF AUGUST, 2007.

X_____