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WASHINGTON STATE
SUPREME COURT

SUPREME COURT NO.
COURT OF APPEALS NO. 34926-8-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD ZACK,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Discretionary review is not warranted here. This case involves straightforward issues of statutory interpretation, as applied to plain language in a gubernatorial proclamation retroceding, “in part,” state criminal jurisdiction within the external boundaries of the Yakama Reservation. The Court of Appeals resolved those issues correctly, in accordance with the precedents of this Court. This case involves no constitutional question, no conflict with any prior decision of any court, and no issue of statewide significance. This Court should deny discretionary review under RAP 13.4.

II. IDENTITY OF RESPONDENT

The State of Washington is the respondent.

III. RESTATEMENT OF THE ISSUE

Should this Court grant discretionary review, the following issue would be presented:

Did Paragraph 3 of Governor’s Proclamation, 14-01, which “retain[ed] jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims,” retain the State’s jurisdiction over criminal offenses involving *either* non-Indian defendants or non-Indian victims on fee lands within the Yakama Reservation, when that is a natural

reading of the language and no other reading would give effect to the Proclamation as a whole?

IV. RESTATEMENT OF THE CASE

A. The September 2016 Assault at Toppenish Hospital

In September 2016, a Corrections Officer with the City of Toppenish booked Donald Zack into Toppenish City Jail. The officer noticed wounds on Zack's ankles and took him to Toppenish Hospital for treatment. CP 25, 81. Toppenish Hospital is on "fee," or "deeded," land within the Yakama Reservation—land that is not held in trust by the United States for the Yakama Nation or its members. *See* CP 27-28, CP 87 (Finding 1.5); RP 7. While he was at the hospital, Zack spat on the officer's face. CP 69-71, 81. Zack has Indian ancestry and lives within the Yakama Reservation. CP 48; RP 12. The officer is non-Indian. CP 87 (Finding 1.2).

The State charged Zack with third degree assault. CP 2. He moved to dismiss, contending that the State lacked jurisdiction over the alleged offense because he is an Indian and the offense occurred within the Yakama Reservation. The court denied the motion, ruling that, under Governor's Proclamation 14-01 and RCW 37.12.010, the state has jurisdiction over an offense committed against a non-Indian on fee land within the Yakama Reservation. CP 88-89; RP 35-39; *see* RP 63-64. Because the ruling relied on the fact that the victim was a non-Indian and the assault occurred on non-

Indian fee land, the court did not decide whether Zack was “Indian” for purposes of criminal jurisdiction. CP 88-89; RP 38-39.

Zack stipulated to the police records and was convicted at a bench trial. CP 72, 80-82; RP 42-48. He appealed to Division III of the Court of Appeals, which applied this Court’s “[s]tandard rules of construction” to Proclamation 14-01 and affirmed the conviction. *State v. Zack*, No. 34926-8-III, slip op. at 10 (Wash. Ct. App. March 8, 2018) (Pet. for Review, Appendix).

B. The Role of Governor’s Proclamation 14-01

To determine whether the State had jurisdiction over Zack’s assault, the courts below construed Governor’s Proclamation 14-01, which concerns the State’s criminal and civil jurisdiction within the Yakama Reservation.¹

Before 1963, the Yakama Reservation was subject to the general criminal jurisdiction principles that apply in Indian country in the absence of federal legislation to the contrary. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979) (hereinafter “*Yakima Indian Nation*”). Under those principles, state courts have jurisdiction over offenses committed in “Indian

¹ Governor’s Proclamation 14-01 is attached to the Court of Appeals’ majority opinion as Appendix A. It is also available at https://www.governor.wa.gov/sites/default/files/proclamations/proc_14-01.pdf.

country”² where neither the perpetrator nor the victim is Indian. *E.g.*, *Draper v. United States*, 164 U.S. 240, 17 S. Ct. 107, 41 L. Ed. 419 (1896); *State v. Lindsey*, 133 Wash. 140, 233 P. 327 (1925). State courts lack jurisdiction over offenses committed by or against Indians in Indian country unless Congress permits it. *E.g.*, *In re White v. Schneckloth*, 56 Wn.2d 173, 351 P.2d 919 (1960); AGO 1955 No. 63.

In 1953, Congress enacted Public Law 83-280 (“Public Law 280”), which authorized states to assume jurisdiction over criminal offenses committed by or against Indians in Indian country. *Yakima Indian Nation*, 439 U.S. at 471-74 n.9. Congress enacted Public Law 280, in part, “to deal with the ‘problem of lawlessness on certain Indian reservations.’” *Id.* at 471 (quoting *Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S. Ct. 2102, 48 L. Ed. 2d 719 (1976)).

In 1963, Washington exercised the authority offered by Congress and assumed partial Public Law 280 jurisdiction over most Indian country

² Congress has defined “Indian country” in 18 U.S.C. § 1151:

[T]he term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

in the state. Laws of 1963, ch. 36 (codified in ch. 37.12 RCW). Pursuant to RCW 37.12.030, the state assumed jurisdiction over offenses “committed by or against Indians” in the manner set forth in RCW 37.12.010.

The assumption of jurisdiction under RCW 37.12.010 depended on who owned the place of the offense and whether the persons involved were Indian or non-Indian. The Yakama Reservation, like many Indian reservations in Washington, has a “checkerboard” land ownership pattern. This means that some land within the Reservation is held in trust by the United States for the Yakama Nation or its members (“trust lands”), while other parcels “are held in fee by non-Indian and Indian owners.” *Yakima Indian Nation*, 439 U.S. at 469. The parcels held in fee are commonly called “fee lands,” “nontrust lands,” or “deeded lands.” See *Yakima Indian Nation*, 439 U.S. at 475 (“fee lands”); *id.* at 498 (“nontrust lands”); *Dep’t of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 265 n.8, 850 P.2d 1306 (1993) (“deeded lands”). Under RCW 37.12.010, as to offenses committed by Indians on trust lands within their own Tribe’s reservation, the state assumed jurisdiction only in eight subject matter areas. *Yakima Indian Nation*, 439 U.S. at 475-76. But as to fee lands, such as the hospital where the offense in this case occurred, Washington assumed criminal jurisdiction “to the same extent that this state has jurisdiction over offenses committed elsewhere within this state,” including offenses by Indians

against non-Indians. RCW 37.12.030; *see Yakima Indian Nation*, 439 U.S. at 498 (“State jurisdiction . . . is complete as to Indians on nontrust lands”); *State v. Clark*, 178 Wn.2d 19, 25, 308 P.3d 590 (2013) (under RCW 37.12.010, state had jurisdiction over offense committed by Indian on fee land within Colville Reservation). The United States Supreme Court upheld this land-title-based jurisdictional scheme in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

Congress later modified Public Law 280 to permit states to undo, or “retrocede,” some or all of the jurisdiction previously assumed under Public Law 280. *See* 25 U.S.C. § 1323. In Washington, Indian tribes may ask the state to retrocede Public Law 280 jurisdiction through the process outlined in RCW 37.12.160. The Yakama Nation used that process to request retrocession of most of the state’s Public Law 280 jurisdiction within the Yakama Reservation and within Yakama Indian country outside the reservation.³ Governor Inslee granted the Yakama Nation’s request, in part, in Proclamation 14-01 (January 17, 2014). The United States Department

³ The United States holds some land in trust for Yakama Nation members outside the Yakama Reservation. *See generally Aleck v. United States*, 2006 WL 2729549 at *2 (D. Or. 2006). These Indian allotments are “Indian country” within the meaning of RCW 37.12.160(9)(d) and 18 U.S.C. § 1151.

of the Interior accepted the governor's offer of retrocession, effective April 19, 2016. 80 Fed. Reg. 63583 (Oct. 20, 2015).

Within the Yakama Reservation, Paragraph 1 of Proclamation 14-01 returned all of the state's Public Law 280 jurisdiction over four subject matter areas irrelevant to this case. Paragraphs 2 and 3 then gave up jurisdiction over criminal offenses involving only Indians—that is, offenses where both the accused and the victim are Indian. But, for all other criminal offenses within the Yakama Reservation, the Proclamation retroceded state criminal jurisdiction only “in part.” In particular, Paragraph 3 of the Proclamation provides:

Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, criminal jurisdiction over all offenses not addressed by Paragraphs 1 and 2. *The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims.*

(Emphasis added.) Paragraph 5 retained all jurisdiction over Yakama Indian country outside the Yakama Reservation.⁴

The Petition does not dispute that the place where the assault occurred in this case was on fee (“deeded” or “nontrust”) land within the Yakama Reservation, after retrocession took effect. The trial court identified the legal issue to be “Post retrocession Indian defendant, non-

⁴ See footnote 3 above.

Indian victim on deeded land,” which, as explained above, is an offense over which the State would have had jurisdiction under RCW 37.12.010 before retrocession. RP 7; *see Clark*, 178 Wn.2d at 25. In denying Zack’s motion to dismiss, the court interpreted Paragraph 3 of Proclamation 14-01 as preserving state jurisdiction on deeded land over criminal offenses involving either non-Indian defendants or non-Indian victims, including the offense in this case. CP 88; RP 38.

The Court of Appeals affirmed. *State v. Zack*, No. 34926-8-III (Wash. Ct. App. March 8, 2018) (Pet. for Review, Appendix). Applying this Court’s “[s]tandard rules of construction” to Proclamation 14-01, the majority held that the word “and” in the phrase “non-Indian defendants and non-Indian victims” must be read to mean “and/or,” because “to do otherwise would render the proclamation internally inconsistent and nonsensical.” *Zack*, slip op. at 5, 10. Judge Fearing concurred in that ruling. *Zack*, concurring op. at 1.

V. REASONS WHY THE COURT SHOULD DENY REVIEW

This case involves ordinary issues of statutory interpretation, as applied to a gubernatorial proclamation. The Court of Appeals’ rejection of Zack’s interpretation of Proclamation 14-01 raises no constitutional question, and does not conflict with any decision from any court. The issue

decided by this case affects only the Yakama Reservation and is thus limited to the two counties where that particular reservation is located.

A. The Petition Identifies No Constitutional Question

Zack argues that this case merits review because the Court of Appeals' interpretation of Governor's Proclamation 14-01 raises a "significant question of constitutional law." Pet. at 4; *see id.* at 17. But the only constitutional provision Zack cites is the Privileges and Immunities Clause in Article IV of the United States Constitution. *Id.* at 4.⁵ That clause protects citizens of one state when they come within the jurisdiction of another. *See McBurney v. Young*, 569 U.S. 221, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013). But this case involves the application of Washington State law to a Washington State citizen. *See* CP 10. The Yakama Reservation is part of the State of Washington, and its residents are Washington citizens. *See Yakima Indian Nation*, 439 U.S. at 469; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 n.10, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987); *Neah Bay Fish Co. v. Krummel*, 3 Wn.2d 570, 101 P.2d 600 (1940). Thus, the Privileges and Immunities Clause is not implicated here.

⁵ Zack also refers to "Art. I, sec. 3, cl. 8," but the reference is unclear. Pet. at 4. Article I, Section 3 of the United States Constitution is not involved in this case because it addresses qualifications and activities of United States Senators. Article I, Section 3 of the Washington Constitution provides that "No person shall be deprived of life, liberty, or property, without due process of law." Zack raised a due process issue at the Court of Appeals regarding sufficiency of the evidence, but his petition does not seek review of that issue. *See Zack*, slip op. at 11.

The only substantive issue presented by this case is a state law question regarding the meaning of the governor's proclamation granting a partial retrocession of state jurisdiction.

B. Zack's Disagreement With the Court of Appeals' Interpretation of Governor's Proclamation 14-01 does not Warrant This Court's Review

Zack's remaining arguments disagree with the Court of Appeals' interpretation of Governor's Proclamation 14-01 and urge review based on his belief that the ruling below was error. The Court of Appeals' interpretation was proper and needs no correction from this Court. The issue meets none of the Court's criteria for review in RAP 13.4(b).

The issue in this case is the meaning of the sentence "The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims" in Paragraph 3 of Proclamation 14-01, the dispositive question being the meaning of the word "and." Pet. at 9; *Zack*, slip op. at 4. The Court of Appeals applied this Court's "[s]tandard rules of construction" to answer that question. *Zack*, slip op. at 10. It held that "the meaning of the word 'and' in this instance is 'and/or,'" because, "[i]n context, the word 'and' is used in a list and should be read in the disjunctive; to do otherwise would render the proclamation internally inconsistent and nonsensical." *Zack*, slip op. at 4-5. The Court of Appeals agreed with the trial court and construed Paragraph 3 to mean that the State retains

jurisdiction over two listed categories of criminal offenses—criminal offenses involving non-Indian defendants, and criminal offenses involving non-Indian victims. *See Zack*, slip op. at 8-10; CP 88; RP 38.

Zack argues at length that the Court of Appeals erred by looking at the governor's intent in issuing Proclamation 14-01, rather than the Department of the Interior's intent in accepting it. Pet. at 14-16. *Zack's* argument is inaccurate and irrelevant. In fact, the Court of Appeals considered the intent of both. The majority looked to the governor's intent, *Zack*, slip op. at 5-6, while the concurrence looked to Interior's intent. *Zack*, concurrence at 1. Both the majority and the concurrence agreed that the plain language of the proclamation precluded *Zack's* interpretation. *Zack*, slip op. at 10 ("Standard rules of construction simply preclude [*Zack's*] interpretation of the proclamation), concurrence at 1 ("I concur in . . . the majority's reading of the language in paragraph 3 of Governor Jay Inslee's Proclamation 14-01"). Thus, the error *Zack* claims does not exist.

Second, *Zack* contends that the Court of Appeals erred because it improperly ignored parts of Proclamation 14-01. Pet. at 16-17. According to *Zack*, the Court of Appeals should have construed the words "retrocede, in part" in Paragraph 3 to mean that the State retroceded *all* jurisdiction within the Yakama Reservation but kept it outside the Reservation pursuant to Paragraph 5. Pet. at 16-17. The Court of Appeals recognized that

Paragraph 3 cannot be read that way because the words “in part” plainly refer to retention of criminal jurisdiction *within* the Yakama Reservation:

Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, *in part*, criminal jurisdiction over all offenses not addressed by Paragraphs 1 and 2. The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims.

(Emphasis added.) Applying “standard rules of construction,” the Court of Appeals interpreted Paragraph 3 in light of its language as a whole and in light of the rest of Proclamation 14-01. *Zack*, slip op at 8-10. Both the majority and the concurrence rejected *Zack*’s interpretation because it would mean that the state gave up *all* Public Law 280 jurisdiction within the Yakama Reservation, which would render the words “in part” meaningless in the context of Paragraph 3. *Zack*, slip op. at 8-9, *see* concurrence at 1.

Zack further claims the Court of Appeals erred because its interpretation provides the state with more jurisdiction than it had before retrocession. Pet. at 10-12. Those arguments and their analysis of case law are misdirected and reach the wrong conclusions because they ignore the distinction between fee land and trust land within the Yakama Reservation. The offense in this case occurred on fee or “deeded” land, *Zack*, slip op. at 10, land that is not “held in trust by the United States” within the meaning of RCW 37.12.010. The precedents of this Court and the United States

Supreme Court recognize that the State's assumption of jurisdiction under RCW 37.12.010 includes all offenses committed by or against Indians on fee land, including offenses by Indians against non-Indians. *Yakima Indian Nation*, 439 U.S. at 498 (under RCW 37.12.010, "State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on nontrust lands"); *Clark*, 178 Wn.2d at 25 ("Under RCW 37.12.010, the State has jurisdiction over crimes committed on fee lands within the borders of a reservation"). The Court of Appeals concluded that Proclamation 14-01 preserves state "jurisdiction to prosecute this assault against a non-Indian occurring on deeded land within the boundaries of the Yakama Reservation." *Zack*, slip op. at 10. That conclusion does not give the state more criminal jurisdiction than it already had, as *Zack* claims. Pet. at 12-13.

The cases *Zack* cites for that claim were about state criminal jurisdiction on trust lands, not fee (or "deeded") lands. Under RCW 37.12.010, as to offenses committed by Indians on trust lands within their own Tribe's reservation, the state assumed jurisdiction only in eight subject matter areas. *Yakima Indian Nation*, 439 U.S. at 469. In the cases *Zack* cites, the State lacked jurisdiction to prosecute because the offenses occurred on reservation trust lands and were not within those subject matter areas. See *State v. Jim*, 173 Wn.2d 672, 680, 273 P.3d 434 (2012) (Treaty

Fishing Access Site was “an established Indian reservation and held in trust by the United States” within the meaning of RCW 37.12.010, thus state lacked jurisdiction to prosecute Yakama Indian for fishing violation); *State v. Sohappy*, 110 Wn.2d 907, 909-10, 757 P.2d 509 (1988) (in-lieu fishing site was land “within an established Indian reservation and held in trust by the United States” within the meaning of RCW 37.12.010, thus state lacked jurisdiction to prosecute Yakama Indian for assaulting non-Indian). Those cases have no application here because the offense in this case occurred on fee (or “deeded”) land. *Zack*, slip op. at 10.

Zack identifies no error in the Court of Appeals’ interpretation of Governor’s Proclamation 14-01. His disagreement with the result reached by the Court of Appeals does not make this a case worthy of this Court’s review.

C. This Case Meets None of the Remaining Criteria of RAP 13.4(b)

This case cannot have genuine statewide significance because it affects only a limited geographic area. The retrocession of state jurisdiction that the governor granted in Proclamation 14-01 applies only within the Yakama Reservation, which lies entirely within Yakima and Klickitat Counties. The decision of Division III of the Court of Appeals will not affect Divisions I or II because appeals from the courts of Yakima and Klickitat Counties must be filed in Division III. RAP 4.1(3).

The Court of Appeals' decision also affects only state court jurisdiction and has no effect on the jurisdiction of any federal or tribal court. The United States and the Yakama Nation are separate sovereigns whose criminal jurisdiction is independent of state jurisdiction. *See Confederated Tribes & Bands of the Yakima Indian Nation v. Washington*, 608 F.2d 750, 752 (9th Cir. 1979); *State v. Schmuck*, 121 Wn.2d 373, 394-95, 850 P.2d 1332 (1993).⁶

Although the geographic application of the Court of Appeals decision will be limited, the State agrees that the proper interpretation of Governor's Proclamation 14-01 is important. The Court of Appeals gave it its intended and clear meaning in a way that complements and does not displace the jurisdiction of either the Yakama Nation or the United States. The goal of retrocession is "ensuring that the best interests of the tribe and the surrounding communities are served." RCW 37.12.160(2). The Court of Appeals' interpretation provides the greatest flexibility for tribal, state, and federal law enforcement officials to pool their limited resources and work together to protect public safety for all residents and visitors within the

⁶ The United States Department of Justice has issued guidance to United States Attorneys stating that the United States' litigating position is that the United States has concurrent jurisdiction under 18 U.S.C. §§ 1152 and 1153 over Indian-country crimes that fall within Washington's Public Law 280 jurisdiction. U.S. Dep't of Justice, *Memorandum for United States Attorneys in "Optional" Public Law 280 States* (Jan. 18, 2017), available at https://turtletalk.files.wordpress.com/2017/01/oaag-80488-v1-optional_pl_280_memo_to_u_s_attorneys.pdf.

Yakama Reservation. Under Zack's interpretation, that flexibility would be lost, creating the risk that some crimes might go uninvestigated and unprosecuted, a result that does not serve anyone's interests.

This Court should reject Zack's attempt to turn ordinary statutory interpretation issues that affect a limited geographic area and a limited set of cases into an issue of substantial public interest. This case does not meet the criteria for discretionary review under RAP 13.4(b)(4).⁷

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⁷ Zack has identified no conflict between the Court of Appeals' decision and any decision of this Court or the Court of Appeals. Thus, this case does not meet the criteria of RAP 13.4(b)(1) or (2).

VI. CONCLUSION

The Court of Appeals properly construed the language of Paragraph 3 of Governor's Proclamation 14-01 to conclude that the State retains criminal jurisdiction under RCW 37.12.010 on "fee" or "deeded" land within the Yakama Reservation where either the defendant or the victim is non-Indian. Nothing in the decision conflicts with prior case law, raises a constitutional question, or involves an issue of statewide significance. Nothing in the Court of Appeals decision warrants further review. Accordingly, this Court should deny Zack's petition for review.

RESPECTFULLY SUBMITTED this 4th day of May, 2018.

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CERTIFICATE OF SERVICE

I, Fronda Woods, certify that I sent a copy of this document, Answer to Petition for Review, to be served on all parties or their counsel of record by agreement of the parties via Electronic mail on the date below and as follows to:

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I hand-delivered the original to the Washington Supreme Court.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of May, 2018, at Olympia, WA.



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