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STATE OF WASHINGTON
Case No. 87376-3

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APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS,
DIVISION THREE
Case No. 29508-7

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALLEN CLARK,

Petitioner.

AMICUS CURIAE BRIEF OF THE COLVILLE
CONFEDERATED TRIBES

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INTRODUCTION

This case calls on the Court to decide whether Omak police officers must make reasonable efforts to cooperate with the Colville Confederated Tribes (“CCT”) when executing criminal process against an enrolled CCT member on Indian trust lands within the Colville Reservation. The Court of Appeals failed to apply controlling precedent and largely ignored the will of the Legislature in determining that Omak police officers may execute a state search warrant on Indian trust lands within the Reservation without even attempting to utilize CCT procedures for such criminal process. The decision below is contrary to this Court’s precedent regarding the exercise of state jurisdiction in Indian country, and is inconsistent with RCW 37.12.100 through .140, in which the Legislature voluntarily retroceded nearly all state criminal jurisdiction on Indian trust land within the Colville Reservation.

The impact of the erroneous decision below is far-reaching. CCT and many of the 28 other federally recognized tribes in the state occupy reservations where some portion of the land is wholly or partially outside of state jurisdiction (through voluntary retrocession or otherwise). Also, like CCT, many of these tribes have enacted tribal code provisions requiring the tribal courts to cooperate with state law enforcement officials conducting searches or other law enforcement activities within their

respective reservations. Requiring the state to utilize such established tribal procedures would further tribal self-government while ensuring effective law enforcement in Indian country.

This Court should reverse the Court of Appeals and hold that the Omak police officers should have attempted to cooperate with CCT officials by following tribal procedures for executing the search warrant within the Colville Reservation.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

CCT hereby incorporates the statement of interest in CCT's concurrently filed Motion for Leave to File *Amicus Curiae* Brief.

RESTATEMENT OF THE ISSUE

Is a search warrant issued by a state court for the search of a residence on Indian trust land within the Colville Reservation valid when the state enforcement officers seeking the warrant did not attempt to utilize established tribal court procedures?

STATEMENT OF THE CASE

CCT incorporates the statement of the case provided in *State v. Clark*, 167 Wn. App. 667, 669-71, 274 P.3d 1058 (2012), and emphasizes the following uncontested facts: (1) Petitioner Michael Clark is an enrolled member of CCT; (2) Clark was convicted of first degree theft following the Omak Police Department's investigation of a burglary on land within

the Colville Reservation that the trial court found to be non-Indian owned “fee land”; (3) the conviction was based on evidence obtained during a search of Clark’s residence on Indian trust land within the Colville Reservation; (4) the search of Clark’s residence was made pursuant to a warrant issued by an Okanogan County judge; and (5) Omak police did not attempt to obtain a warrant from the Colville Tribal Court to search petitioner’s trailer or otherwise seek to coordinate execution of the warrant with CCT officials. *Id.* at 669-71.

ARGUMENT¹

Execution of the search warrant at issue in this case was inconsistent with the limits on state jurisdiction over Indians within a reservation the Court recognized in *Powell v. Farris*, 94 Wn.2d 782, 620 P.2d 525 (1980). In *Powell*, the Court found it to be “axiomatic that state power over Indians on a reservation is limited to the power granted by Congress in [P.L. 280].” 94 Wn.2d at 784; *see also Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 754, 958 P.2d 260 (1998) (states may not “apply[] state law to tribal Indians on Indian reservations, without an express grant of authority from Congress.”) (emphasis added); *State v. Pink*, 144 Wn. App. 945, 952, 185 P.3d 634

¹ The Court reviews legal conclusions pertaining to suppression of evidence *de novo*. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

(2008). The *Powell* Court accordingly instructed that the state's exercise of jurisdiction against Indians on a reservation is only permitted if (1) the action is consistent with the state's assumption of jurisdiction under Public Law 83-280 ("P.L. 280"), *id.* at 784, or (2) the state action does not "infringe on the right of reservation Indians to make their own laws and be ruled by them," *id.* at 786 (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)); *see also Maxa v. Yakima Petroleum Inc.*, 83 Wn. App. 763, 769, 924 P.2d 372 (1996) ("[T]he essential question is whether state assumption of jurisdiction would interfere with reservation self-government.") (citing *Williams*, 358 U.S. at 220).

Under the *Powell* rule, the search warrant at issue in this case was an invalid exercise of state jurisdiction in Indian country. As detailed below, Washington State chose not to retain P.L. 280 jurisdiction to execute search warrants on Indian trust land within the Colville Reservation, and the exercise of such jurisdiction infringes on CCT's sovereignty because it undermines the established tribal procedures for issuing warrants on the Reservation. The U.S. Supreme Court's decision in *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), does not compel a different conclusion or require this Court to abandon long-standing precedent supporting tribal sovereignty. *Cf. Hinkle v. Abeita*, 2012-NMCA-074, 283 P.3d 877, 884-85 (N.M. Ct. App. 2012).

I. THE STATE DID NOT MAINTAIN JURISDICTION UNDER P.L. 280 TO EXERCISE CRIMINAL PROCESS ON INDIAN TRUST LANDS WITHIN THE COLVILLE RESERVATION.

Under *Powell*, the Court of Appeals should have first examined whether execution of the warrant in this case was within the bounds of jurisdiction the state chose to retain in Indian country under P.L. 280. Such an inquiry leads to one conclusion: the state specifically retroceded all jurisdiction on Indian trust lands within the Colville Reservation except for eight specified areas of law, none of which include the offense of theft, search warrants, or other criminal process. This voluntary limitation of state jurisdiction on the trust land where the search was executed renders the warrant invalid regardless of the state's jurisdiction over the underlying criminal activity.

A. P.L. 280 and the Colville Reservation.

In 1953, Congress enacted P.L. 280, which required some states to assume criminal and civil jurisdiction in Indian country and granted all other states, including Washington, the option to do so. Pub. L. No. 83-280, 67 Stat. 588 (1953). P.L. 280 was enacted during an era when Congress aggressively sought to assimilate Indian tribes by a variety of means, including removing federal jurisdiction over Indian country and making Indians subject to general state law. *See* Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian*

Country Granted by Public Law 280, 87 Wash. L. Rev. 915, 930-32 (2012) (“Anderson”).

Pursuant to the original enactment of P.L. 280, the Washington Legislature, in 1957, directed the governor, upon the request of any tribe within the state, to assume criminal and civil jurisdiction “to the extent authorized [by P.L. 280]” over Indians and Indian country. Laws of 1957, ch. 240, § 2. In 1963, the Legislature removed the prerequisite of tribal consent and unilaterally assumed partial P.L. 280 jurisdiction over all “Indians and Indian territory, reservations, country, and lands” in the state. Laws of 1963, ch. 36, § 1 (codified at RCW 37.12.010). This assumption of jurisdiction was partial in that it did not apply to Indians on trust or other restricted lands within a reservation except with respect to the eight enumerated subject areas where the state maintained jurisdiction.² In addition to Washington’s unilateral assumption of partial P.L. 280 jurisdiction, the 1963 amendment established a process whereby a tribe could request the state to assume more extensive jurisdiction on reservation trust and other restricted lands. Laws of 1963, ch. 36, § 5

²The eight enumerated subjects of continuing state jurisdiction are: (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. RCW 37.12.010. *But see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209-10, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (discussing other limits on state P.L. 280 jurisdiction).

(codified at RCW 37.12.010, .021). In 1965 the Colville Business Council (CCT's governing body) initiated this process, and the state assumed full P.L. 280 jurisdiction over such lands within the Colville Reservation. However, Congress significantly amended P.L. 280 in 1968, authorizing the federal government to accept full or partial retrocession of jurisdiction a state had assumed over Indian country pursuant to the original version of P.L. 280. Pub. L. No. 90-284, tit. IV, § 403, 82 Stat. 79 (codified at 25 U.S.C. § 1323). In 1986, the Washington Legislature authorized the governor to retrocede all areas of P.L. 280 jurisdiction to the federal government, except for the partial jurisdiction the state had assumed in 1963 under RCW 37.12.010.³ Laws of 1986, ch. 267 (codified at RCW 37.12.100). Pursuant to the 1986 law, the governor issued a proclamation retroceding state jurisdiction to the federal government, which the Bureau of Indian Affairs accepted in 1987. 52 Fed. Reg. 8372 (Mar. 17, 1987).

B. The State Lacks Authority to Issue and Execute Search Warrants on Indian Trust Land Within the Reservation.

As a result of the state's voluntary retrocession of P.L. 280 jurisdiction on the Colville Reservation to the United States in 1987, the

³ While CCT was the only tribe in Washington initially authorized to request retrocession under this statute, Laws of 1986, ch. 267, § 4, the statute was amended to allow requests for retrocession from six other tribes, *see* RCW 37.12.100. In 2012, the Legislature went far beyond its initial efforts to retrocede jurisdiction over certain reservation lands, demonstrating the public policy in favor of tribal self-government and sovereignty. Laws of 2012, ch. 48, § 2(1); *see also* Anderson, 87 Wash. L. Rev. at 947-51.

state has chosen only to retain jurisdiction over Indians within the Colville Reservation to the extent expressly assumed under RCW 37.12.010. Specifically, on Indian trust land and other restricted lands within the Reservation, jurisdiction retained by the state is expressly limited to the eight areas of law enumerated in RCW 37.12.010. None of the eight areas encompass the execution of search warrants, other criminal process, or any of the crimes with which Clark was charged.

The Court has supported this narrow interpretation of the state's partial jurisdiction under P.L. 280 on Indian trust lands within reservations. In *State v. Cooper*, the Court addressed Washington's unilateral assumption of partial P.L. 280 jurisdiction under the 1963 Act and explained that "[c]riminal jurisdiction was not one of the eight categories of law in which the State assumed jurisdiction over" reservations and other Indian country. 130 Wn.2d 770, 773-74, 928 P.2d 406 (1996) (citing RCW 37.12.010). Thus, for Indian trust lands within reservations, the "State [has not] assumed criminal jurisdiction." *Id.* at 774 & n.4. Applying the same *expressio unius, exclusio alterius* reasoning,⁴ the state's authority to issue search warrants falls outside of the state's P.L. 280 jurisdiction over Colville Reservation trust lands

⁴ See *In re Detention of Lewis*, 163 Wn.2d 188, 196, 177 P.3d 708 (2008) (quoting *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999)).

because the Legislature did not choose to assume such authority when it adopted RCW 37.12.010. *Cf. Idaho v. Mathews*, 133 Idaho 300, 311, 986 P.2d 323 (1999) (Idaho’s assumption of P.L. 280 jurisdiction over seven areas of law “did not assume jurisdiction over [the underlying crimes] or the execution of state court search warrants within Indian country”).

Indeed, while the state did have jurisdiction to issue warrants on the Reservation from 1965 to 1987 when it had full P.L. 280 jurisdiction at CCT’s request, its voluntary retrocession regarding all but the eight areas of law eliminated any authority to issue and execute the search warrant for Clark’s residence. A different outcome would be contrary to the intent of the Legislature, which understood that the retrocession process it undertook for the Colville Reservation over twenty-five years ago would narrow state jurisdiction over Indians on trust land within the Reservation. It would also be inconsistent with the Supreme Court’s command that the state jurisdiction assumed under P.L. 280 be narrowly construed. *Bryan v. Itasca County*, 426 U.S. 373, 392-93, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); *see also Cohen’s Handbook of Federal Indian Law*, § 2.02[1] (2012 ed.) (“Cohen”).

II. THE STATE’S FAILURE TO SEEK A TRIBAL COURT WARRANT INFRINGED ON CCT’S SOVEREIGNTY.

Neither Respondent nor proposed *amicus curiae* Washington

Association of Prosecuting Attorneys (“WAPA”) attempt to reconcile the Legislature’s clear intent to limit state jurisdiction within Indian country expressed in RCW 37.12.010 with their position that the state may exercise criminal process on Indian trust land. However, this Court has provided specific instruction on how to reconcile these positions.

According to this Court’s *Powell* decision, in the absence of state jurisdiction under P.L. 280 to execute the search warrant, the lower court should have examined whether exercise of jurisdiction “infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.” 94 Wn.2d at 786 (quoting *Williams*, 358 U.S. at 220); *see also Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1508 (S.D. Cal. 1992) (“[A] judicial officer’s writ cannot run outside the officer’s jurisdiction.”). Here, the state’s execution of a search warrant outside of Washington’s P.L. 280 jurisdiction impermissibly infringed on CCT’s ability to govern itself because it failed to comply with the Colville Tribal Court’s procedures for the execution of such process, and because the Omak police made no effort to cooperate with CCT officials in exercising criminal process on Indian trust lands. *See Anderson*, 87 Wash. L. Rev. at 943 n.162 (“When a state officer wishes to conduct a search in territory where the state lacks jurisdiction under P.L. 280, the proper recourse is to obtain a warrant from the tribal court.”) (citing *South Dakota v.*

Cummings, 2004 S.D. 56, 679 N.W.2d 484 (2004)); *see also State v. Eriksen*, 172 Wn.2d 506, 514-15, 259 P.3d 1079 (2011) (jurisdictional disputes between the state and tribes should be “addressed by use of political and legislative tools, such as cross-deputization or mutual aid pacts . . .”).⁵

Application of the infringement test in this manner is consistent with the Idaho Supreme Court’s decision in *Mathews*, which considered “whether a state court may issue a warrant to search within Indian country without tribal court approval where the state court has jurisdiction over the underlying crime . . .” 133 Idaho at 312. The *Mathews* court first determined that, under P.L. 280, the state “did not assume jurisdiction over . . . the execution of state court search warrants within Indian country.” *Id.* at 311. However, since the underlying off-reservation crime was subject to the state’s jurisdiction, the court went on to examine “whether the execution of the . . . search warrant within the Nez Perce Indian Reservation either unlawfully infringed on the right of reservation Indians to make their own laws and be ruled by them, or is preempted by federal law.” *Id.* at 313. The *Mathews* court noted that state officers had

⁵ CCT has made significant efforts to coordinate with state law enforcement agencies. Currently, 19 of 24 CCT Police officers are cross-commissioned to enforce state and local laws, and 5 additional officers are in the process of becoming cross-commissioned.

attempted to work with tribal officers to obtain a warrant, but that tribal law “did not establish a requirement or a procedure governing the execution of state court issued warrants authorizing searches within Indian country” *Id.* at 313-14. Thus, the state officers were “left to guess at the appropriate course of action.” *Id.* at 314. The court ultimately determined that tribal sovereignty was not infringed by the execution of the state warrant “where the state possesses jurisdiction over the underlying crime and where tribal law does not provide a procedure for executing the warrant within Indian country.” *Id.* (emphasis added); *see also Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir. 1969) (decision based on tribe’s “procedures for Indian extradition”).

In contrast to the non-existent tribal procedures in *Mathews*, the CCT Code expressly requires the Tribal Court to “cooperate . . . with all federal, state, county and municipal agencies, when such cooperation is consistent with this Code” CCT Code § 1-1-102 (Appendix A). The CCT Code also enables state law enforcement to obtain a tribal warrant for searches of Clark’s residence and other trust property on the Reservation. *See id.* § 2-1-35 (Appendix B).⁶ Because Clark is a CCT member who

⁶ WAPA wrongly suggests that the recent amendment to the CCT Code, clarifying and broadening the circumstances in which non-tribal law enforcement agents may obtain a tribal search warrant, should be read as an admission that Omak police would not have been able to obtain a warrant from the Tribal Court against Clark under the then-existing

resided within and was charged with a crime occurring on the Reservation, he was subject to Tribal Court jurisdiction. Thus, had the Omak police officers attempted to coordinate their enforcement efforts with CCT, they would not have been “left to guess at the appropriate course of action,” and would not have unnecessarily infringed on CCT’s sovereignty by unilaterally executing the warrant on Indian trust land.

In short, the state exceeded its limited jurisdiction in issuing and executing the warrant at Clark’s residence and infringed on CCT’s sovereign right to make its laws and be governed by them. Accordingly, the warrant was issued without legal authority and was invalid.

III. *NEVADA V. HICKS* IS NOT CONTROLLING.

The Court of Appeals also erred by relying on dicta from *Hicks* rather than this Court’s rule in *Powell* to uphold the search of Clark’s residence. *See Clark*, 167 Wn. App. at 672-73. *Hicks* is one of a series of Supreme Court decisions following *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), all of which involved tribal assertions of authority over non-members. *E.g.*, *Hicks*, 533 U.S. at 355 (“This case presents the question whether a tribal court may assert

provision. WAPA Br. at 3. WAPA fails to recognize that the crime being investigated (theft) constituted an “offense against the Tribes” and therefore fit within the CCT Code provision at the time of the search. *See* CCT Code § 3-1-55 (Appendix C).

jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant . . .”). The instant case raises a different issue: the state’s authority over tribal members while on Indian trust land within the Reservation. *See, e.g., Cummings*, 679 N.W.2d at 487-89, (finding *Hicks* to be “factually and legally distinguishable” and declining to apply dicta regarding state authority on reservations).⁷

Other decisions from the Court of Appeals and other courts indicate that the *Montana* line of cases, including *Hicks*, do not apply to exercises of state authority over Indians. *See, e.g., Young v. Duenas*, 164 Wn. App. 343, 350-51, 262 P.3d 527 (2011) (“tribe [is not] attempting to assert any regulatory authority over a nonmember, but instead . . . a nonmember, attempting to sue the tribe in a civil suit in state court.”);

⁷ While WAPA contends that the discussion in *Hicks* on the execution of search warrants is not dicta, WAPA Br. at 7 n.7, WAPA fails to address the limits the *Hicks* Court expressly placed on its decision. *See Hicks*, 533 U.S. at 358 n.2 (“Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.”). Indeed, the *Hicks* Court made clear it was addressing tribal jurisdiction under the *Montana* test, rather than state jurisdiction. *See id.* at 358 (first inquiry is whether the tribe “can regulate state wardens executing a search warrant for evidence of an off-reservation crime”); *id.* at 360 (consideration of the three grounds for tribal jurisdiction over non-members under *Montana*); *id.* at 371 (discussing exceptions to the *Montana* rule); *id.* at 374 (tribe lacked jurisdiction to hear *Hicks*’ claim regarding state officers’ violation of tribal law). The other justices agreed that *Hicks* should be read narrowly. *Id.* at 376 (Souter, J., concurring) (emphasizing Court’s “limited” holding); *id.* at 386 (Ginsburg, J., concurring) (same); *id.* at 397 (O’Connor, J., concurring in part and concurring in the judgment) (*Hicks*’ case “concern[s] the civil adjudicatory jurisdiction of tribal courts.”). Also, contrary to WAPA’s assertion, there remains a question as to whether the portions of Justice Scalia’s opinion relied on by the Court of Appeals commanded a majority of the Court. *See Cummings*, 679 N.W.2d at 488-89 & n.4.

Cordova v. Holwegner, 93 Wn. App. 955, 967, 971 P.2d 531 (1999) (explaining difference between the infringement and *Montana* analyses); *Hinkle*, 283 P.3d 877 (reviewing *Hicks* and other cases applying *Montana*, reaffirming court’s reliance on *Williams* infringement test, and rejecting *Montana* analysis for cases involving state jurisdiction in Indian country); *Cummings*, 679 N.W.2d at 489 (“*Hicks* should be construed to address [the question of tribal court jurisdiction over state officers] only”) (citing similar cases); *see also Water Wheel Camp Rec. Area v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011) (“We have recognized the limited applicability of *Hicks*. . . . *Hicks* is best understood as the narrow decision it explicitly claims to be.”); Cohen, § 6.03[2][c] (“State jurisdiction and tribal jurisdiction in Indian country raise two separate legal questions.”).

Even if *Hicks* applied to the issue here, it is factually distinguishable and does not support the decision below. *See Cummings*, 679 N.W.2d at 488-89. The Court of Appeals relied on dicta from *Hicks*, in which Justice Scalia expressed his belief that the state had authority for searches within the reservation in light of the “considerable” state interest in executing process. *See* 533 U.S. at 364. In relying on this dicta, the Court of Appeals (along with Respondent and WAPA) failed to recognize crucial factual differences that make this case distinguishable from *Hicks*. Specifically, in *Hicks*, the Nevada game warden who executed the warrant

had on two occasions obtained a tribal court search warrant and both searches were executed in conjunction with tribal police. 533 U.S. at 356; *see also id.* at 397 (O'Connor, J., concurring in part) (state and tribal officials "acted in full cooperation"). In contrast, the Omak police did not attempt to cooperate with CCT to execute the search, despite CCT's demonstrated commitment to cooperation with state law enforcement. Also, unlike in *Hicks*, where the criminal conduct under investigation occurred off-reservation (heightening Nevada's interest in effective enforcement), 533 U.S. at 356, 362, Clark's alleged criminal conduct occurred on-reservation where CCT has a strong interest in maintaining law and order and the state's interest is diminished. Finally, the state interest in unilaterally imposing state law is diminished because a tribal process exists for the state to achieve its law enforcement objectives. *See Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. 05-10296-BC, 2010 WL 5185114, *3 (E.D. Mich. Dec. 17, 2010) (cooperative law enforcement agreement "consistent with *Hicks* and the interests of the public" because it "simply requires that the state police officers follow certain procedures before entering the [reservation].").

For similar reasons, this case is distinguishable from *State v. Cayenne*, 165 Wn.2d 10, 14, 195 P.3d 521 (2008), in which the Court found *Hicks* to be "relevant" to its conclusion that the state may extend

sentencing conditions to a tribal member's on-reservation fishing activities.⁸ The *Cayenne* decision does not indicate that there was any tribal process available for imposing the state court's sentencing conditions within the Chehalis Reservation, while CCT does have a process enabling state and tribal cooperation in furtherance of their shared law enforcement objectives. The degree of infringement of tribal sovereignty also differs substantially. The sentencing condition in *Cayenne* did not prohibit the member from exercising his on-reservation fishing rights, but rather barred one method of fishing. 165 Wn.2d at 17 n.2. By contrast, this Court has recognized that the execution of a search warrant issued without authorization is an infringement that goes to the core of individual liberty and calls for heightened scrutiny:

The search warrant is one of the most extraordinary means by which the state may exert its power, and one whose abuse may be the most grievously disruptive of the liberty of individuals. . . . It is entirely appropriate that so powerful a tool of governmental authority be carefully circumscribed in its use through limitation to the subjects and procedures defined by a statute or court rule.

City of Seattle v. McCready, 123 Wn.2d 260, 277, 868 P.2d 134 (1994)

⁸ While the *Cayenne* decision is distinguishable as described above, CCT believes the *Cayenne* decision is of questionable validity for a number of reasons. For example, the *Cayenne* Court failed to recognize that *Hicks* is expressly limited to the question of tribal court jurisdiction over non-member state officials. *See supra* at Part III. The *Cayenne* Court also failed to examine the state's jurisdiction under P.L. 280 on the reservation and failed to acknowledge or apply the infringement test from *Powell*. *See supra* at Part II; *see also* Cohen, § 18.03[2][a] (criticizing the *Cayenne* court's reliance on *Hicks*).

(quoting *State v. Myers*, 102 Wn.2d 548, 555, 689 P.2d 38 (1984)).

Instead of addressing these distinctions, WAPA references several out-of-context cases for its broad reading of *Hicks* as supporting a bright-line rule that the state may serve criminal process on Indian lands, regardless of the burden on tribal interests. *See* WAPA Br. at 10-12. However, these cases actually bolster the conclusion this Court reached in *Powell*—that state exercises of jurisdiction on Indian trust lands are permissible only if the state interest is significant and the infringement on tribal self-government is minimal. *See, e.g., Water Wheel*, 642 F.3d at 816 (upholding tribal jurisdiction over non-member lessee because “[a]ny other conclusion would impermissibly interfere with the tribe’s inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress’s interest in promoting tribal self-government.”); *Narrangansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 22-23 (1st Cir. 2006) (in determining whether state can execute warrant under “the general body of Indian law,” the court must “identify and weigh the competing state, federal, and tribal interests that obtain within the concrete factual context of this dispute.”).⁹ At least two

⁹ *See also State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 403 (Colo. App. 2008), *aff’d on other grounds*, 242 P.3d 1099 (Colo. 2010) (trial court could enforce subpoenas against tribe because, *inter alia*, the incursion was necessary to prevent “significant off-reservation effects” and the subpoenas did not “authorize state

cases cited by WAPA are entirely inapplicable because Congress had conferred much broader jurisdiction on the state in question than Washington has assumed under P.L. 280. *See, e.g., Kaul v. Stephan*, 83 F.3d 1208, 1217 & n.12 (10th Cir. 1996) (upholding state search warrant executed within Indian reservation because Kansas assumed criminal jurisdiction over Indian country pursuant to the Kansas Act, a precursor to P.L. 280); *Narrangansett*, 449 F.3d at 19 (tribal lands at issue “shall be subject to the civil and criminal laws and jurisdiction of the [state].”) (quoting 25 U.S.C. § 1708(a)). Finally, WAPA’s reliance on the unpublished ruling denying preliminary relief in *Confederated Tribes and Bands of the Yakama Nation v. Holder* is misplaced; that court expressly stated it was not ruling on the merits. No. CV-11-3028-RMP, 2012 WL 893913, *3 (E.D. Wash. Mar. 15, 2012) (“Policies that counsel against the extraordinary relief of a preliminary injunction may have no relevance to the ultimate questions of tribal and state sovereignty”). Moreover, that case involved the “legislative authority” of the Yakama Nation “to restrict incursions by state officers,” not state jurisdiction to execute

agents to invade the territory of the reservation”); *State v. Harrison*, 148 N.M. 500, 238 P.3d 869, 877 (2010) (“Most courts that have addressed a state officer’s authority to conduct criminal investigations in Indian country also ‘have found that a determination of whether such an exercise of state authority infringes on tribal sovereignty turns on the existence of a governing tribal procedure.’”) (citations omitted); *Landreman v. Martin*, 191 Wis. 2d 787, 797, 530 N.W.2d 62 (1995) (service of process valid because Menominee Tribe lacked “its own service of process procedures”).

warrants in Indian country. *Id.* at *2.

CCT's goals in this case are to protect its sovereignty and right to self-government, while ensuring that law enforcement officers can bring both tribal members and non-members to justice. CCT has no more interest than the state in allowing the Reservation to become an "asylum for fugitives from justice," *Hicks*, 533 U.S. at 364 (citation omitted), or a "haven for criminals," *Cayenne*, 165 Wn.2d at 17.¹⁰ Indeed, CCT has established tribal law procedures whereby the state can obtain and execute a valid warrant, and has instructed the Tribal Court to cooperate with state jurisdictions to allow for effective law enforcement on the Reservation. *See* CCT Code, §§ 1-1-102, 2-1-35. Under these circumstances, application of the infringement test, especially as articulated in *Mathews*, fosters cooperation between tribes and local law enforcement and enhances law and order on the Reservation, while respecting CCT's sovereign right to make laws and be governed by them.

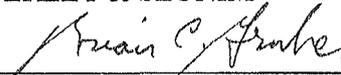
CONCLUSION

The decision of the Court of Appeals should be reversed.

¹⁰ CCT rejects WAPA's suggestion that tribal-state cooperation would be a significant burden on state law enforcement. WAPA Br. at 17-19. Several courts have recognized the practicability of such cooperation in furthering the common interest in effective law enforcement. *E.g.*, *Hicks*, 533 U.S. at 356 (state successfully coordinated with tribal court twice to conduct on-reservation investigations); *Harrison*, 238 P.3d at 872 (state officer successfully secured arrest warrant and executed it in compliance with tribal requirements); *Saginaw Chippewa*, 2010 WL 5185114, at *3 (requirement that state officers follow certain tribal procedures was consistent with "interests of the public").

Dated this 21st day of December, 2012.

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM



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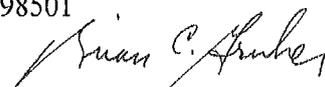
CERTIFICATE

I certify that, on December 21, 2012, I mailed a copy of the foregoing *Amicus Curiae Brief Of The Colville Confederated Tribes*, postage prepaid, to:

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Appendix A: Excerpt from CCT Code Ch. 1-1

removed for cause as provided in this subchapter or by reason of the abolition of the office, but shall be eligible for reappointment.

1-1-102 Judicial Cooperation

All judges and personnel of the Tribal Court shall cooperate with all branches of the BIA, with all federal, state, county and municipal agencies, when such cooperation is consistent with this Code, but shall ever bear in mind that their primary responsibility is to the people of the Tribes.

1-1-103 Removal of Judges

During tenure in office, a judge may be suspended, dismissed or removed for cause by a vote of the Council. Copies of a written statement setting forth the facts and the reasons for such proposed action must be delivered to the judge and to members of the Council at least ten (10) days before the meeting of the Council before which he is to appear. A hearing shall then be held by the Council wherein the accused judge shall be given an adequate opportunity to answer any and all charges. Causes judged sufficient for removal shall include, by way of example and not limitation:

- (a) Excessive use of intoxicants,
- (b) Immoral behavior,
- (c) Conviction of any offense other than minor traffic violations,
- (d) Use of official position for personal gain,
- (e) Desertion of office, or
- (f) Failure to perform duties.

The decision of the Council shall be final. Action taken under or interpretation of this section shall be consistent with Amendment X of the Constitution and By-laws of the Colville Confederated Tribes.

1-1-104 Appellate Judges

(a) Each case appealed will be handled on a case-by-case basis.

(b) The Chief Judge of the Colville Tribal Court shall submit to the Colville Business Council, for the Council's selection and approval, a list of potential judges to serve on an initial panel of appellate court justices.

(Amended 2/7/85, Resolution 1985-67)

(c) Following the initial selection of appellate panelists, the Chief Justice of the Colville Court of Appeals shall make the final selection of judges to serve on the appealed case. The final panel shall be created on a case-by-case basis and shall be paid for services rendered as provided by the Business Council.

(Amended 9/7/76, Resolution 1976-554)

(d) The Chief Justice of the Colville Tribal Court may establish an en banc proceeding consisting of all members of the original panel of appellate justices as provided by tribal court rules.

(e) The appellate judges shall be sworn in by the Chief Judge of the Colville Tribal Court to sit on the assigned case.

(Adopted 2/22/83, Resolution 1983-140)

1-1-105 Magistrates

In addition to judges provided by this Chapter, the Business Council may appoint, up to three (3) magistrates to exercise the powers provided for herein. Such person must meet all the requirements of this Chapter and shall be bound by all the provisions herein. Provided however, that such persons need be over twenty-one (21) years of age. Such persons shall have the power to issue search or arrest warrants, receive bail, set the amount of bail where no amount has been set by tribal law or the Chief Judge, and set and continue trial dates. Magistrates shall exercise these powers when assigned to them by a Tribal Judge or at any time a Tribal Judge is not reasonably available. Any such action of a magistrate shall be subject to

Appendix B: Excerpt from CCT Code Ch. 2-1

complaining witness is aware of the gravity of initiating a criminal complaint, the necessity of a Court appearance for himself and witnesses, the possible liability for false arrest and consequences of perjury, such affidavit may be in substantially the form prescribed or approved by the Administrator of the Court.

(f) "Issuance of summons" if it appears from the complaint or from an affidavit filed that there is reasonable cause to believe that an offense has been committed and that the defendant has committed it, the judge may order service of the complaint upon the defendant either by criminal summons or by a warrant to apprehend pursuant to Colville Tribal Code section 2-1-32. The judge shall issue a summons instead of a warrant unless there is reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent serious bodily harm to the accused or another, or a person summoned fails to appear in response to the summons, or if service is unsuccessful, a warrant for his arrest may issue.

(Amended 4/17/86, Resolution 1986-172)

2-1-31 Limitation on Filing of Complaints

No complaint shall be filed charging the commission of an offense as defined by this Code unless the offense shall have been committed within the time period for that class of offense as follows:

Class A or those offenses listed in CTC 3-3-40(a).....Five (5) years

Class B or those offenses listed in CTC 3-3-40(b).....Three (3) years

Class C or those offenses listed in CTC 3-3-40(c).....One (1) year

(Amended 8/17/89, Resolution 1989-610)

2-1-32 Warrants to Apprehend

Every judge of the Court shall have the authority to issue warrants to apprehend, the warrants to issue upon a showing of probable cause only after a written complaint shall have been filed bearing the signature of the complaining witness. Service of warrants shall be made by an officer. No warrant to apprehend shall be valid unless it shall bear the signature of a judge of the Court.

2-1-33 Arrests

No police officer shall arrest any person for any offense defined by this Code or by federal law, except when the offense shall occur in the presence of the arresting officer or he shall have probable cause to believe that the person arrested has committed an offense, or he shall have a warrant commanding him to apprehend the person.

2-1-34 Hot Pursuit

Any police officer who observes any person inside the Reservation committing an offense defined by this Code or by federal law or who has probable cause to believe that the person has committed an offense, may pursue and capture the person or seize and impound the property in his possession if he attempts to flee the Reservation.

2-1-35 Search Warrants

Every judge of the Court shall have authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of the Court. However, no warrant of search and seizure shall be issued except upon a presentation of a written or oral complaint based upon probable cause, supported by oath or affirmation and charging the commission of an offense against the Tribes. No warrant for search and seizure shall be valid unless it contains the name or description of the person or property to be searched and seized and bears the signature of a judge of competent jurisdiction. Service of warrants of search and seizure shall be made by an officer.

2-1-36 Search Without Warrant

An officer may search or seize property without a warrant in circumstances under which warrantless searches are permitted by federal criminal law.

2-1-37 Crime Involving Domestic Violence

(a) The provisions in Chapter 5-5 shall be used in cases involving domestic violence. To the extent that

Appendix C: Excerpt from CCT Code Ch. 3-1

- 3-1-55** **Theft**
Any person who shall take the property of another person with intent to steal shall be guilty of Theft. Theft is a Class B offense.
- 3-1-56** **Theft of Services**
Any person who shall obtain services which he knows are available only for compensation, by deception, threat, force or any other means designed to avoid due payment therefor, shall be guilty of Theft of Services. Theft of Services is a Class B offense.
- 3-1-57** **Trespass-Buildings**
Any person who shall enter or remain in any building or occupied structure or the premises of another person, knowing that he is not authorized to do so, whether by day or night, shall be guilty of Trespass-Buildings. Trespass-Buildings is a Class C offense.
- 3-1-58** **Trespass-Lands**
Any person who shall enter or remain upon any land as to which notice against trespass is given to him by actual communication, or by posting in a manner reasonably likely to come to the attention of intruders or by fencing or other means of enclosure manifestly designed to exclude intruders, or who shall willfully allow livestock to occupy or graze on the fenced lands of another shall be guilty of Trespass-Lands. Trespass-Lands is a Class C offense.
- 3-1-59** **Unauthorized Use of Vehicle**
Any person who shall operate another's automobile, airplane, motorcycle, motor boat or other motor propelled vehicle without the consent of the owner shall be guilty of Unauthorized Use of Vehicle. Unauthorized Use of Vehicle is a Class B offense.
- 3-1-60** **Unlawful Disposition of Estate Property**
Any person who shall, without proper authority, sell, trade, or otherwise dispose of any property of an estate before determination of the heirs, shall be guilty of Unlawful Disposition of Estate Property. Unlawful Disposition of Estate Property is a Class C offense.
- 3-1-61** **Unlawful Fence Cutting**
Any person who shall willfully cut the wire or any member of a fence belonging to another shall be guilty of Unlawful Fence Cutting. Unlawful Fence Cutting is a Class C offense.
- 3-1-62** **Unlawful Green Timber Cutting**
Any person who shall, without proper authority cut any standing green timber on the Reservation, shall be guilty of Unlawful Green Timber Cutting. Unlawful Green Timber Cutting is a Class C offense.
- 3-1-63** **Unlawful Issuance of Bank Check**
(a) A person commits unlawful issuance of bank check if the person shall, is with the intent to defraud, issue, or pass a check, draft or order for payment of money upon any bank or other depository for the purpose of obtaining money, property or any other thing of value, or paying for services, knowing at the time of such issuance or delivery that:
- (1) He has insufficient funds in or credit with the bank or depository for payment in full; or
 - (2) Prior to the issuance or delivery of said check or order he has closed his account with the bank or depository; or
 - (3) He issues a stop-payment order directing the bank or depository on which the check is drawn not to honor said check and fails to make payment of money in the amount of the check or draft or otherwise arrange a settlement agreed upon by the holder of the check within thirty (30) days of issuing said check or draft.

OFFICE RECEPTIONIST, CLERK

To: Cara Hazzard
Subject: RE: State v. Clark; Case No. 87376-3

Received 12-21-12

From: Cara Hazzard [<mailto:chazzard@zcvbs.com>]
Sent: Friday, December 21, 2012 12:58 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Brian Gruber; Joshua Osborne-Klein
Subject: State v. Clark; Case No. 87376-3

Dear Clerk,

Please accept the attached documents (listed below) to be filed in the case of State of Washington v. Michael Allen Clark, Washington State Supreme Court Case No. 87376-3.

1. Colville Confederated Tribes' Motion for Leave to File *Amicus Curiae* Brief
2. *Amicus Curiae* Brief of the Colville Confederated Tribes

Filed by Brian C. Gruber, WSBA #32210 of Ziontz Chestnut, Varnell, Berley & Slonim, 425-448-1230, bgruber@zcvbs.com.

Thank you,

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