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STATE OF WASHINGTON  
BY an  
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NO.

COA NO.34563-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,  
Petitioner,

vs.

GERALD CAYENNE,  
Respondent.

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STATE'S PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER ..... 1

B. RELIEF REQUESTED ..... 1

C. ISSUES PRESENTED FOR REVIEW ..... 1

D. STATEMENT OF THE CASE ..... 2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED ..... 3

    1.    A Court’s Jurisdiction over the Original Offense Allows the  
          Court to Enforce its Statutorily Authorized Probation  
          Conditions Regardless of Where the Defendant Travels .. 6

    2.    State Laws of General Applicability May Be Enforced  
          Against an Indian Even If it Might Impact the Indian’s  
          Exercise of Federally-Secured Hunting or Fishing Rights  
          ..... 9

    3.    Our Trial Court’s Authority to Enforce Their Orders Does  
          Not End at the Borders of the Reservation ..... 11

F. CONCLUSION ..... 12

TABLE OF AUTHORITIES

TABLE OF CASES

*Confederated Tribes of Chehalis Indian Reservation v. Washington*,  
96 F.3d 334 (9th Cir. 1996), *cert. denied*, 520 U.S. 1168 (1997) ..... 6

*DeCoteau v. District County Court*, 420 U.S. 425,  
95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975) ..... 6

*Farwell v. City of Seattle*, 43 Wash. 141, 86 P. 217 (1906) ..... 4

*Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304,  
150 L. Ed. 2d 398 (2001) ..... 12

*Somday v. Rhay*, 67 Wn.2d 180, 406 P.2d 931 (1965) ..... 12

*State ex rel. Best v. Superior Court for Okanogan County*,  
107 Wash. 238, 181 P. 688 (1919) ..... 7

*State ex rel. Westlund v. Nehis*, 43 Wis.2d 379,  
168 N.W.2d 866 (1969) ..... 5

*State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007). ..... 7

*State v. Cayenne*, \_\_\_ Wn. App. \_\_\_, 158 P.3d 623 (2007) ..... 2, 3

*State v. Lane*, 112 Wn.2d 464, 771 P.2d 1150 (1989) ..... 4

*State v. Olney*, 117 Wn. App. 524, 72 P.3d 235 (2003),  
*review denied*, 151 Wn.2d 1004 (2004) ..... 9, 11

*State v. Prado*, 86 Wn. App. 573, 937 P.2d 636 (1997) ..... 5

*State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996) ..... 7

*State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007) ..... 5

*State v. Williams*, 13 Wash. 335, 43 P. 15 (1895) ..... 7

*United States v. Gallaher*, 275 F.3d 784 (9th Cir. 2001) ..... 8, 10

<i>United States v. Juvenile #1</i> , 38 F.3d 470 (9th Cir. 1994) . . . . .	8, 10
<i>United States v. Soto-Olivas</i> , 44 F.3d 788 (9th Cir.), <i>cert. denied</i> , 515 U.S. 1127 (1995) . . . . .	5
<i>United States v. Three Winchester 30-30 Caliber Lever Action Carbines</i> , 504 F.2d 1288 (7th Cir. 1974) . . . . .	10

STATUTES

Chapter 37.12 RCW . . . . .	12
RCW 10.01.050 . . . . .	7
RCW 3.46.030 . . . . .	4
RCW 3.50.020 . . . . .	4
RCW 37.04.010 . . . . .	4
RCW 37.04.020 . . . . .	4
RCW 37.16.180 . . . . .	4
RCW 77.15.460 . . . . .	11
RCW 77.15.580 . . . . .	2
RCW 9.94A.010 . . . . .	10
RCW 9.94A.340 . . . . .	11
RCW 9.94A.505(1) . . . . .	7
RCW 9.94A.505(11) . . . . .	7
RCW 9.94A.505(2)(b) . . . . .	7

RCW 9.94A.505(8) .....	7, 10
RCW 9.94A.650(2)(a) .....	8
RCW 9.94A.660(7)(b) .....	8
RCW 9.94A.745 through RCW 9.94A.74504 .....	6, 8
RCW 9A.04.030 .....	5
Sentencing Reform Act (SRA), chapter 9.94A RCW .....	7

#### RULES AND REGULATIONS

RAP 13.4 .....	3
RAP 13.4(b)(4) .....	3, 12

### **A. IDENTITY OF PETITIONER**

The State of Washington, by and through its attorney, Pamela B. Loginsky, Special Deputy Prosecuting Attorney for Grays Harbor County, asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

### **B. RELIEF REQUESTED**

The State seeks review of the Court of Appeals decision that ordered the superior court to amend the judgement and sentence to specify that Gerald Cayenne is excused from complying with the crime-related prohibition of possessing no gill nets while Cayenne is within the geographic borders of the Chehalis Reservation. A copy of the Court of Appeals decision is in the appendix at pages A-1 through A-10. Division II's opinion was filed May 22, 2007. Division II denied a timely filed motion for reconsideration on July 9, 2007.

### **C. ISSUES PRESENTED FOR REVIEW**

1. Whether a court's ability to enforce crime-related prohibitions or other conditions of a sentence, imposed upon a defendant over whom the court has personal jurisdiction, is limited to conduct committed at a location within the court's territorial jurisdiction?

2. Whether an Indian who commits an offense outside the geographic borders of a reservation is exempt from those facially neutral sentencing

statutes that might interfere with the Indian's exercise of his federally created fishing rights?

#### **D. STATEMENT OF THE CASE**

The defendant, Gerald Cayenne, was charged by amended information filed on August 1, 2005, with two counts of unlawful use of net to take fish in the first degree in violation of RCW 77.15.580. CP 3. The jury found Cayenne guilty of one count, but were unable to reach a verdict as to the other count. CP 14-15.

A standard range sentence was imposed upon Cayenne on March 1, 2006. CP 21-28. The court also ordered the following crime-related prohibitions: "Defendant shall not own any gill net." CP 24.

Cayenne, an enrolled member of the Chehalis Tribe, orally requested that the restriction upon his ownership of gill nets be limited to his off-reservation conduct. RP 3/1/2006 at 5; RP 2/28/2006 at 22. This request was denied. *Id.*

Cayenne filed a timely notice of appeal. CP 29. In his appeal, Cayenne challenged only that portion of the judgment and sentence that precluded him from owning gill nets. *Brief of Appellant*, at 1.

On May 22, 2007, the Court of Appeals issued a published opinion. The Court held that a state court may only impose a crime-related prohibition for activities engaged in by an Indian on state land. *State v. Cayenne*, \_\_\_\_

Wn. App. \_\_\_, 158 P.3d 623, 624 (2007). The Court remanded Cayenne's case to the trial court with directions "conduct a hearing and to enter a corrected judgment, which clarifies that the state trial court's imposition of a crime-related prohibition does not apply to activities within the Chehalis Indian Reservation." *Id.*

The State filed a timely motion to reconsider. That motion was denied on July 9, 2007.

#### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

RAP 13.4 discusses the considerations governing this Court's acceptance of review. Here, review is appropriate because the Court of Appeals' decision, taken to its logical conclusion, significantly impacts the respect owed to the courts and harms public safety, *See* RAP 13.4(b)(4).

The published opinion in *State v. Cayenne*, erroneously concludes that because a Washington Superior Court would not have jurisdiction to criminally prosecute Cayenne for possessing a gill net within the Chehalis Indian Reservation, that the superior court cannot punish Cayenne for violating its valid crime related prohibition within the borders of the reservation. Taken to its logical conclusion, this new rule would prevent a Seattle Municipal Court Judge from punishing a DUI probationer for driving drunk in the City of Renton, since the Seattle Municipal Court does not have jurisdiction to try a defendant for a crime committed in another city. *See*,

*e.g.*, RCW 3.46.030 and 3.50.020 (criminal jurisdiction is created for violations of city ordinances); *Farwell v. City of Seattle*, 43 Wash. 141, 144-45, 86 P. 217 (1906) ("it is a general principle that a municipal corporation cannot usually exercise its powers beyond its own limits, and if in any case it has authority to do so, it must be derived from such statute which expressly or impliedly permits it."). The consequence of this limitation would be diminished respect for our courts.

This new rule would prevent a Pierce County Superior Court Judge from enforcing a "no unsupervised contact with young children" condition upon a convicted child molester who invites a number of young girls on an unchaperoned outing within a National Park located within our state, a military installation such as Fort Lewis, or to some other exclusive federal enclave. *See, e.g., State v. Lane*, 112 Wn.2d 464, 469-70, 771 P.2d 1150 (1989) (the State has ceded jurisdiction to try crimes committed on the Fort Lewis property to the United States); RCW 37.04.010 (consent to acquisition of land); RCW 37.04.020 (cession of jurisdiction over land acquired by United States); RCW 37.16.180 (cession of jurisdiction over lands donated to United States). The consequence of this limitation would be reduced public safety.

Finally, this new rule would prevent the Spokane County Superior Court from sanctioning a drug court participant or a DOSA defendant who

consumes an unauthorized controlled substance while at a sporting event on the University of Idaho campus. *Cf.* RCW 9A.04.030 (identifying the limited occasions when a person who commits a crime outside of the state may be criminally prosecuted within Washington). The consequence of this limitation would be a diminishment of these therapeutic/rehabilitative programs' ability to coerce the participants into maintaining sobriety.

Fortunately, a court's sanctioning of a defendant for violating a term of parole, probation or supervision is not considered a new criminal prosecution. Rather, the sanction is considered punishment for the original crime. *See, e.g., State v. Watson*, 160 Wn.2d 1, 10-11, 154 P.3d 909 (2007) (incarceration for probation violations relates back to the original conviction for which probation was granted); *State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636 (1997) (modifications of sentences due to violations of the conditions of community supervision is deemed punishment for the original crime).

This rule allows courts to set conditions or terms of supervised release for acts that do not constitute a crime. *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995). The fact that the authority for the limitations arises from the court's jurisdiction over the original crime permits the court to sanction violations of the order regardless of where the defendant commits the violation. *See, e.g., State ex rel.*

*Westlund v. Nehis*, 43 Wis.2d 379, 168 N.W.2d 866, 868-69 (1969) (conditions of parole are not suspended by a parolee crossing state boundaries and the location where the parolee violates the conditions of his sentence is incidental; neither the federal constitution nor federal enactments have taken from the states the right to maintain such supervision and enforce such conditions as to parolees who violate conditions of their sentences in another jurisdiction); accord RCW 9.94A.745 through RCW 9.94A.74504 (adopting the interstate compact for adult offender supervision to facilitate the enforcement of our supervision, probation and parole orders when offenders go to other states).

This rule applies to the instant case and mandates the granting of the State's petition for review and, ultimately, the affirmance of the "no gill net" prohibition as originally ordered by the trial court.

**1. A Court's Jurisdiction over the Original Offense Allows the Court to Enforce its Statutorily Authorized Probation Conditions Regardless of Where the Defendant Travels**

The State of Washington clearly had jurisdiction to prosecute Gerald Cayenne for his unlawful fishing committed outside the borders of the Chehalis Indian Reservation.<sup>1</sup> *DeCoteau v. District County Court*, 420 U.S.

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<sup>1</sup>Chehalis Indians have no off-reservation treaty fishing rights because they were not signatories to any treaties and there is no other federally created off-reservation fishing right. See *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996), *cert. denied*, 520 U.S. 1168 (1997)

425, 427 n.2, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975); *State ex rel. Best v. Superior Court for Okanogan County*, 107 Wash. 238, 181 P. 688 (1919); *State v. Williams*, 13 Wash. 335, 43 P. 15 (1895).

Upon his conviction, the Grays Harbor Superior Court clearly had jurisdiction to sanction Cayenne for his conduct. RCW 10.01.050. The range of available sanctions is established by the legislature. *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996) (it is the legislature's prerogative to decide the punishments for crimes, within constitutional limits).

In this case, the legislature specifically authorized the trial judge to impose a period of confinement and to impose crime related prohibitions. RCW 9.94A.505(1), (2)(b), and (8). The crime related prohibitions may extend for a period of time not to exceed the statutory maximum for Cayenne's crime. *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007).

The Sentencing Reform Act (SRA), chapter 9.94A RCW, contains no provision restricting the trial judge's ability to enforce any crime related prohibitions to acts for which the State could criminally prosecute the defendant. To the contrary, the SRA repeatedly authorizes courts to impose conditions upon defendants for which violations are not a crime. *See, e.g.*, RCW 9.94A.505(11) (participation in a domestic violence perpetrator

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(rejecting the Chehalis Tribe's claim to off-reservation fishing rights under theories of unextinguished aboriginal rights or fishing rights under the Treaty of Olympia).

program); RCW 9.94A.650(2)(a) (devote time to a specific employment or occupation); RCW 9.94A.660(7)(b) (remain within prescribed geographical boundaries). The SRA also contains evidence of Washington's entry into the Interstate Compact for Adult Offender Supervision. RCW 9.94A.745 through RCW 9.94A.74504. The purpose of this Compact is to facilitate the return of an individual who violates the terms of a Washington judgment and sentence while in another state.

The imposition of a "do not possess gill nets" crime related prohibition upon Cayenne was appropriate under the above analysis. Any sanction for Cayenne's failure to comply with this prohibition is part of the punishment for Cayenne's conviction for first degree unlawful use of nets. The fact that the State could not also criminally prosecute Cayenne for possessing gill nets within the boundaries of the Chehalis Indian Reservation does not prevent the trial court from demanding Cayenne's compliance with its valid judgment and sentence. *Cf. United States v. Gallaher*, 275 F.3d 784, 793-94 (9th Cir. 2001) (upholding crime-related prohibition against possessing "any firearms or other dangerous weapons, including but not limited to any bows and arrows or crossbows" despite defendant's argument that this violated his treaty hunting rights); *United States v. Juvenile #1*, 38 F.3d 470 (9th Cir. 1994) (condition of probation prohibiting Indian juvenile offender from possessing firearms until he is 21 years old did not have to be

modified to allow the juvenile to participate in ceremonial tribal hunts).

This Court should grant the State's petition for review in the instant case to clarify that an Indian who violates Washington laws at a location where the state has jurisdiction over their conduct will be subject to the same punishment as a non-Indian receives. Any other rule would violate the privileges and immunities clause of the Washington Constitution.

**2. State Laws of General Applicability May Be Enforced Against an Indian Even If it Might Impact the Indian's Exercise of Federally-Secured Hunting or Fishing Rights**

Cayenne's status as an Indian does not serve to restrict the trial court's ability to enforce its valid judgement and sentence. An Indian defendant who is convicted of a crime may have his or her federally-secured hunting and fishing rights interfered with by incarceration. Accordingly, the Grays Harbor Superior Court did not have to include a provision in its commitment order directing that Cayenne should be periodically released from jail so that he could exercise his federally-secured fishing rights.

Similarly, an Indian defendant who is convicted of a crime may have his or her federally-secured hunting and fishing rights interfered with by the application of a non-discriminatory state law that is otherwise applicable to all citizens of the state. *See State v. Olney*, 117 Wn. App. 524, 72 P.3d 235 (2003), *review denied*, 151 Wn.2d 1004 (2004) (prosecution for unlawful

possession of a loaded firearm in violation of RCW 77.15.460); *accord United States v. Gallaher*, 275 F.3d 784 (9th Cir. 2001) (conviction for possession of ammunition by a felon); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974) (forfeiture of firearms from an Indian who was also a convicted felon). This principle extends to the imposition of crime-related prohibitions. *See, e.g., Gallaher*, 275 F.3d at 793-94 (upholding crime-related prohibition against possessing “any firearms or other dangerous weapons, including but not limited to any bows and arrows or crossbows” despite defendant’s argument that this violated his treaty hunting rights); *United States v. Juvenile #1*, 38 F.3d 470 (9th Cir. 1994) (condition of probation prohibiting Indian juvenile offender from possessing firearms until he is 21 years old did not have to be modified to allow the juvenile to participate in ceremonial tribal hunts).

The provision authorizing a court to impose crime related prohibitions upon an individual who is convicted of a felony is a non-discriminatory state law that is applicable to all citizens of the state who are convicted of a felony. The provision, RCW 9.94A.505(8) is not exclusively directed to fish and game matters. To the contrary, it is directed toward community protection and toward reducing the risk of reoffense by offenders in the community. *See* RCW 9.94A.010 (setting out the purposes of the SRA). Thus, the State need not establish that the crime-related prohibitions imposed are conservation

related in order to enforce them against an Indian felon. *Cf. Olney*, 117 Wn. App. at 529 (State need not establish that RCW 77.15.460 is reasonable and necessary to accomplish game conservation purposes as the statute is of general application and not limited to hunters).

Again, review of the Court of Appeal's published opinion is necessary to ensure that every individual who appears before our courts for sentencing is treated the same regardless of ethnicity. *See* RCW 9.94A.340.

**3. Our Trial Court's Authority to Enforce Their Orders Does Not End at the Borders of the Reservation**

In its opinion, the Court of Appeals explained at some length why state courts lack jurisdiction to enforce state criminal laws against tribal members within the member's reservation. The discussion on this point, while fundamentally sound with regard to subject matter jurisdiction to enforce state laws, could be misinterpreted because it is ultimately irrelevant to the legal issue. This discussion did not confront or address the trial court's uncontested personal jurisdiction over a probationer like Cayenne.

The State's petition for review should be granted because the Court of Appeals' unnecessary discussion will erroneously lead people to conclude that a state court's orders are of no effect within Indian country. To the contrary, process of state courts may run into an Indian reservation where the subject-matter or controversy is otherwise within the cognizance of the state

court. *Nevada v. Hicks*, 533 U.S. 353, 363, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). This rule authorizes a state court that possesses jurisdiction to try a tribal member for a violation of state law outside the reservation to issue a search warrant that will be executed by state officials at the tribal member's on-reservation home. *Id.* This rule also authorizes an arrest pursuant to a state arrest warrant of an Indian within the reservation for a crime committed outside the reservation. *Id.*; *Somday v. Rhay*, 67 Wn.2d 180, 181, 406 P.2d 931 (1965) (deputy sheriff authorized to arrest individuals found upon lands within the geographic boundaries of a reservation that are subject to state jurisdiction under Chapter 37.12 RCW). This rule also supports the issuance of a summons to an Indian who violates a condition of a state sentence while within the reservation.

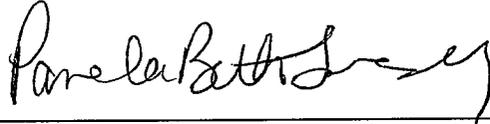
The failure to clarify this point could hamper the execution of search warrants, could result in delays in arresting wrongdoers and could harm the public welfare. The State's petition for review should, therefore, be granted pursuant to RAP 13.4(b)(4).

## F. CONCLUSION

Review of the instant case is appropriate as Division II's opinion raises numerous issues of substantial public interest.

Respectfully Submitted this 6th day of August, 2007.

H. STEWARD MENEFEE  
Prosecuting Attorney

A handwritten signature in cursive script, reading "Pamela B. Loginsky".

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PROOF OF SERVICE ✓

I, Amber Castillo, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 6th day of August, 2007, I deposited in the mails of the United States of America, postage prepaid, the original document to which this proof of service is attached in an envelope addressed to:

David C. Ponzoha, Clerk  
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On the 6th day of August, 2007, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 6th day of August, 2007, at Olympia, Washington.

  
AMBER CASTILLO

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STATE OF WASHINGTON

BY \_\_\_\_\_ DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

GERALD CAYENNE,

Appellant.

No. 34563-3-II

PUBLISHED OPINION

BRIDGEWATER, P.J. — Gerald Cayenne, a tribal member, appeals the trial court's imposition of a crime-related prohibition against possessing any gill nets, which the trial court interpreted to extend throughout the Chehalis Indian Reservation, after the State convicted him of first degree unlawful use of nets to take fish. We hold that, although the trial court may impose a crime-related prohibition for activities on state land, it has had no criminal jurisdiction over the Chehalis Indian Reservation since 1989. Thus, a state trial court cannot regulate the behavior of a Chehalis tribal member by imposing a crime-related prohibition on activities within the Chehalis Indian Reservation. Accordingly, we affirm the crime-related prohibition as

A-1

it applies to state land. But we vacate the crime-related prohibition as it purported to extend, or could be interpreted to extend, to fishing within the Chehalis Indian Reservation. We remand for the trial court to conduct a hearing and to enter a corrected judgment, which clarifies that the state trial court's imposition of a crime-related prohibition does not apply to activities within the Chehalis Indian Reservation.

#### FACTS

Gerald Cayenne is a tribal member of the Chehalis Tribe of the Chehalis Indian Reservation in southwest Washington. During the spring and summer of 2005, Washington State Department of Fish and Wildlife officers observed Cayenne unlawfully gillnetting in the Chehalis River, not too far from the Chehalis Indian Reservation. Thereafter, the officers arrested him. And the State charged Cayenne with two counts of felony first degree unlawful use of nets to take fish, contrary to RCW 77.15.580(2), (3)(b).

A jury found Cayenne guilty of count two as charged. The trial court sentenced him to eight months of confinement and, among other things, prohibited him from possessing any gill nets. In response to whether the prohibition would apply on the Chehalis Indian Reservation, the trial court stated:

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 his right to do that.

RP (March 1, 2006) at 5.

Cayenne appeals, arguing that the trial court exceeded its authority when it prohibited him from possessing any gill nets on the Chehalis Indian Reservation.

## ANALYSIS

Under the Sentencing Reform Act of 1981, the trial court is permitted to impose crime-related prohibitions as part of a sentence.<sup>1</sup> RCW 9.94A.505(8); *State v. Hearn*, 131 Wn. App. 601, 607-08, 128 P.3d 139 (2006). But the trial court possesses only the power to impose sentences the law allows. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). “When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the *erroneous* sentence, when the error is discovered.” *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), *cert. denied*, 350 U.S. 1002 (1956); *see State v. Palmer*, 73 Wn.2d 462, 475, 438 P.2d 876, *cert. denied sub nom.*, *Phillips v. Washington*, 393 U.S. 954 (1968); *see also Heflin v. United States*, 358 U.S. 415, 418, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959).

The principles governing the resolution of this case are not new. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973). Traditionally, courts have considered Indian nations as “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 8 L. Ed. 483 (1832). Under this concept of Indian sovereignty, 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. The laws of the

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<sup>1</sup> “A crime-related prohibition will be reversed only if it is manifestly unreasonable.” *State v. Hearn*, 131 Wn. App. 601, 607-08, 128 P.3d 139 (2006).

individual states, therefore, have no force on the reservations. *Worcester*, 31 U.S. (6 Pet.) at 561. “The whole intercourse between the United States and [Indian nations] is, by our constitution and laws, vested in the government of the United States.” *Worcester*, 31 U.S. (6 Pet.) at 561.

In 1864, the Secretary of the Interior by order established the Chehalis Indian Reservation, setting aside land in southwest Washington for the Chehalis Indian Tribe.<sup>2</sup> *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 338, (9th Cir. 1996); *see also* 1 *Indian Affairs: Laws and Treaties* at 903 (Charles J. Kappler ed., 1904). The Chehalis Tribe is a self-governing Indian tribe, organized under the Indian Reorganization Act of 1934,<sup>3</sup> and recognized as such by the Secretary of the Interior.

The Chehalis Indian Tribe has its own independent government, with a constitution and bylaws that were adopted on July 15, 1939. *See* INDIAN TRIBAL CODES: A MICROFICHE COLLECTION OF INDIAN TRIBAL LAW CODES (Ralph W. Johnson ed., 1988) (Marian Gould Gallagher Law Library, Univ. of Wash. Sch. of Law); *Upper Chehalis Tribe v. United States*, No. 237, 12 Indian Claims Commission Decisions 644, 653 (Additional Finding of Fact 30) (Oct. 7, 1963), *available at* <http://digital.library.okstate.edu/icc/index.html> (last visited May 2007). And the Chehalis Indian Tribe is a member of the Northwest Intertribal Court System (NICS), which acts as a personnel bank and provides direct court-related services. *See* WASH. STATE

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<sup>2</sup> In 1886, President Grover Cleveland ordered that the land “reserved for the use and occupation of the Chehalis Indians . . . be . . . restored to the public domain.” 1 *Indian Affairs: Laws and Treaties* at 903 (Charles J. Kappler ed., 1904). This order, and similar orders in 1908 and 1909, allowed the Chehalis Indians to immediately obtain homestead on the reservation under the homestead laws. *Confederated Tribes*, 96 F.3d at 339.

<sup>3</sup> *See* 25 U.S.C. §§ 461-494a.

FORUM TO SEEK SOLUTIONS TO JURISDICTIONAL CONFLICTS BETWEEN TRIBAL & STATE COURTS, TRIBAL COURT HANDBOOK FOR THE 26 FEDERALLY RECOGNIZED TRIBES IN WASHINGTON STATE, at 4 (Ralph W. Johnson & Rachael Paschal eds., 2d ed. 1992).

Our courts have recognized Indian tribes as “unique aggregations possessing attributes of sovereignty over both their members and their territory . . . they are ‘a separate people’ possessing ‘the power of regulating their internal and social relations . . . .’” *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82, 6 S. Ct. 1109, 30 L. Ed. 2d 228 (1886)). “[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *McClanahan*, 411 U.S. at 168 (quoting *Rice v. Olson*, 324 U.S. 786, 789, 65 S. Ct. 989, 89 L. Ed. 1367 (1945)).<sup>4</sup> “Thus, Congress has consistently acted upon the assumption that the states have no power to regulate affairs of Indians on reservations and has expressly granted jurisdiction to the states when it has desired to do so.” *In re Adoption of Buehl*, 87 Wn.2d 649, 654, 555 P.2d 1334 (1976) (citing *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)).

In 1953, Congress enacted Public Law 83-280 and provided the states with the power to assume jurisdiction over the reservations. *McClanahan*, 411 U.S. at 178 n.17. “The statute was an attempt to strike a balance between abandoning the Indian to the states and maintaining them as wards of the federal government, subject only to federal or tribal jurisdiction.” *Buehl*, 87

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<sup>4</sup> Nevertheless, this concept of Indian sovereignty has not remained constant during the last century. *In re Adoption of Buehl*, 87 Wn.2d 649, 654, 555 P.2d 1334 (1976). While the basic policy of *Worcester* has remained, the Supreme Court has modified this policy “in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized.” *Williams v. Lee*, 358 U.S. 217, 219, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); *Buehl*, 87 Wn.2d at 654.

Wn.2d at 655 (citing Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 537 (1975)). Public Law 83-280 gave the consent of the United States to states, including Washington, "to assume jurisdiction [over criminal offenses and civil causes of action] at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." Pub. L. No. 83-280, ch. 505, § 7, 67 Stat. 588, 590 (1953).

In 1957, the Washington legislature took affirmative action under Public Law 83-280 and enacted chapter 37.12 RCW. *Buehl*, 87 Wn.2d at 656 n.5. Specifically, RCW 37.12.010 permitted the State to assume civil and/or criminal jurisdiction over reservations only after a request from individual Indian tribes. *Buehl*, 87 Wn.2d at 656 n.5. Nine tribes so requested, including the Chehalis Indian Tribe. See TRIBAL COURT HANDBOOK, at 8.

In 1963, the Washington legislature amended chapter 37.12 RCW and extended jurisdiction over some matters without prior tribal consent. *Buehl*, 87 Wn.2d at 656, n.5; *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974). As amended in 1963, RCW 37.12.010 now provides:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;

- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

In 1968, Congress enacted the Indian Civil Rights Act<sup>5</sup> and amended Public Law 83-280 so that henceforth no state could acquire jurisdiction over the objections of affected Indians. 25 U.S.C. § 1326; *Buehl*, 87 Wn.2d at 656 n.5. This Act was not retroactive; and it did not affect pre-1968 state jurisdictional assumptions under Public Law 83-280. *See Estate of Cross v. Comm'r*, 126 Wn.2d 43, 47, 891 P.2d 26 (1995).

But the Act did authorize the states, with tribe and federal consent, to retrocede jurisdiction from the state to the federal government. 25 U.S.C. § 1323(a). In 1986, the Washington legislature enacted RCW 37.12.100, which provided a procedure for retrocession of criminal jurisdiction over Indians for acts occurring on the Colville reservation.<sup>6</sup> Laws of 1986, ch. 267, § 2. In 1988, the legislature extended RCW 37.12.100 to the Quileute, Chehalis, and Swinomish reservations.<sup>7</sup> Laws of 1988, ch. 108, § 1. The procedure for transfer of jurisdiction is detailed in RCW 37.12.120:

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<sup>5</sup> 25 U.S.C. §§ 1301-03.

<sup>6</sup> Retrocession does not affect the "imposed" state jurisdiction under the 1963 law. *See TRIBAL COURT HANDBOOK*, at 9.

<sup>7</sup> The legislature has since extended RCW 37.12.100 to the Skokomish, Muckleshoot, and Tulalip tribes. Laws of 1995, ch. 202, § 1; Laws of 1995, ch. 177, § 1; Laws of 1994, ch. 12, § 1.

Whenever the governor receives from the confederated tribes of the Colville reservation or the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, or Tulalip tribe a resolution expressing their desire for the retrocession by the state of all or any measure of the criminal jurisdiction acquired by the state pursuant to RCW 37.12.021 over lands of that tribe's reservation, the governor may, within ninety days, issue a proclamation retroceding to the United States the criminal jurisdiction previously acquired by the state over such reservation. However, the state of Washington shall retain jurisdiction as provided in RCW 37.12.010. The proclamation of retrocession shall not become effective until it is accepted by an officer of the United States government in accordance with 25 U.S.C. Sec. 1323 (82 Stat. 78, 79) and in accordance with procedures established by the United States for acceptance of such retrocession of jurisdiction. The Colville tribes and the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, and Tulalip tribes shall not exercise criminal or civil jurisdiction over non-Indians.

Retrocession is effected by publication in the Federal Register, which shall specify the effective date of retrocession. *State v. Hoffman*, 116 Wn.2d 51, 70, 804 P.2d 577 (1991). In 1989, the United States government accepted this state's proclamation of retrocession of criminal jurisdiction over the Chehalis Indian Reservation. 54 Fed. Reg. 19959 (1989).

Clearly, the State may try Cayenne for his criminal acts committed off the reservation. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975). But because 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.<sup>8</sup> Nor can the Chehalis

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<sup>8</sup> In general, the State may regulate on-reservation hunting, fishing, and gathering by tribal members only in "exceptional circumstances." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983). In *Puyallup Tribe, Incorporated v. Department of Game*, 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977), the Supreme Court upheld the State's authority to regulate on-reservation fishing by tribal members. In *Puyallup*, the on-reservation lands at issue no longer belonged to the tribe, the treaty accorded the tribe a right in common with all citizens of the Territory, and the State had an interest in conserving a

Indian Tribe confer jurisdiction on the state courts by agreement. *See Kennerly v. District Court*, 400 U.S. 423, 427-30, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971) (vote by tribal council to permit state jurisdiction over reservation held insufficient to vest state with jurisdiction). Finally, even if tribal law were to regulate the behavior of Chehalis Indians in this circumstance, it is not the province of a non-tribal court to impose punishment on a member who engages in such activity on the reservation.

Because the trial court in this case exceeded its authority by attempting to extend the criminal jurisdiction of the Washington courts to regulate the behavior of a Chehalis Indian on his reservation, we hold that the prohibition against possessing gill nets is void as unenforceable.<sup>9</sup>

We affirm the crime-related prohibition as it applies to State land. But we vacate the crime-related prohibition as it purported to extend, or could be interpreted to extend, to fishing within the Chehalis Indian Reservation. We remand for the trial court to conduct a hearing and

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scarce, common resource. *Puyallup*, 433 U.S. at 175-77; *see also Mescalero Apache Tribe*, 462 U.S. at 332 n.15

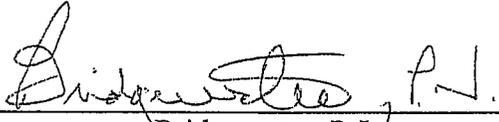
In particular, the Chehalis Indian Tribe has not granted away any of its exclusive fishing rights. *State v. Stritmatter*, 102 Wn.2d 516, 521, 688 P.2d 499 (1984). Therefore, any regulation or prohibition by the State "must be a necessary conservation measure and must also be the least restrictive means available for preserving area fisheries from irreparable harm." *Stritmatter*, 102 Wn.2d at 522. And the State must demonstrate that its regulation is a reasonable and necessary conservation measure. *See Antoine v. Washington*, 420 U.S. 194, 207, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975).

Here, the State has failed to demonstrate that the prohibition against possessing any gill nets on the Chehalis Indian Reservation was anything more than a crime-related prohibition as part of a sentence.

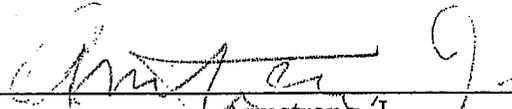
<sup>9</sup> Because of the facts in this case, we do not address any issue where the State has retained jurisdiction or where the United States has jurisdiction. *See, e.g.*, 18 U.S.C. § 1153; RCW 37.12.010.

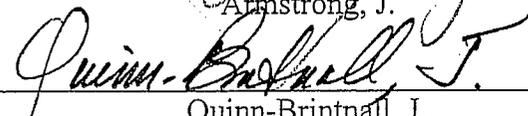
34563-3-II

to enter a corrected judgment, which clarifies that the State trial court's imposition of a crime-related prohibition does not apply to activities within the Chehalis Indian Reservation.

  
\_\_\_\_\_  
Bridgewater, P.J.

We concur:

  
\_\_\_\_\_  
Armstrong, J.

  
\_\_\_\_\_  
Quinn-Brintnall, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  
Respondent,  
v.  
GERALD CAYENNE,  
Appellant.

No. 34563-3-II

ORDER DENYING MOTION TO  
RECONSIDER

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DIVISION II  
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STATE OF WASHINGTON  
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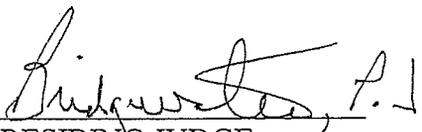
**RESPONDENT** moves for reconsideration of the court's decision terminating review, filed **May 22, 2007**. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Bridgewater, Armstrong, Quinn-Brintnall

**DATED** this 9<sup>th</sup> day of July, 2007.

**FOR THE COURT:**

  
PRESIDING JUDGE

cc: Gerald R. Fuller  
Katherine Lee Svoboda  
David L. Donnan  
Gregory Charles Link  
Pamela Beth Loginsky