No. 11-___

IN THE

Supreme Court of the United States

ROBERT REGINALD COMENOUT, SR., AND
ROBERT REGINALD COMENOUT, JR.,
Petitioners,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the State of Washington Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Did the court below err by holding that the State of Washington has jurisdiction to charge a state cigarette tax crime against a Quinault Indian and other Indians allegedly selling untaxed cigarettes at the Quinault Indian's trust allotment located outside the Quinault Indian Reservation boundaries?

2. Did the court below err in refusing to apply the federal law definition of Indian country, 18 U.S.C. § 1151(c)?

3. Did the court below err in holding that the State of Washington, an optional Public Law 280 state, had state tax crime criminal jurisdiction of enrolled Indians on trust lands?

4. Did the court below err in holding that Washington law, Wash.Rev.Code 37.12.010 through 060, was exempt from the Quinault Tribe's retrocession of state jurisdiction?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all remaining parties to the proceedings in the court below. Edward Amos Comenout, one of the Defendants and the Quinault Tribe member who owned the trust land, died on June 4, 2010. When the case was pending in the Court of Appeals of the State of Washington Division II, the State moved to dismiss the case against him. The Motion was granted on June 30, 2010. Attached as Appendix D.[1] Robert Reginald Comenout Sr., and Robert Reginald Comenout Jr., are the remaining Petitioners-Appellants below and are the Petitioners in this writ.

[1] Appendix hereafter "App" refers to the Appendix filed with this Petition for Writ of Certiorari.

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The Information (App. C) was filed in the State Court of Pierce County, Washington. A Motion to Dismiss was denied by the trial court. The case was timely appealed to the Court of Appeals Division II of Washington State. That Court, on its own motion, certified two issues to be fundamental and urgent issues of broad public impact requiring prompt and ultimate determination. Pursuant to Wash.Rev.Code 2.06.030(d), the issue sought to be heard in this Petition is whether a state court can charge a state tax crime against Indians for activity on trust land located outside reservation boundaries.

OPINION BELOW

Initially, the Court of Appeals granted review. The State Supreme Court overturned the Court of Appeals by answering the certified questions referred to it and upheld state jurisdiction.

The State Supreme Court accepted the review on September 17, 2011. (App. B). The Washington State Supreme Court Opinion dated November 8, 2011, is reported at *Comenout v. Washington*, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011). (App. A). The judgment by the Washington State Supreme Court was final on December 28, 2011. (App. B). This petition is timely.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 for the reason that the state statute, Wash.Rev.Code 37.12.010, is contrary to the federal definition of Indian country, 18 U.S.C. § 1151 and U.S.Const. Art. 1 § 8, cl.3. The allotment provision of the Treaty with the Quinaults is also an issue. These issues are final decisions by the Washington State Supreme Court.

The reason that the issues are final is that the claim that the State had criminal jurisdiction of Indians is separable from the merits in the case. See *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44, 97 S.Ct 2205, 53 L.Ed.2d 96 (1977). Later review of the federal jurisdictional issue of criminal jurisdiction of Indians is unobtainable. The state court decision is final for purposes of jurisdiction of the member Indians. If this Court reverses, the case is dismissed. Since this is a criminal case, the State will normally have no appeal. *Arkansas v. Sullivan*, 532 U.S. 769, 772, 121 S.Ct 1876, 149 L.Ed.2d 994

(2001). *New York v. Quarles*, 467 U.S. 649, 651 104 S.Ct 2626, 81 L.Ed.2d 550 (1984); *Kansas v. Marsh*, 548 U.S. 163, 168, 126 S.Ct 2516, 165 L.Ed.2d 429 (2006) and *Harris v. Washington*, 404 U.S. 55, 56, 92 S.Ct 183, 30 L.Ed.2d 212 (1971). These are exceptions to the finality rule. *Pierce County, Washington v. Guillen*, 537 U.S. 129, 140, 123 S.Ct 720, 154 L.Ed.2d 610 (2003); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485, 95 S.Ct 1029, 43 L.Ed.2d 328 (1975). Therefore, this Court has jurisdiction.

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

This case involves the Treaty of Olympia, July 1, 1855, (App. E) creating the Quinault Indian Reservation. It provides for off-reservation Indian owned allotments. This case seeks to clarify that the federal definition of Indian Country, 18 U.S.C. § 1151 includes off-reservation Indian allotments when victimless crimes by Indian members are charged. Federal preemption is mandated by U.S. Const. Art. 1 § 8, cl. 3, granting congressional exclusive control over Indian tribes and Wash.Const Art. 26(2) disclaiming all rights to all lands held in trust by tribal Indians. The Petitioners will also establish that Public Law 280, 18 U.S.C. § 1162(b), 18 U.S.C. §§ 1152, 1153, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 and 15 U.S.C. § 375(7)(B) as recently amended and as originally enacted never granted criminal jurisdiction over tribal Indians allowing Washington State to charge a state tax crime. The State of Washington never acquired jurisdiction as the State accepted taxation of Indians real and personal property in enacting 18 U.S.C. § 1152(b) stating:

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. Public Law 280.

STATEMENT OF FACTS

Petitioners, Robert Reginald Comenout Sr., and Robert Reginald Comenout Jr., enrolled Native American Indians, have been criminally charged by the State of Washington with three felonies. The felonies are selling cigarettes without a license contrary state law, Wash.Rev.Code 82.24.500; possessing over ten thousand cigarettes without notifying the state contrary to Wash.Rev.Code 82.24.110(2); and theft in the first degree. The date of the alleged state crimes is July 25, 2008. The date of the Information is September 26, 2008. The State admitted that the alleged state crimes occurred on land held in trust by the United States Government. (App. G). The 1926

Deed states that it is allotted land to Quinault Indian Edward Comenout, Edward Amos Comenout's father. (App. H) The Statement of Probable Cause (App. G) admits that the land was Indian trust land, 25 U.S.C. §§ 348 and 354. The State contends that the land is outside the boundaries of "any formal reservation." The State also admitted that Edward A. Comenout, now deceased, was a registered member of the Quinault Indian Tribe. (App. G). The Comenouts, in the Pierce County Superior Court, moved to suppress and dismiss. They filed an interlocutory motion to the Washington State Court of Appeals, Division II that was granted. Division II found that two issues merited review to the Washington State Supreme Court. The Washington State Supreme Court on March 24, 2011, accepted the certification of the two questions. They were:

1. Does the State have criminal jurisdiction over tribal members selling unstamped cigarettes from a store located on tribal trust land that is not within the borders of a reservation?

2. Are the Appellants exempt from collecting State cigarette taxes as "Indian retailers" under Wash.Rev.Code § 82.24.295(1)?

Initially, the Court of Appeals granted an interlocutory appeal on the basis that the State's cigarette tax law did not apply to the Comenouts.

The Washington State Supreme Court, in answering the certified questions reversed the Court of Appeals, held that the State had criminal jurisdiction and that the Defendants were not exempt from a state crime of collecting the State cigarette tax.

REASONS FOR GRANTING THE WRIT

A. The Washington Supreme Court Wrongfully Found State Jurisdiction.

The Washington State Supreme Court erred by refusing to apply the Indian country definition contained in 18 U.S.C. § 1151. The statute states:

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

This case is within 1151(c).

The Quinault Indian Treaty, Treaty of Olympia, 12 Stat 971 (1855) (App. E) at Article 6, provides that the President of the United States may remove the Quinault Indians from the Quinault Reservation and place them in other parts of the Washington Territory. Edward A. Comenout's father, with trust funds, in 1926 (App. H) bought the land in Puyallup, Washington, where the alleged state criminal activity occurred. It was placed in trust from the date of acquisition to this day. Petitioners are enrolled Tulalip and Yakama Indians and are treated the same as Quinault Indians for purposes of criminal jurisdiction by virtue of the "Duro Fix." 25 U.S.C.

§ 1301(2); *U.S. v. Lara*, 541 U.S. 193, 210, 124 S.Ct 1628, 158 L.Ed.2d 420 (2004). To gain entrance into the Union, the Washington Territory agreed on February 22, 1889, (25 U.S. Statutes at Large c 180 p 676) to disclaim all rights to Indian trust lands. The prior Act of March 2, 1853, establishing the Washington Territory retained authority to the federal government to regulate the Indians in the territory. (10 U.S. Statutes Large c 90 p 172). The Washington State Constitution incorporated the disclaimer provision into its Constitution. Art. 26(2) states in its relevant part:

> **Second.** That the people inhabiting this state do agree and declare that they forever disclaim . . . . all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

The complete mistake committed by the State of Washington in determining jurisdiction is that Washington never had criminal jurisdiction. The Quinault Treaty of 1855 predated Washington State statehood. The Washington State Constitutional disclaimer did not limit congressional control only to Indian reservations. It disclaimed any rights to "all lands . . . owned or held by any Indian." The disclaimer clearly applies to the trust land owned by Edward Comenout at Puyallup. Later, the retrocession is moot as the State always disclaimed criminal jurisdiction of Indians.

Consequently, the State never had authority over the trust property of the Quinault Indians, whether on or off the reservation. *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct 2102, 48 L.Ed.2d 718 (1976).

B. Public Law 280 Does Not Apply.

The Washington Court held that state criminal jurisdiction was not part of the Quinault retrocession. (*Comenout v. Washington*, 267 P.3d at 358). The reversible error is that the Treaty and Washington Constitution never granted Indian criminal jurisdiction to the State. In 1817, Congress passed the General Crimes Act, 18 U.S.C.§ 1152. The Act did not apply to offenses between two Indians or crimes on land secured by treaty. *U.S. v. McBratney*, 104 U.S. 621, 14 Otto 621, 26 L.Ed. 869 (1881). Sixty years later, Congress gave federal courts exclusive jurisdiction over major crimes which do not include state tax offenses. 18 U.S.C. §§ 2241-2244, 67 Stat 588. In 1953, Congress passed Public Law 280 (67 Stat 588) mandating criminal jurisdiction to six (6) states. The mandate did not include Washington State. In 1968, Congress amended Public Law 280, Pub. L. 90-284, 82 Stat 78, 25 U.S.C. §§ 1321(a) and 1322(a) to allow nine (9) states, including Washington, to assume optional jurisdiction. This amendment included a provision for tribal consent. It was not retroactive. The Act expressly excludes state taxation. 18 U.S.C. § 1162(b). Cohen's, "*Handbook of Federal Indian Law*," 2005 Ed., Nell Jessup Newton Ed. § 6.04[3][b][ii] states:

> The federal grant of jurisdiction to the states under Public Law 280 excludes significant subject areas, particularly in the regulatory and tax fields. The Act expressly precludes state taxing

> and certain other exercises of jurisdiction over trust and restricted Indian property, as well as jurisdiction over federally protected Indian hunting and fishing rights.

The law was again amended by the Tribal Law and Order Act of 2010, Pub L. 111-211, Title II § 221(a) and (b), 124 Stat 2272. The amendments are not retroactive to this case. The State of Washington never had authority over the Quinault Reservation since it was organized before Washington became a state. *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 387-88, 96 S.Ct 2102, 48 L.Ed.2d 710 (1976) held that Public Law 280 was not intended to assimilate Indian tribes. The legislative history holds that state tax jurisdiction has been intentionally excepted. This holding is clear error as the State of Washington never had criminal jurisdiction regarding this matter to the federal government never relinquished jurisdiction to Washington. Further, the State never exercised any criminal jurisdiction on any subject except the seven subject matters defined in Wash.Rev.Code 37.12.010. This statute contains the only jurisdictional areas requested by Washington State. They are: (1) Compulsory school attendance; (2) Public assistance: (3) Domestic relations; (4) Mental illness; (5) Juvenile delinquency; (6) Adoption proceedings; (7) Dependent children. None of the subject matter areas even remotely concern state taxes. Thus, Indians are exempt from state taxes. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). The Washington State Supreme Court erred (*Comenout*, 267 P.3d at 358) when it held . . . the jurisdiction exercised by the

State over the Tribe pursuant to the 1963 statutory amendment, RCW 37.12.010 through 060, was excepted from the retrocession. Consequently, the State's jurisdiction over cases like this was unaffected. (App. F). The manifest error by the Court was that the exception to retrocession of the eight subject matters never remotely included state tax crimes by Indians. The exception is not applicable to cases like this. The holding is contrary to *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 498, 99 S.Ct 740, 58 L.Ed.2d 740 (1979) rejected the argument that Washington, an optional P.L. 280 state, was required to assume full mandatory jurisdiction. The court held:

> A State that has accepted the jurisdictional offer in Pub.L. 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953.

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S.Ct 1257, 36 L.Ed.2d 129 (1973) holds that treaties prevent state taxation as ". . . Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." *Id.* at 175. The court held that the treaties must be interpreted as denying state taxation on Indians.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209, 107 S.Ct 1083, 94 L.Ed.2d 244 (1987) applies the test to determine the application of Public Law 280. It states, "if the intent of a state law is generally to prohibit certain conduct, it falls within

Pub.L. 280's grant of criminal jurisdiction, but if the state generally permits the conduct at issue . . . Pub.L 280 does not authorize its enforcement on an Indian reservation." Thus, smoking and state taxes are not prohibited in Washington, Pub.L 280 does not apply.

C. The Definition of 18 U.S.C. § 1151 Preempts State Law When State Taxation of Indians is at Issue.

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 453, 115 S.Ct 2214, 132 L.Ed.2d 400 (1995) holds that Indian allotments no longer part of a reservation are included in the definition of Indian Country. *U.S. v. Pelican*, 232 U.S. 442, 452, 34 S.Ct 396, 58 L.Ed. 676 (1914) denied state jurisdiction of a crime by a Colville Indian committed on an allotment located outside the Colville Indian Reservation. *Ex parte Van Moore*, 221 F. 954 (D.C.S.D. 1915) and *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (2010), confirm that off-reservation allotted lands fall under 18 U.S.C. § 1151(c), if within a reservation, they could also qualify under 18 U.S.C. § 1151(a). *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354-5, 82 S.Ct 424, 7 L.Ed.2d 424 (1962) also requires that federal law defines Indian Country. The State had no jurisdiction. The *Seymour* Court held that the issue was important as it pertained to the United States relationship with Indian wards.

The Washington Supreme Court on February 9, 2012, in *State v. Jim*, ___P.3d___, 2012 WL 402051, page 4 (Wash. 2012) involving an arrest of a Yakama Indian on a federally established *in lieu* fishing site, admitted that state law is not consistent with 18 U.S.C. § 1151 stating:

> The federal definition of Indian country and the land on which the State has assumed criminal jurisdiction do not exactly align. *Compare* 18 U.S.C. § 1151, *with* RCW 37.12.010. So whether land is Indian country for purposes of federal jurisdiction is not itself dispositive of whether the same land is within an Indian reservation for purposes of state criminal jurisdiction. However, the term "Indian reservation" appears in the federal definition of Indian country as one of three categories of land of which Indian country is comprised. 18 U.S.C. § 1151(a). If a tract of land is considered Indian country *because* it is a reservation, *see id.*, this informs whether such land is also a reservation for purposes of State jurisdiction under RCW 37.12.010. The term "reservation" is not defined in federal statute, though federal courts have had an opportunity to consider the matter. Because the very authority of Washington's statutory assumption of state criminal jurisdiction over Indian lands derives from federal law, *see* 25 U.S.C. §§ 1321, 1323, the two schemes are necessarily related.

The Washington State Supreme Court with dissents held that the in lieu fishing site was in federal jurisdiction even though not on any reservation. Off-reservation fishing sites and off-reservation allotments are both within 18 U.S.C. § 1151(c) and are both treated the same way. Both are in federal, not state jurisdiction, for Indian crime issues. The state statute is different, but the federal law definition preempts state law.

The state statute, Wash.Rev.Code 37.12.010, actually excludes the Comenout land as it applies to land stating "or subject to a restriction imposed by the

United States. The recently amended statute, 15 U.S.C. § 375(7)(A)and(B), called the PACT Act, clarifies that the definition of Indian country includes "any other land held in trust."

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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