11-424

No. _____

In The
Supreme Court of the United States

JERRY JOSEPH LOMAS,

Petitioner,

v.

TONY HEDGPETH, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit incorrectly denied Petitioner a Certificate of Appealability, pursuant to 28 U.S.C. § 2253(c), on his Sixth Amendment claim that his trial counsel rendered ineffective assistance of counsel by failing to file a Motion to Dismiss and/or Suppress pursuant to his Fourth Amendment right to be free from an unreasonable search and seizure on the Morongo Band of Mission Indians' Reservation's protected land?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Jerry Joseph Lomas respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's Request for a Certificate of Appealability, appears at page 1 of the appendix to the Petition. The United States District Court's Order of Adoption, Judgment, and Order Denying Certificate of Appealability appear at pages 2 to 7 of the appendix to the Petition.[1] The Final Report and Recommendation of the Magistrate Judge appears at pages 8 to 35 of the appendix to the Petition.

JURISDICTION

On July 18, 2011, the Ninth Circuit Court of Appeals entered its Order denying Petitioner's Request for Certificate of Appealability. The jurisdiction

[1] On October 19, 2009, the District Court entered Judgment dismissing Petitioner's claims pursuant to 28 U.S.C. § 2254, and on November 16, 2009, issued an Order denying Petitioner's Request for a Certificate of Appealability.

of this Court is invoked pursuant to 28 U.S.C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 2253 provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

2. 28 U.S.C. § 2254 provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination

of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for

> an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.
>
> (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

3. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

4. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

> seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 25, 2002, Petitioner Jerry Joseph Lomas ("LOMAS") was arrested and later charged, on August 13, 2004, by a Second Amended Information in the Riverside County Superior Court with six counts of assault with a semiautomatic firearm upon a peace officer (Cal. Penal Code § 245(d)(2)). Each count also included allegations that LOMAS used a semiautomatic firearm (Cal. Penal Code §§ 12022.5(a), 1192.7(c)(8)) and that LOMAS personally and intentionally discharged a firearm (Cal. Penal Code §§ 12022.53(c), 1192.7(c)(8)). Count 6 included an allegation that LOMAS committed the felony alleged in Count 6 while released from custody on a pending felony charge (Cal. Penal Code § 12022.1). LOMAS pled not guilty to all charges.

On October 6, 2004, following a five (5) day trial, the jury returned verdicts of guilty on all six counts of assault with a firearm on a peace officer in violation of Cal. Penal Code § 245(d)(1) (a lesser included

offense). The jury also found true as to each count that LOMAS personally used a semiautomatic rifle and personally and intentionally discharged same (Cal. Penal Code §§ 12022.5(a)(1), 1192.7(c)(8), 12022.53(c)). After the jury convicted LOMAS, for sentencing purposes, he admitted the allegation that he committed the felony alleged in Count 6 while released from custody on a pending felony charge (Cal. Penal Code § 12022.1).

On March 4, 2005, the trial court denied LOMAS' Motion for New Trial and Supplemental Motion for New Trial; and LOMAS was sentenced to a total of 36 years, 8 months in state prison and ordered to pay $4,000.00 in restitution. On March 18, 2005, the trial court vacated and modified LOMAS' sentence; however, the modification resulted in the same total punishment.

LOMAS timely appealed on March 22, 2005 to the Court of Appeal of the State of California, Fourth Appellate District, Division Two; his convictions were affirmed on September 27, 2006. LOMAS' Petition for Review to the Supreme Court of the State of California was filed on October 30, 2006 and denied on January 17, 2007. Thus, LOMAS exhausted all of his State Court remedies.

On January 3, 2008, LOMAS filed a Writ of Habeas Corpus by a Person in State Custody, pursuant to 28 U.S.C. § 2254, in the United States District

Court, Central District of California. The issue presented was:

> WHETHER PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS TRIAL ATTORNEY FAILED TO FILE A DISPOSITIVE PRE-TRIAL MOTION TO DISMISS ON JURISDICTIONAL GROUNDS AND/OR MOTION TO SUPPRESS BASED UPON THE ARRESTING OFFICERS' LACK OF ANY LAWFUL BASIS TO ENTER THE MORONGO BAND OF MISSION INDIANS' RESERVATION?

The District Court issued an Order Requiring an Answer/Return to the Petition on January 17, 2008. The Respondent ("HEDGPETH") filed an Initial Response on February 20, 2008 and an Answer on March 28, 2008. LOMAS filed a Traverse on April 10, 2008.

On September 4, 2009, United States Magistrate Judge Hillman issued a Report and Recommendation for dismissal of the Petition. On September 17, 2009, LOMAS filed his Objections to the Report and Recommendation. On October 19, 2009, the District Court adopted the Report and Recommendation and dismissed LOMAS' claim.

On October 20, 2009, LOMAS filed his Notice of Appeal to the Ninth Circuit Court of Appeals. In addition, LOMAS filed a Request for a Certificate of Appealability in the District Court. On November 16,

2009, the District Court denied LOMAS' Request for a Certificate of Appealability.

On November 23, 2009, LOMAS filed a Request for a Certificate of Appealability in the Ninth Circuit. On July 18, 2011, the Ninth Circuit issued an Order denying LOMAS' request.

LOMAS is currently incarcerated at the Kern Valley State Prison in Delano, California.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT INCORRECTLY DENIED PETITIONER A CERTIFICATE OF APPEALABILITY, PURSUANT TO 28 U.S.C. § 2253(c), ON HIS SIXTH AMENDMENT CLAIM THAT HIS TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FILE A MOTION TO DISMISS AND/OR SUPPRESS PURSUANT TO HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM AN UNREASONABLE SEARCH AND SEIZURE ON THE MORONGO BAND OF MISSION INDIANS' RESERVATION'S PROTECTED LAND

A. Introduction

Pursuant to 28 U.S.C. § 2253(c)(1), in order for LOMAS to appeal the District Court's dismissal of a petition for writ of habeas corpus, a "circuit justice or judge" must first issue a Certificate of Appealability. *Hanson v. Mahoney*, 433 F.3d 1107, 1111 (9th Cir. 2006). "It is well settled that the phrase 'circuit

justice or judge' – though ambiguous – includes district judges as well as circuit judges." *Id.* Regarding the issuance of a Certificate of Appealability as a predicate to appellate review, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") apply to all cases in which the notice of appeal was filed after the AEDPA's effective date, April 24, 1996. *See Valerio v. Dir. of the Dep't of Prisons*, 306 F.3d 742, 763 (9th Cir. 2002).

Under the AEDPA, in order for a Certificate of Appealability to issue, LOMAS must have made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The Ninth Circuit describes this showing requirement as "relatively low," and "satisfied when the petitioner can demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further." *Williams v. Woodford*, 384 F.3d 567, 583 (9th Cir. 2001) (internal quotations and citations omitted). Any doubt about granting a Certificate of Appealability is to be resolved in LOMAS' favor. *Id.* In an application for Certificate of Appealability, "the petitioner need not show that he should prevail on the merits since he has already failed in that endeavor." *Silva v. Woodford*, 279 F.3d 825, 833 (9th Cir. 2002); *citing Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

This Court has held: **"A petitioner satisfies [the above-referenced] standard by demonstrating that jurists of reason could disagree with**

the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *citing Slack v. McDaniel*, 529 U.S. 473, 481 (2000). [Emphasis added]. The preceding standard was designed to prevent "frivolous" appeals from proceeding, yet allows for the protection of the petitioner's right to be heard. *Sub judice*, LOMAS met this "relatively low" burden and this Court should grant LOMAS' petition for certiorari, vacate the Ninth Circuit's judgment and remand for further consideration.

The Ninth Circuit erred in denying Petitioner a Certificate of Appealability. Petitioner's narrow argument is that he was denied his Sixth Amendment right to effective assistance of counsel when his trial counsel failed to file a Motion to Dismiss and/or Suppress pursuant to his Fourth Amendment right to be free from an unreasonable search and seizure on his reservation's protected land. LOMAS' counsel failed to investigate and discover the legal basis, and move to dismiss the case (or suppress the evidence) based on the unequivocal fact that Public Law 280 did not authorize the police officers to enter the Indian Reservation where there was no probable cause that a crime was committed, or about to take place.

LOMAS' claim has merit and presents a substantial question regarding the denial of a constitutional right, which was worthy of consideration by the Ninth Circuit Court of

Appeals. As such, this Court should grant LOMAS' petition for certiorari, vacate the Ninth Circuit's judgment and remand for further consideration, thereby permitting LOMAS to appeal the dismissal of his claim in the District Court.

B. Magistrate Judge's and District Court's Findings[2]

On October 20, 2009, the District Court issued an Order Adopting the Report and Recommendation of United States Magistrate Judge Hillman. Essentially, Magistrate Judge Hillman found in his Report and Recommendation (dated September 4, 2009), that the Riverside County Sheriff's Department had jurisdiction over the area where the incident occurred. (R&R, p. 18). Moreover, Magistrate Judge Hillman found that "a pre-trial motion to dismiss for lack of jurisdiction would have been meritless." (R&R, p. 16). Magistrate Judge Hillman decided that the State Court's decision below was not "based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." (R&R, p. 15).

The District Court adopted all of Magistrate Judge Hillman's findings, which LOMAS contended were erroneous, contrary to the record evidence, and at a minimum, the issue would be decided differently

[2] The Ninth Circuit's Order denying the Certificate of Appealability did not contain an analysis of LOMAS' petition.

by the Ninth Circuit Court of Appeals, therefore, a Certificate of Appealability should have been issued. The Ninth Circuit erred when it failed to issue the Certificate of Appealability. Based on the authorities and citations below, this Court should decide that LOMAS met the "relatively low" burden required for a Certificate of Appealability, grant this petition, and remand the cause to the Ninth Circuit for further proceedings.

C. Certificate of Appealability Warranted: Denial of Petitioner's Sixth Amendment Constitutional Right to Effective Assistance of Counsel

It is clear that Petitioner has met the "relatively low" requirement that there has been a "substantial showing of the denial of [his] constitutional right[s]" to effective assistance of counsel (in violation of the Sixth Amendment) and to be free from an unreasonable search and seizure (in violation of the Fourth Amendment). *See* 28 U.S.C. § 2253(c); *Williams*, 384 F.3d at 583. Therefore, the Ninth Circuit erred when it failed to issue a Certificate of Appealability permitting LOMAS to proceed with his appeal because, although the District Court may have dismissed LOMAS' Petition, "the issues [sub judice] are debatable among jurists of reason; **that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further.**" *Id.* [Emphasis added].

The law in the Ninth Circuit is well settled that "[a] deficient performance is one in which counsel made errors so serious that she was not functioning as the counsel guaranteed by the Sixth Amendment," *Iaea v. Sunn*, 800 F.2d 861, 864 (9th Cir. 1986); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Specifically, LOMAS' trial counsel failed to investigate, discover, and move to dismiss the case (or suppress the evidence) based on the unequivocal fact that Public Law 280 **did not authorize the police officers to enter the Indian Reservation where there was no probable cause** that a crime was committed, or about to take place. *Sub judice*, the officers lacked the authority, and had no jurisdiction, to be where they were, **trial counsel failed to discover and act on it**, and LOMAS was prejudiced by trial counsel's mistakes. There never has been a satisfactory explanation given for LOMAS' trial attorney's failure. It is clear that LOMAS was deprived of the effective assistance of counsel at trial, a denial of his constitutional right. *See* 28 U.S.C. § 2253(c), U.S. CONST. amend. VI. The facts below could well be resolved by the Ninth Circuit differently than the District Court, therefore this Court should grant LOMAS' petition, remand this case to the Ninth Circuit, and permit LOMAS' appeal to proceed.

The undisputed record evidence demonstrated that the Riverside County Sheriff's Department's contract with the Morongo Band of Mission Indians Tribe began on September 27, 2002, two (2) days after the acts alleged in the

charging document. When arresting LOMAS, the Riverside County Sheriff's Department had no search warrant, and no probable cause that any crime was committed off the Reservation, therefore they could not have legally entered upon Reservation lands. The record evidence was crystal clear there was no "unusual activity" on the Reservation at the time of the warrantless (and baseless) search – there was only a campfire. Apparently, the deputies decided to enter land over which they had no jurisdiction so they could (illegally) "investigate." Although the Magistrate Judge concluded that the Riverside County Sheriff's Department had "undisputed jurisdiction to investigate," (R&R, p. 18), on the Morongo Reservation, LOMAS believes, in good faith, the Ninth Circuit will come to the opposite conclusion based on the Record Evidence:

> Deputy Campa testified that on September 24, 2002, he was assigned to Baker 70 – B beat, which meant it was his duty to patrol the Morongo Reservation. [1RT65]. When asked whether that was standard practice at that time, **he testified that, that was actually the first night we instituted that beat.** (R&R, p. 10, fn.3) [Emphasis added].

The issue presented in this Petition is not **where** the matter should have been prosecuted, it is **if the matter could be prosecuted at all** based on the deputies' lack of jurisdiction in this case. Trial counsel's failure to file a Motion to Dismiss, or Suppress, was not without merit, under state and federal law,

as the Magistrate Judge found (R&R, p. 15), and the Ninth Circuit could resolve the issue differently. The Ninth Circuit erred by failing to issue a Certificate of Appealability in this matter. This Court should grant this petition.

LOMAS' counsel candidly advised the trial Court at sentencing[3] that he was "unaware of any provision of law suggesting that, in a jurisdiction where crimes pursuant to Public Law 280 can be prosecuted by state authorities, local law enforcement agencies cannot enter onto reservation land without probable cause to believe a crime has occurred." **However, it goes without saying that without probable cause, a police officer cannot enter someone's property – private or Indian Reservation – without consent.** At a minimum, trial counsel should have investigated the Fourth Amendment issue and filed a Motion challenging the search and seizure. Despite the Magistrate Judge's conclusion and the District Court's adoption of same, and the Ninth Circuit's decision to not issue a Certificate of Appealability, it is clear LOMAS has met the "relatively low" burden of having a Certificate of Appealability issued here. The issue before this Court is not whether LOMAS' counsel was ineffective – but if he has made a "substantial showing of the denial of a constitutional right" entitling him to review by the Ninth Circuit. As LOMAS' Fourth and Sixth

[3] LOMAS' counsel at sentencing replaced his trial counsel.

Amendment rights have been violated, this Court should order the Ninth Circuit to issue a Certificate of Appealability and to consider this matter on the merits.

D. Certificate of Appealability Warranted: Trial Counsel's Failure to File a Motion on Fourth Amendment Grounds

"The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.'" *People v. Souza* (1994) 9 Cal. 4th 224, 229; *quoting Terry v. Ohio*, 392 U.S. 1 (1968). This Court has unequivocally held that "any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all of the circumstances surrounding the incident in each individual case." *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988); *United States v. Cortez*, 449 U.S. 411 (1981); *Florida v. Royer*, 460 U.S. 491 (1983).

As in *Hutchinson v. Hamlet*, 2006 U.S. Dist. LEXIS 45240, p. 55-56 (U.S. Dist. Ct. N.D. Cal.), "after reviewing the state court record as a whole, this Court [should have been] persuaded that counsel's failure to conduct [a] reasonable investigation . . . 'fell below an objective standard of reasonableness,' and the state court's determination of the chain constitutes an unreasonable interpretation of *Strickland*." *Hutchinson*, *id.* "[E]ven if counsel had

neglected to conduct the investigation at the time as a part of a tactical decision . . . tactics as a matter of reasonable performance could not justify the omission." *Id.*; *quoting Williams v. Taylor*, 529 U.S. 362, 373 (2000). Just because the Magistrate, and the District Court, decided this issue did not rise to the level of ineffective assistance of counsel, does not mean that the Ninth Circuit could not disagree. The Ninth Circuit erred when it denied LOMAS' request for a Certificate of Appealability.

LOMAS respectfully suggests to this Court (as he did in his Objections to the Magistrate Judge's Report and Recommendation) that the **only** evidence presented at trial concerning the officers' knowledge of events on the Reservation was that the officers had observed vehicles traveling on the Reservation without using headlights and that there was a campfire on the Reservation. Once the officers entered the Reservation (illegally) and "viewed" the scene, **they had no jurisdiction to take any action with respect to either of these observations.**

Similarly, this Court has "note[d] that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1983).

> . . . the common-sense approach utilized by most lower courts is required by the *Fourth Amendment* prohibition on 'unreasonable search and seizures' and [this Court held] that an important factor to be considered

> when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see *Payton*, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as [a non-criminal civil traffic offense], has been committed. *Id.*

LOMAS is mindful that this was not a warrantless entry of a home or residence, but *sub judice*, LOMAS had a similar Fourth Amendment prohibition against unreasonable search and seizure on the Reservation. There were no "exigent circumstances" here, such as "hot pursuit of a suspect, the need to prevent physical harm to the offender and the public or the need to prevent destruction of evidence." *Id.* at 748. (Citations omitted). The Fourth Amendment prohibits the officers *sub judice* from entering the Reservation when the only alleged offense observed was not **criminal** in nature.

That is why a Certificate of Appealability should have been issued by the Ninth Circuit. In deciding whether a State may enforce a law within an Indian Reservation pursuant to Public Law 280, a court must determine "whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state

court." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987). Moreover, "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at 209. If the intent of a state law is generally to prohibit certain conduct, it falls within Public Law 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Public Law 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy. *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 306 (9th Cir. 1993)

The officers' lack of jurisdiction, permission, or authority to be within the boundaries of the Morongo Band of Mission Indians' Reservation in the instant case gave rise to a meritorious basis for a Motion to Dismiss and/or a Motion to Suppress, which trial counsel should have filed. This Court should acknowledge that LOMAS has made the "substantial showing" required by 28 U.S.C. § 2253(c), that the Ninth Circuit could resolve this issue differently, and grant this petition.

LOMAS' Fourth Amendment right to be free from an unreasonable search and seizure was violated, despite the Magistrate Judge's finding that Petitioner had "no objectively reasonable subjective expectation of privacy" on his Indian Reservation (R&R, p. 18).

The Ninth Circuit could, and should, decide this issue differently, especially in light of Respondent's concession that "if the state had sought to prosecute Petitioner for – operating a vehicle without headlights, there might have been a basis for a motion to dismiss on *lack-of-jurisdiction grounds*." (Resp. Mem., p. 16). The trial testimony was crystal clear: The only activities the deputies observed which caused them to enter the Indian reservation were a campfire and vehicles being driven at night with (and without) the use of headlights. (RT, p. 71, 117, 183). The deputies exceeded their jurisdictional authority *sub judice* to be present on an Indian reservation without legal cause.

Applying the rule announced in *California v. Cabazon Band of Mission Indians*, it is clear that operating a vehicle at night without the use of headlights is not a criminal statute applicable to Native Americans within an Indian reservation. *Cabazon Band of Mission Indians*, 480 U.S. at 208. At best, that conduct appears to be a violation of Cal. Vehicle Code § 24400, which is an **infraction**, not a criminal statute. Since operating a motor vehicle is allowed, subject to regulation, such as using headlights at night, the State of California was without authority under Public Law 280 to enforce the law against Native Americans on a reservation. Accordingly, there was no evidence that any **crime** enforceable against Native Americans on the Reservation had been committed by anyone who may have been present in the Potrero Canyon the night of Petitioner's arrest. Thus,

LOMAS' Fourth Amendment right was violated. LOMAS has met the "relatively low" burden for a Certificate of Appealability to be issued.

The officers *sub judice* were without authority to enforce traffic laws, or a time and place restriction concerning campfires (assuming *arguendo* that any such restrictions existed), on LOMAS or anyone else gathered in the Potrero Canyon within the boundaries of the Morongo Reservation. Accordingly, the officers here had no authority to be present on the Morongo Band of Mission Indians' Reservation and no constitutional basis to seize LOMAS, or anyone present, at the campfire site.

LOMAS' trial counsel could, and should, have presented the following issue to the trial Court, pretrial:

> **This cause should be dismissed on jurisdictional grounds and/or the evidence suppressed based upon the officers' unlawfully entering the Morongo Reservation and seizing Petitioner without reasonable suspicion, or any just, probable or legal cause.** [Emphasis added].

Such a motion would have had merit and most likely would have been dispositive of the charges.

CONCLUSION

Contrary to the Magistrate Judge's, and the District Court's, ultimate findings, LOMAS maintains that trial counsel's failure to file a dispositive pre-trial motion to dismiss on jurisdictional grounds and/or a motion to suppress based upon a violation of his Fourth Amendment right to be free from an unreasonable search and seizure deprived him of his Sixth Amendment right to effective assistance of counsel. LOMAS' trial counsel failed to investigate, discover, and move to dismiss the case (or suppress the evidence) based on the unequivocal fact that Public Law 280 did not authorize the police officers to enter the Indian Reservation where there was no probable cause that a crime was committed, or about to take place. The deputies exceeded their jurisdictional authority *sub judice* to be present on an Indian reservation without legal cause.

Although the Ninth Circuit has ruled to the contrary, LOMAS contends "**that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further.**" *See Williams*, 384 F.3d at 583. LOMAS has made a "substantial showing" of the denial of the right to effective assistance of counsel. Thus, his claim is nonfrivolous and worthy of full appellate review.

This petition for a writ of certiorari should be granted, the Ninth Circuit's judgment vacated and this case remanded to the Ninth Circuit thereby

permitting LOMAS to proceed with the appeal of the denial of his §2254 Petition by the District Court.

DATED: October 4, 2011.

Respectfully submitted,

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