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Case No. 87376-3

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALLEN CLARK

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR
OKANOGAN COUNTY

**SUPPLEMENTAL BRIEF OF
PETITIONER**

Submitted by:

Anthony Martinez, Rule 9, #9128404
Stephen Graham, WSBA #25403
Law Office of Steve Graham
1312 North Monroe, #140
Spokane, WA 99201
Telephone: 509-252-9167
Attorney for Petitioner Michael Clark

ORIGINAL

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A. STATEMENT OF ISSUE

Does the Constitution require local police departments to obtain, or to attempt to obtain, a search warrant issued by a tribal court, prior to searching the home of a tribal member living on trust land on an Indian reservation?

B. STATEMENT OF THE CASE

Michael Clark is an enrolled member of the Colville Confederated Tribes, and is a resident of Omak, Washington on the Colville Indian Reservation. The State charged Michael Clark with Burglary in the 2nd Degree, Theft 1st Degree, and Malicious Mischief in the 3rd Degree. CP 95. The charges stem from the October 13th, 2009 burglary of a railroad depot which sits on fee land, but is on the Reservation. RP 29-30. The Omak police obtained a search warrant for Clark's trailer (which sits on trust land on the Reservation) from a District Court judge in Okanogan County. RP 27. The detective made no effort to obtain a search warrant from a judge from the Colville Confederated Tribes. RP 28. The detective did not seek assistance from the tribal police either. RP 28. The detective is not cross-commissioned as an officer with the tribe. RP 27. The detective then served the search warrant on Mr.

Clark's home and found stolen items from the railroad burglary.
RP 315.

Michael Clark filed a motion to suppress evidence on June 3rd, 2010, arguing that the police should have obtained a warrant from the Colville Tribal Court to search his residence. CP 80-83. A hearing was held and testimony was taken from Detective Koplín (RP 17) and briefly from Michael Clark (RP 42). The trial court denied the defendant's motion to suppress. CP 48-50. The case proceeded to jury trial. Mr. Clark was acquitted of Burglary and Malicious Mischief, but convicted of Theft in the First Degree. RP 455. He appealed unsuccessfully to the Court of Appeals. The Supreme Court granted review.

C. ARGUMENT

1. **The Constitution requires local police departments to obtain, or to attempt to obtain, a search warrant issued by a tribal court, prior to searching the home of a tribal member living on trust land on an Indian reservation.**

A Tribal warrant is needed to execute a search warrant on Indian land. See *United States v. Baker*, 894 F.2d 1144 (10th Cir. Colo. 1990). In that case, the court explained:

Defendant contends that the search warrant was void as beyond the issuing state court's jurisdiction pursuant to 18 U.S.C. §§ 1151-1153, because it purports to authorize a search for evidence of criminal activity on property rented by an enrolled member of the Southern Ute Tribe and located within the exterior boundaries of Southern Ute

tribal lands. Since it is undisputed that defendant's property was located within Indian country and Colorado has never obtained an extension of its jurisdiction to include such lands, we must agree with defendant that the La Plata County District Court acted beyond its authority in issuing the search warrant for evidence of suspected criminal activity on defendant's property.

Id. 894 F.2d 1144, 1146.

Under the laws of the Major Crimes Act, codified as amended at 18 U.S.C. Sec 1153 (1982), the U.S. has exclusive jurisdiction over any Indian who has allegedly committed within Indian country any of 14 enumerated crimes, including murder. That Act, as amended, provides in pertinent part:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, **burglary**, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (Emphasis added)

The Supreme Court has expressly ruled that state criminal jurisdiction in Indian country is limited to crimes committed "by non-Indians against non-Indians . . . and victimless crimes by non-Indians." *Solem v. Bartlett*, 465 U.S. 463, 465 n.2, 79 L. Ed. 2d 443, 104 S. Ct. 1161 (1984).

The police sought the search warrant to investigate Michael Clark's involvement in the suspected burglary of a structure belonging to Columbia

River Railroad at 901 Omak Avenue, an address also within the Colville Indian Reservation. “[A] state court may not issue a warrant to search an area within Indian country where the state does not have jurisdiction over the underlying crime.” *State v. Mathews*, 133 Idaho 300, 313 (1999). In Michael Clark’s case, the police should have availed themselves of the procedures under the Colville Tribal Code to properly search the residence in question. If the Tribe provides a legal channel to seek the State’s goal, then courts are slow to allow a State process that would disrupt this tribal process. As stated in *State v. Mathews*:

Other courts addressing this issue in similar contexts have focused their analysis on the existence of a tribal procedure addressing the execution of state process pursuant to state court jurisdiction over the underlying crime. In *State ex rel. Merrill v. Turtle*, 413 F.2d 683 (9 Cir. 1969), cert. denied, 396 U.S. 1003, 24 L. Ed. 2d 494, 90 S. Ct. 551 (1970), the court reviewed the validity of a state's extradition of an Indian defendant from the reservation. The court in *Merrill* recognized that the validity of the state's exercise of jurisdiction within Indian country "must be determined in light of whether such exercise would 'infringe on the right of reservation Indians to make their own laws and be ruled by them.'" 413 F.2d at 685 (citing *Williams v. Lee*, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)). The Ninth Circuit, applying this analysis, held that the state's exercise of jurisdiction infringed on the Indians' right to self-government where the tribe had an established extradition procedure which was not followed by the state. However, in *State ex rel. Old Elk v. District Court of Big Horn*, 170 Mont. 208, 552 P.2d 1394, 1398 (Mont. 1976), the court held that the execution of a state arrest warrant for an Indian within Indian country was valid in the absence of tribal court procedure governing extradition. Thus, the courts addressing the exercise of state arrest jurisdiction within Indian country 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.

State v. Mathews, 133 Idaho 300, 314 (1999).

The Colville Tribal Code provides as follows:

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.

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.

Thus it is clear that the Omak police could have sought a Tribal warrant, but chose not to.

When our case went to Division Three, the Court of Appeals relied on the case of *Nevada v. Hicks* in making its decision. That case is distinguishable. In *Nevada v. Hicks*, the Supreme Court phrased the issue in that case as: “[W]hether a *tribal court may assert jurisdiction over civil claims against state officials* who entered tribal land to execute a search

warrant against a tribe member suspected of having violated state law outside the reservation.” *Hicks*, 533 U.S. at 355, 121 S.Ct. at 2308, 150 L.Ed.2d at 405 (emphasis added). In the case at bar, the issue is whether or not off-reservation police officers can lawfully search trust lands without applying for a search warrant through the Tribal court. The distinction is that in *Hicks*, the Tribe was attempting to extend its jurisdiction over state officials by subjecting them to civil claims in tribal court. Michael Clark is not the only one to see this distinction. Courts in Utah, North Dakota, and Michigan have also made this distinction. We next turn those three courts.

In the case of *Jones ex rel. Murray v. Norton*, a court in Utah considered a motion to dismiss a wrongful death action against a police detective who joined a police chase that spilled onto an Indian reservation that lead to the death of tribal member. No. 2:09-cv-00730-TC-SA, 2010 WL 2990829 (10th Cir. July 26, 2010). The police detective moved to dismiss citing *Nevada v. Hicks*. The court did not consider *Nevada v. Hicks* to be on point, and explained.

An arrest of a tribal member on tribal land by a state officer is unconstitutional because “[a] warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause.” *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir.1990) (holding that an Oklahoma police officer did not have jurisdiction to arrest a tribe member on tribe land for violation of Oklahoma's public intoxication ordinance). . . . “The Supreme Court has expressly stated that state criminal jurisdiction in Indian country is

limited to crimes committed ‘by non-Indians against non-Indians ... and victimless crimes by non-Indians.’ “ *Ross*, 905 F.2d at 1353 (quoting *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)). Defendants argue that under *Nevada v. Hicks*, state sovereignty does not end at a reservation's borders. 533 U.S. 353, 360–61, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). In *Hicks*, the Supreme Court held that an Indian tribe lacked both “legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, [and] lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duty.” *Id.* at 374. But that case does not modify the holding in *Ross* because *Hicks* concerned tribal authority rather than the authority of the state. Specifically, *Hicks* held that the tribes cannot interfere with the state concerning areas of the state's jurisdiction: tribe members off the reservation and non-tribe members. Conversely, *Ross* held that the state may not interfere with the self-governance of Indian tribes by arresting tribe members on tribal land for crimes committed on tribal land.

Id.

Similarly, a related question was considered by the State Supreme Court of North Dakota. *State v. Cummings*, 2004 S.D. 56, 679 N.W.2d 484 (2004). In *Cummings*, a sheriff's deputy pursued a speeding vehicle and arrested the driver who was a tribal member. The court upheld the suppression of derivative evidence due to the unlawful entry onto Indian lands without a warrant, rejecting the prosecutor's reference to *Nevada v. Hicks*. The court explained:

State asserts that the trial court erred in relying on *Spotted Horse* and disregarding the United States Supreme Court's holding in *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). Our review of *Hicks* reveals that its holding does not apply in this case and that the language the State relies upon in support of its argument is insufficient to allow such an incursion on tribal sovereignty,

especially without specific direction from the United States Congress or a clear holding by a majority of the Supreme Court. By its own terms, the holding of *Hicks* does not apply in this case. The Supreme Court phrased the issue in that case as:

[W]hether a *tribal court may assert jurisdiction over civil claims against state officials* who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.

Hicks, 533 U.S. at 355, 121 S.Ct. at 2308, 150 L.Ed.2d at 405 (emphasis supplied). Here, the question is whether a state officer may pursue a tribal member onto a reservation for a traffic offense without a warrant or tribal permission. The key distinction is that in *Hicks*, the Tribe was attempting to extend its jurisdiction over state officials by subjecting them to claims in tribal court. Here, the State is attempting to extend its jurisdiction into the boundaries of the Tribe's Reservation without consent of the Tribe or a tribal-state compact allowing such jurisdiction. In other words, in *Hicks*, tribal sovereignty was being used as a sword against state officers. Here, tribal sovereignty is being used as a shield to protect the Tribe's sovereignty from incursions by the State.

State v. Cummings, 2004 S.D. 56, 679 N.W.2d 484, 487-88.

In the case of *United States v. Peltier*, the court invalidated a search warrant issued for land on a reservation that was signed by a state court judge. 344 F. Supp. 2d 539 (E.D. Mich. 2004). The defendant was a tribal member and lived within the bounds of the reservation, and as a result of the search warrant, the police found various drugs and firearms. The court considered the case of *Nevada v. Hicks* case, but only for the proposition that “[s]tates presumptively lack both civil and criminal jurisdiction over tribal members for activities that occur within reservation boundaries.” *Peltier*, 344 F. Supp. 2d at 547 citing *Hicks*, 533 U.S. at 362, 121 S.Ct. 2304. The *Peltier* court explained:

In *United States v. Baker*, the Tenth Circuit held that in the absence of State criminal jurisdiction, a State search warrant issued to search land on an Indian reservation was not valid against a tribal member unless it was issued pursuant to Federal Rule of Criminal Procedure 41 or it was “otherwise ‘federal in character.’ ” 894 F.2d at 1146–47.

...

The same reasoning applies here. The investigation into drug activity in Isabella County was run by a State concept unit: BAYANET. There is no evidence that federal agents participated in the surveillance of investigation of the defendant or his residence. No attorney for the government or government agent requested the State judge to issue the search warrant, and there was no federal involvement in the execution of the warrant. The search warrant, therefore, was not valid in Indian country. A search warrant signed by a person who lacks the authority to issue it is void as a matter of law. *United States v. Neerng*, 194 F.Supp.2d 620, 627 (E.D.Mich.2002) (citing *United States v. Scott*, 260 F.3d 512 (6th Cir.2001)). The State judge was not authorized to issue the warrant to search the property within the reservation in this case. The evidence seized pursuant thereto, therefore, must be suppressed.

United States v. Peltier, 344 F. Supp. 2d 539, 547-48 (E.D. Mich. 2004).

This was the same argument that Michael Clark made below to the Superior Court and to Division III.

A minority (of one) jurisdictions has cited *Nevada v Hicks* for the proposition that State police can enter a reservation with a tribal search warrant. In the case of *Narragansett Indian Tribe v. Rhode Island*, the court held that State officials could, in fact, search Tribal lands, with a search warrant signed by a state judge. 449 F.3d 16, 22 (1st Cir. 2006).

That case is distinguishable. The Narragansett Indian Tribe doesn't have the same sovereignty or independence that the Colville Tribes. When the

Narragansett Indians reclaimed their territorial lands of 1,800 acres in Rhode Island, a settlement provision was that “all laws of the State of Rhode Island shall be in full force and effect on the settlement lands.” 449 F.3d 16, 19 (1st Cir. 2006). In addition, the law states that “the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.” *Id.*, citing 25 U.S.C. § 1708(a). Upholding the search warrant, the court explained:

In effect, then, the Tribe abandoned any right to an autonomous enclave, submitting itself to state law as a *quid pro quo* for obtaining the land that it cherished. It is surpassingly difficult to imagine what the linguistic formulation that embodied this concession would entail if not an acknowledgment that the State may enforce its applicable criminal laws on the settlement lands by conventional means; any contrary interpretation would make the relevant provisions of both the J-Mem and the Settlement Act meaningless. The execution of a search warrant referable to violations of the State's legally binding cigarette tax scheme falls squarely within the ambit of the ceded authority.

Id. at 22.

To uphold the precedent of the Court of Appeals below would serve to further erode the sovereignty of Indian nations and reservations in this country.

From first contact, Indian tribes have been in danger of being assimilated into American society, thereby losing their separate political and cultural identity. The only thing preventing this has been the tribes' un-extinguished claim to sovereignty--“the right [to be both] self-governing, [and] to exercise dominion over land.” The federal government's failure to protect tribes' unique status and communal identities has seriously eroded the tribes' land base, and

with it, their ability to self-govern. This has left tribes, which have resisted assimilation, outside our society--without the power to resist its intrusions, share in its benefits, or contribute to its evolution.
(Internal cites omitted)

Hope M. Babcock, A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered, 2005 Utah L. Rev. 443, 444-45 (2005)

Mr. Clark feels that to uphold the Court of Appeals would establish a bad precedent. Out of all the search warrant cases that have been discussed (by all parties to this case), most police departments usually recognized the tribal authorities in some way. In *Nevada v. Hicks*, the defendant police department had a state court warrant and a Tribal court warrant.¹ In *Idaho v. Mathews*, the “sensitivity of state law enforcement officers to Nez Perce tribal sovereignty [was] demonstrated by their efforts to obtain direction from the BIA, [and] the tribal prosecutor...” 133 Idaho 300, 313, 986 P.2d 323, 336 (1999). Here the Omak police department did not involve the Tribal judges, the tribal police, or the tribal prosecutor, and pretty much pretended that the Tribes did not exist. That is not how the law works in the State of Washington.

RCW 37.12.010 breaks down where and when State Courts have jurisdiction over tribal members or their lands. Nothing in RCW 37.12.010

¹ *Nevada v. Hicks*, 533 U.S. 353, 356, 121 S. Ct. 2304, 2308, 150 L. Ed. 2d 398 (2001).

extends state jurisdiction – criminal or civil – over the execution of a search warrant on Indian land. RCW 37.12.010 reads, “such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation ...”. Our Public Law 280 statute precludes the state’s exercise of jurisdiction on its face. The history of Public Law 280 was summarized by this Court in *State v. Pink*:

In 1953, Congress enacted federal legislation authorizing states to impose concurrent state jurisdiction in Indian country with or without tribal consent. Public Law 280, Pub.L. No. 85–280, 67 Stat. 588 (1953). The Washington Legislature, however, elected to extend civil and criminal jurisdiction only to those reservations requesting that it do so. Ch. 37.12 RCW; *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471–72, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979); see *Cross v. Comm’r of Internal Revenue*, 126 Wash.2d 43, 46–49, 891 P.2d 26 (1995) (discussing the history of Public 951 Law 280 (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321–1326; 28 U.S.C. § 1360)). But in 1963, the Washington Legislature extended its jurisdiction, without tribal consent, to include state criminal and civil jurisdiction over all non-Indians in Indian country, Indians on fee-patented land on reservations, and Indians on tribally-owned or individually allotted lands held in trust by the federal government. RCW 37.12.010; *Quinault Tribe*, 368 F.2d at 651–52; *State v. Sohappy*, 110 Wash.2d 907, 909, 757 P.2d 509 (1988). The legislature did not assert general jurisdiction but set forth eight categories of cases over which it would assert jurisdiction. RCW 37.12.010(1)-(8). These excepted categories include: (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 on the public streets, alleys, roads, and highways. RCW 37.12.010(1)-(8). In 1968, Congress narrowed the states’ powers under Public Law 280 by enacting the Indian Civil Rights Act of 1968, 25 U.S.C. § 1321. Under the act, a state may not assume criminal jurisdiction without the consent of the tribe. This

jurisdictional limitation was not retroactive; jurisdiction a state assumed before the 1968 act was not displaced.

State v. Pink, 144 Wn.App. 945, 950, 185 P.3d 634, 636-37 (2008). That above history of Public Law 280 (involving the Quinault Tribe) is largely the same as the Colville Indian Tribes. Under RCW 37.12.021, the Colville Tribes (or rather their leaders) handed over all criminal jurisdiction over to the State in 1965. The history of this is covered in *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). However, Washington State voluntarily retroceded jurisdiction back to the Tribes in 1987. RCW 37.12.100-140.

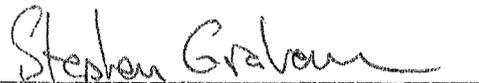
Absent RCW 37.12.010, Washington would not have any jurisdiction over the underlying conduct. Washington State's jurisdiction over Indian country is limited under Public Law 280. *State v. Jim*, 173 Wash. 2d 672, 678, 273 P.3d 434, 436 (2012). The Colville Tribal Court has concurrent jurisdiction over the crime and the police could easily have gone to tribal court to get a warrant. There is nothing in the record that the police in Okanogan County have ever had a problem with a Tribal Court judge improperly denying a warrant. Accordingly, we ask this court to direct the police of this State to work with the tribal courts for searches on trust land.

D. Conclusion.

In conclusion, we would ask that this Court overturn the decision of the Court of Appeals.

DATED this 7th day of October, 2012.

By 
Anthony Martinez, Rule 9, #9128404

By 
Stephen Graham, WSBA #25403
Attorney for Petitioner Michael Clark

I, Stephen Graham, swear under penalty of perjury under the laws of the State of Washington that I served a copy of Appellant's Supplemental Brief by postage paid, first class, U.S. Mail, on the following persons:

Stephen Bozarth
Jennifer Richardson
Prosecuting Attorney
PO Box 1130
Okanogan, WA 98840

Michael Clark, #793311
Washington State Correction Center
1313 N 13th Ave
Walla Walla, WA 99362

Tim Woolsey
ORA Colville Tribes
Box 150
Nespelem, WA 99155

Lisa Koop
ORA Tulalip Tribe
6406 marine Dr.
Tulalip, WA 98271

DATED this 7th day of October, 2012



STEPHEN T. GRAHAM

OFFICE RECEPTIONIST, CLERK

To: steve@grahamdefense.com
Cc: Martinez Anthony
Subject: RE: State v. Michael Clark 87376-3

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From: steve@grahamdefense.com [<mailto:steve@grahamdefense.com>]

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To: OFFICE RECEPTIONIST, CLERK

Cc: Martinez Anthony

Subject: State v. Michael Clark 87376-3

Attached is my Petitioner's Supplemental Brief for filing in the case of State v. Michael Clark 87376-3. Thank you,
Steve Graham #25043

LAW OFFICE OF STEVE GRAHAM
1312 North Monroe, Suite 140
Spokane, WA 99201
Phone (509) 252-9167
Fax (509) 356-1714
Cell: (509) 675-0847



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