NO. 804991

COA No. 34563-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

GERALD CAYENNE,

Respondent.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

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I. INTEREST OF AMICUS CURIAE

The Attorney General is a statewide elected official and part of the executive branch of state government. Const. art. III, § 1. The Attorney General is "the legal adviser of the state officers" and performs "such other duties as may be prescribed by law." Const. art. III, § 21; *see also* RCW 43.10.040 (Attorney General's duties). As a result, the Attorney General has particular expertise in Indian law. The Attorney General also represents the state in criminal sentencing and is experienced in matters of sentencing conditions by state courts. This brief is submitted to assist the Court in reviewing the petition for review in this case.

II. ISSUE PRESENTED

This is a criminal case against Gerald Cayenne, a member of the Confederated Tribes of the Chehalis Indian Reservation. He committed a crime *outside* the boundaries of the Chehalis Reservation. The court found Mr. Cayenne guilty of a felony in connection with taking fish using an unlawful and unlicensed gillnet. *See* RCW 77.15.580. His sentence includes a crime-related condition prohibiting Mr. Cayenne from possessing a gillnet, because he had used that device to violate state criminal laws. Mr. Cayenne does not contest that the state court had personal jurisdiction and subject matter jurisdiction over him. The issue presented is:

> Does a state criminal court have authority to impose a crime-related sentencing condition on an offender who is a member of an Indian tribe, where the condition would control the offender's future conduct, including the offender's conduct while within the boundaries of his Tribe's reservation?

III. STATEMENT OF THE CASE

Gerald Cayenne challenged his sentence to the extent it precluded him from possessing a gillnet within the boundaries of the Chehalis Indian Reservation. Br. Appellant at 1. The court of appeals found a significant limit on the power of state courts to impose crime-related sentencing requirements applicable to members of Indian tribes. The court of appeals treated the crime-related prohibition as if the state was exercising criminal authority. The opinion reasons that if the state lacks authority to punish *on-reservation* crimes by tribal members, a sentencing condition for an *off-reservation* crime cannot be applied to the defendant on reservation.[1]

> [B]ecause the State has no criminal jurisdiction over the Chehalis Indian Reservation, it cannot regulate the behavior of Chehalis Indians by imposing state crime-related prohibitions, as part of a sentence, on activities within the Chehalis Indian Reservation.

State v. Cayenne, 139 Wn. App. 114, 123 ¶ 16, 158 P.3d 623 (2007).

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[1] The Confederated Tribes of Chehalis Indian Reservation are federally recognized as the successor to bands and tribes that did *not* enter into treaties with the United States and have no federally protected rights to fish outside the reservation boundaries. *See generally Confederated Tribes of Chehalis Indian Reservation v. Washington,* 96 F.3d 334 (9th Cir. 1996), *cert. denied*, 520 U.S. 1168 (1997) (finding and concluding that Chehalis Tribe and Shoalwater Bay Indian Tribe have no treaty rights, no *off-reservation* fishing rights, and no unextinguished aboriginal fishing rights).

IV. WHY REVIEW SHOULD BE GRANTED

The court of appeals lost sight of the legal principle that a sentencing condition arises from the state's authority to punish an *off-reservation* crime. Prior to this case, no case has held that the state's authority to enforce sentencing conditions for an *off-reservation* crime depends on criminal jurisdiction for *on-reservation* crimes.[2]

The better analysis is provided by United States Supreme Court precedent. As shown below, a state may impose and enforce sentencing conditions for an *off-reservation* crime because: (1) no federal law bars the state from imposing sentencing conditions for *off-reservation* crimes and applying them to the defendant even if the defendant travels to an Indian reservation; and (2) a sentencing condition for an *off-reservation* crime does not impair the tribe's sovereignty over its internal relations and self-governance. This case thus presents a significant conflict justifying review. RAP 13.4(b)(1), (2). The court of appeals' analysis also impairs the public's interest in criminal sentencing. RAP 13.4(b)(4). Finally, the decision is analogous to a ruling that would find a state action unconstitutional. *See* RAP 13.4(b)(3).

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[2] It is well established that if a court sanctions a defendant for violating a term of parole, probation, or supervision, it is not a new criminal prosecution; it is part of the punishment for the original crime. *See, e.g., State v. Watson*, 160 Wn.2d 1, 10–11, 154 P.3d 909 (2007) (probation violations relate back to the original conviction for which probation was granted).

A. The Decision Is Inconsistent With Numerous Decisions Of The United States Supreme Court

1. The Court Of Appeals Relies On Inaccurate Statements Of Indian Law That Have Been Long Abandoned

The court of appeals starts with what it labels a "concept of Indian sovereignty" and states that

> only the federal government, through its constitution and laws, is empowered with jurisdiction over dealings with Indian nations, even though the Indian lands fall within the geographical boundaries of individual states. *Worcester,* 31 U.S. (6 Pet.) at 557.

Cayenne, 139 Wn. App. at 118–19. This is a demonstrably inaccurate.

In *Nevada v. Hicks*, 533 U.S. 353, 1215 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), the Court confirmed that state authority within Indian reservations requires a different analysis to evaluate how the "inherent sovereignty" of the state applies to matters within Indian reservations. The Court starts by rejecting the very statement relied on in *Cayenne*:

> Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia,* 6 Pet. 515, 561, 8 L. Ed. 483 (1832)," *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 141, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). "Ordinarily," it is now clear, "*an Indian reservation is considered part of the territory of the State.*" U.S. Dept. of Interior, Federal Indian Law 510, and n.1 (1958), *citing Utah & Northern R. Co. v. Fisher,* 116 U.S. 28, 6 S. Ct. 246, 29 L. Ed. 542 (1885); *see also Organized Village of Kake v. Egan,* 369 U.S. 60, 72, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962).

Hicks, 533 U.S. at 361–62 (emphasis added) (alternation in original) (footnote omitted). The *Hicks* Court then explained exactly how the cited statement from *Worcester* reflects that particular case and time:

> [The statement in *Worcester*] must be considered in light of the fact that "[t]he 1828 treaty with the Cherokee Nation . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory." *Organized Village of Kake v. Egan,* 369 U.S. 60, 71, 82 S. Ct. 562 (1962); *cf. Williams v. Lee,* 358 U.S., at 221–222, 79 S. Ct. 269 (comparing Navajo treaty to the Cherokee treaty in *Worcester*).

Hicks, 533 U.S. at 362 n.4 (alterations in original).[3]

The "concept" of sovereignty that state laws can have no application within Indian reservations is unsound. A reservation is "part of the territory of the state" and a different analysis applies. *Id.* at 362.

2. The Analysis Of State Authority in *Hicks*

Hicks provides a model for analyzing what the Court calls the states' "inherent jurisdiction on reservations". *Id.* at 365. The Court recognizes first that states generally do not exercise power to sanction *on-reservation* crimes by a tribal member:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal

[3] *See also California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214–15, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) ("Our cases, however, have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent.").

> interest in encouraging tribal self-government is at its strongest. *Bracker, supra,* at 144, 100 S. Ct. 2578.

Id. at 362. The Court contrasts this with state authority over *off-reservation* crimes by Indians (such as the poaching crimes involved in both *Hicks* and *Cayenne*) where there is no barrier to state authority:

> It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) *off the reservation. See Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148–149, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Hicks, 533 U.S. at 362 (emphasis added).[4] *Hicks* then goes on to explain how state authority to enforce an *off-reservation* crimes may can follow the defendant to the reservation.

a. State Authority Over *Off-Reservation* Crimes

Hicks concerned a state's power to serve process—a criminal search warrant—against a member of an Indian tribe on his property within his tribe's reservation. The Court first noted that its prior cases recognize that state laws do not operate equally upon Indians and non-Indians found within a reservation. But no prior case had found any distinction between non-Indians and Indians, or their property, when

[4] Both *Mescalero Apache Tribe* and *Confederated Tribes of the Chehalis Reservation* recognized that express federal law, such as a treaty, may authorize *off-reservation* conduct that would otherwise be contrary to state law.

addressing "the scope of the *process* of state courts." *Hicks,* 533 U.S. at 364. The Court specifically relied on cases where process" referred to arrest powers as well as search warrants.

Next, the Court held that the state's interest in executing process related to the violation of state laws did not impair tribal sovereignty including "tribal self-government or internal relations" or "the right to make laws and be ruled by them". *Id.*

> The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.

Id. The Court also explained that its ruling made "perfect sense" in light of the consideration that federal lands were never intended to be havens for criminals avoiding justice after violating state laws.

> [A]s we explained in the context of federal enclaves, the reservation of state authority to serve process is necessary to "prevent [such areas] from becoming an asylum for fugitives from justice." *Fort Leavenworth R. Co. v. Lowe,* 114 U.S. 525, 533, 5 S. Ct. 995, 29 L. Ed. 264 (1885).

Hicks, 533 U.S. at 364 (second alteration in original). The Court rejected *Arizona ex rel. Merrill v. Turtle,* 413 F.2d 683 (9th Cir. 1969), holding that Arizona could not enter the reservation to seize a suspect for violations of state law. *Turtle*, 413 F.2d at 685–86.

The *Hicks* Court then examined arguments that state authority over

on-reservation crimes must exist before a state could serve process connected to an *off-reservation* crime. The United States Government argued as amicus and equated a state's power to serve process on Indians within the reservation with whether the state could exercise criminal authority over Indians *on-reservation.* The Court labeled this approach to the question of state authority as "*misleading*". *Hicks,* 533 U.S. at 365. The Government erred by relying on statutes that concern state authority over crimes *committed on a reservation.* The Court thus distinguished between a state attempting to exercise authority over an *on-reservation* crime by an Indian and a state punishing an *off-reservation* crime.[5]

This Court should accept review because, contrary to *Hicks,* the court of appeals concluded that an Indian reservation was a place where criminal defendants can avoid the sentences of state courts. *Cf. City of Yakima v. Aubrey,* 85 Wn. App. 199, 931 P.2d 927 (defendant could not avoid sentencing by obtaining a tribal order prohibiting him from leaving

[5] An example of this was the United States Government's analysis of a state's Public Law 280 powers, *see* 18 U.S.C. § 1162. In *Cayenne,* the court of appeals similarly relied on an analysis of Public Law 280's grant of power over certain crimes within Indian reservations; how P.L. 280's powers were implemented in RCW 37.12; and how some of P.L.'s 280 authority was "retroceded" for certain reservations. While the court of appeals may have accurately captured the complicated issue of P.L. 280, *Hicks* demonstrates that it is not relevant to state authority that exists in connection with an *off-reservation* crime.

the reservation), *review denied*, 132 Wn.2d 1011, 940 P.2d 654 (1997).[6]

b. The Court Of Appeals Decision May Create Doubt Concerning State Civil Laws

Hicks also noted how its ruling flowed from its ruling upholding state laws requiring a tribal retailer to collect sales tax on cigarettes:

> When, however, state interests outside the reservation are implicated, *States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in Confederated Tribes.* In that case, Indians were selling cigarettes on their reservation to nonmembers from off reservation, without collecting the state cigarette tax. *We held that the State could require the Tribes to collect the tax* from nonmembers, and could "impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax," 447 U.S., at 151, 100 S. Ct. 2069.

Hicks, 533 U.S. at 362 (emphasis added). The contrary ruling of the court of appeals may therefore undermine state powers in non-criminal contexts, such as the taxation example cited in *Hicks*.

B. The Scope Of State Sentencing Power Requires Resolution By This Court

The Court might at first blush assume that a sentence prohibiting possession of a gillnet is related to Indian fishing rights. The court of appeals does not pin its ruling to fishing rights. The public importance of the decision is therefore illustrated by a few examples:

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[6] We emphasize that this analysis of legal authority is not a barrier to the cooperative relationship used by state and tribal law enforcement agencies in Washington related to process for *off-reservation* crimes.

- A crime-related prohibition might forbid contact with a victim of a crime; *Cayenne* suggests such a condition would not apply if the defendant is an Indian and goes to his or her reservation to engage in the unlawful contact.
- A crime-related prohibition might forbid a convicted child rapist from working with children; *Cayenne* suggests that the condition might be unenforceable to a defendant within the boundaries of his or her reservation.
- A crime-related prohibition might forbid possession of tools or chemicals connected to meth; *Cayenne* suggests that the defendant now has an incentive to move such activities to his or her Indian reservation to avoid the sentencing condition.

Washington includes 29 federally-recognized Indian tribes based in Washington. *See* 72 Fed. Reg. 13,648 (Mar. 22, 2007). The ruling disproportionately affects Indian and non-Indians living within those reservations, who lose the benefit of crime-related sentencing conditions.

V. CONCLUSION

The conflict between *Cayenne* and controlling United States Supreme Court case law is irreconcilable and affects important state interests in criminal sentencing. The amici therefore supports review.

RESPECTFULLY SUBMITTED this 29th day of October 2007.

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