No. 07-103

In The
Supreme Court of the United States

RICKIE L. REBER, TEX WILLIAM ATKINS,
STEVEN PAUL THUNEHORST & C.R.,

Petitioners,

vs.

STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari
To The Utah Supreme Court

BRIEF IN OPPOSITION

MARK L. SHURTLEFF
Utah Attorney General
KIRK M. TORGENSEN
Chief Deputy Attorney General
J. FREDERIC VOROS, JR.*
Chief, Criminal Appeals Div.
JOANNE C. SLOTNIK
Assistant Attorney General
Counsel for Petitioner
160 East 300 South, 6th Floor
Post Office Box 140854
Salt Lake City, UT 84114-0854
(801) 366-0180

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should this Court consider three factual issues governed by state law that were not decided by the Utah Supreme Court and are irrelevant to its decision?

2. Should this Court consider two issues related to the Ute Partition Act that are not dispositive and were not decided by the Utah Supreme Court?

3. Should this Court engage in further review of a correct ruling from the Utah Supreme Court that is based on well-settled federal law?

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STATEMENT

1. *Summary of the Facts*. During the 2002 Utah deer hunt, Petitioner Reber's son, C.R., shot a trophy deer in Indian country with his father's assistance. Pet. App. 2, ¶ 3; R. 584: 157. When conservation officers from the Utah Division of Wildlife Resources stopped Petitioners at a checkpoint, they observed a large buck in Petitioner's truck bed. The deer did not have a state hunting permit, license, or tag attached to it, as required by state law. R. 584: 158.

During the same hunting season, Petitioners Thunehorst and Atkins killed another, smaller deer in Indian country. Similarly, neither of them had a hunting permit.

The parties stipulated that each of the three adult petitioners was 1/16 Indian by blood and that they were not members of any federally-recognized Indian tribe. Resp. App. 1, 13-14.[1]

2. *Summary of the proceedings*. Petitioner Reber was charged with aiding or assisting in the wanton destruction of wildlife, a third degree felony, in violation of Utah Code Ann. §§ 23-20-4(3)(a). Pet. App. 2, ¶ 3. Petitioner C.R. was referred to juvenile court. *Id.* Petitioners Thunehorst and Atkins were charged with aiding or assisting in the wanton destruction of wildlife, a class A misdemeanor, in violation of Utah Code Ann. § 23-20-4(3)(b). *Id.* at ¶ 4.

[1] The juvenile was 1/32 Indian by blood.

Petitioner Reber filed a motion to dismiss for lack of jurisdiction. R. 12-13. After extensive briefing and several hearings, the trial court denied the motion, upholding state jurisdiction because Petitioner Reber had failed to establish he was Indian for purposes of criminal jurisdiction. Resp. App. 11-21. A jury tried Petitioner Reber and convicted him as charged. R. 505-06, 564. The court ordered a suspended prison term of zero-to-five years, restitution of $4,000 payable to the Utah Department of Wildlife "Stop Poaching" Fund, a fine of $1,250 or 250 hours of community service, and three years of probation with conditions attached. R. 562-65.

Petitioner Reber timely appealed, seeking review of the trial court's pre-trial jurisdictional rulings. R. 566-67. The Utah Court of Appeals consolidated Petitioner Reber's appeal with appeals raising identical issues filed by Petitioners Thunehorst and Atkins.[2] The Utah Court of Appeals vacated the convictions, concluding that "the crimes occurred in Indian Country governed by the Ute Tribe. Because the Ute Tribe is the victim, the State does not have jurisdiction." Pet. App. 21, ¶ 13. Having thus held that the State lacked jurisdiction by virtue of the Ute Indian Tribe's status as a victim, the court did not address any other issues raised by Petitioners. *Id.* at 15, n.1.

[2] Petitioners Thunehorst and Atkins agreed at this juncture to be bound by the outcome of Petitioner Reber's appeal.

The Utah Court of Appeals denied the State's petition for rehearing. Pet. App. 40-41. The State filed a petition for writ of certiorari in the Utah Supreme Court. Petitioners filed a cross-petition. The Utah Supreme Court granted the petitions as to three issues. Two addressed whether the Ute Indian Tribe possessed unfettered regulatory or property interests over all hunting throughout Indian country such that the Tribe would be the victim of any illegal hunting in Indian country. The third addressed whether Petitioners had established they were Indians. Pet. App. 3, ¶ 7. The Court further ordered that the juvenile court case adjudicating Petitioner Reber's son, C.R., be consolidated into this case. *Id.* at ¶ 1.

3. *Utah Supreme Court decision*. Focusing entirely on jurisdiction, the Utah Supreme Court unanimously reversed the Court of Appeals, citing at the outset the undisputed governing principle that "[w]ithin Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians and victimless crimes by non-Indians." Pet. App. 4, ¶ 9 (quoting *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984) (citation omitted)). The Utah Supreme Court held both that unlawful hunting is a victimless crime and that Petitioners had failed to establish that they were Indians. *Id.* at 4, ¶ 9; 8, ¶19; 11, ¶ 26. Because these Indian country crimes were both victimless and committed by non-Indians, the Utah Supreme Court held, the State properly exercised jurisdiction over Petitioners. *Id.* at 12, ¶ 27.

Petitioners' crimes were victimless. The Utah Supreme Court determined that because Petitioners' crimes were victimless, the Ute Indian Tribe could not be a victim. The Court articulated two reasons underlying this conclusion.

First, the Ute Indian Tribe could not be a victim because it lacked a regulatory interest in Petitioners' unlawful hunting under the factual circumstances of this case. Tribes cannot regulate hunting and fishing by non-Indians on land within the geographical boundaries of Indian country that is not owned by or held in trust for Indians, either individually or as a Tribe. *Id.* at 6-7, ¶¶ 15-16 (citing *Montana v. United States*, 450 U.S. 544 (1981)). Here, Petitioners did not dispute that the crimes occurred on non-Indian-owned land. *Id.* Consequently, lacking any regulatory interest, the Tribe could not be a victim. *Id.* at 7, ¶ 16.

Second, the Ute Indian Tribe could not be a victim because it did not have a property interest in the deer. Indeed, no entity "owns" wildlife in the sense of having an enforceable property interest in wild animals on the hoof. *Id.* at 8, ¶ 17 (citing *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977)). This conclusion has been applied explicitly to Indian tribes. *Id.* at ¶ 18 (citing *White Mountain Apache Tribe v. Arizona Dep't of Game & Fish*, 649 F.2d 1274, 1283 (9th Cir. 1981)). Because the Ute Indian Tribe had no protected property interest in wildlife, it could not be a victim by virtue of such an

interest in the deer that were unlawfully shot. *Id.* at 8-9, ¶ 19.

Based on these two rationales, the Utah Supreme Court concluded that, "[o]ther than the wildlife itself, these crimes have no victims." *Id.* at 8-9, ¶ 19.

Petitioners are not Indians. The Utah Supreme Court also held that Petitioners failed to establish they are Indians. *Id.* at 9-12. In *United States v. Rogers*, 45 U.S. 567 (1846), this Court articulated a two-part test for determining Indian status. To claim the status of an Indian, a person must show both that he possessed a sufficient quantum of Indian blood and that he is recognized as an Indian by a Tribe or the federal government. The Utah Supreme Court held that Petitioners had failed to meet both of these required prongs. *Id.* at 9, ¶ 21.

The first prong of the *Rogers* test, requiring a showing that Petitioners possess a significant quantum of Indian blood, was dispositive. *Id.* Petitioners stipulated to possessing only 1/16 Indian blood. Resp. App. 1, 13-14. The Utah Supreme Court rejected petitioners' claim of Indian status because no court has held 1/16 Indian blood sufficient under *Rogers*. Pet. App. 9, ¶ 22. Moreover, even assuming that 1/16 Indian blood would suffice, the Court also rejected Petitioners' claim because the ancestors through whom they claimed Indian blood had been listed on the Ute Partition Act final termination roll. *Id.* at 9-10, ¶ 23. Petitioners, as descendants of terminated Indians, thus had zero Indian blood for purposes of

recognition by the federal government. *Id.* (citing *United States v. Von Murdock*, 132 F.3d 534, 536 (10th Cir. 1997). Failing the first prong of *Rogers* for either of these two articulated reasons defeated Petitioners' claim of Indian status.

While the Utah Supreme Court need not have reached the second prong of the *Rogers* test, requiring recognition as an Indian by a tribe or society of Indians or by the federal government, it nonetheless chose to do so. *Id.* at 9, ¶ 21. The Court noted that the Uintah band is not recognized as a tribe by the federal government and, further, that the Uintah band has no existence apart from the federally-recognized Ute Tribe. *Id.* at 10-11, ¶ 24 (citing *Von Murdock*, 132 F.3d at 541). Because under federal law the Uintah band exists only within the Ute Tribe and because Petitioners concede they are not members of the Ute Tribe, their claim also fails under the second prong of *Rogers*. *Id.* at 11, ¶ 25 .

Thus, both because the Ute Indian Tribe is not a victim and because Petitioners failed to establish they are Indians within the meaning of federal law, the State had jurisdiction. Accordingly, the Utah Supreme Court reversed the decision of the Utah Court of Appeals and reinstated the convictions. *Id.* at 12, ¶ 27. It did not, however, remand the case to the court of appeals for consideration of the other issues Petitioners had raised, but which the court of appeals had not reached. Petitioners did not file a petition for rehearing to request a remand for consideration of

those issues. Instead, they filed a Petition for Certiorari in this Court.

REASONS FOR DENYING THE WRIT

The only issue decided by the Utah Supreme Court in this case was whether the State of Utah could exercise jurisdiction over hunting crimes committed within the geographic boundaries of Indian country. Yet none of the five questions presented in the Petition for Writ of Certiorari has any bearing on that determination. Rather, Petitioners seek review of non-dispositive questions unaddressed by any Utah appellate court.

The first three questions presented by the Petition are fact-specific matters of state law that are irrelevant to the jurisdictional question, have not been addressed by any Utah appellate court, and raise no recurring issues of general concern.

The fourth and fifth questions presented raise issues of federal law related to the Ute Partition Act that are unnecessary to determining whether Petitioners are Indian for purposes of criminal jurisdiction in Indian country. That is, regardless of how a court might construe the Ute Partition Act, Petitioners nonetheless lack Indian status under the dispositive *Rogers* test. Moreover, they have not preserved any grounds for challenging the Utah Supreme Court's holding that they are not Indian under *Rogers*.

Finally, the decision of the Utah Supreme Court is correct as a matter of law, relying on well-settled precedent from this Court and from the Tenth Circuit.

I. The first three questions Petitioners present – involving interpretation of a state statute governing mistake of law, elements of an offense charged in juvenile court, and alleged judicial bias – raise matters of state law that are irrelevant to the question decided by the Utah Supreme Court, have not been ruled upon by any Utah appellate court, and do not involve recurring issues of general importance.

The first three questions Petitioners present all turn on routine applications of state law that are irrelevant to the question decided by the Utah Supreme Court in this case. Moreover, no Utah appellate court has ruled on any of these questions. None is appropriate for certiorari review.

First, Petitioners claim that, in determining intent, a jury should have been permitted to assess the reasonableness of their reliance on two federal cases. *See* Pet. 12-14. This question refers to a trial court ruling interpreting a state statute governing mistake of law as a defense. *See* Pet. App. 31-37, 47. Whether the trial court correctly interpreted a state statute presents a narrow and case-specific question of state law, wholly lacking in implications of broad scope. *See Stone v. So. Ill. & M. Bridge Co.*, 206 U.S. 267, 272-73 (1907) (declining to consider question of state law).

Moreover, the two cases on which Petitioners assert they reasonably relied wholly fail to support their positions. *Timpanogos Tribe v. Conway*, 286 F.3d 1195 (10th Cir. 2002), was an interlocutory appeal from the denial of the state's motion to dismiss under rule 12(b)(6), Federal Rules of Civil Procedure. *Conway,* 286 F.3d at 1198. In that context, a panel of the Tenth Circuit determined that the Timpanogos Tribe "may establish federal question jurisdiction in asserting its hunting rights" even though it was not a federally-recognized tribe. Pet. App. 65. This ruling merely permitted the suit to continue; the court granted no other relief at that time. *Id.* at 63-66. Nowhere does the case suggest that alleged Uintah band members can hunt without a state permit on the land at issue here. Petitioners fail to explain how or why a ruling on a motion to dismiss caused them to reasonably believe that they were exempt from state law forbidding hunting without a state permit.

The other case on which Petitioners purportedly relied is *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) ("*Ute V*"); Pet. App. 48-57 (excerpt only). *Ute V*, however, is a boundary diminishment case that determined which lands within the Uintah Valley Indian Reservation were no longer Indian country.[3] *Ute V* did not change the Indian country

[3] The Uintah Valley reservation forms the northern section of what is today the Uintah and Ouray reservation. The Uncompahgre reservation forms the southern section. *See* Pet. App. 17, ¶ 8 (quoting *Von Murdock*, 132 F.3d at 540). *Ute V* addresses

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status of the National Forest lands and the Uncompahgre reservation, where Petitioners committed their crimes. *Id.* at 1515; R. 50; R. 584: 191; Resp. App. 11-13. To the extent that *Ute V* has any relevance to this case, it stands for the undisputed proposition that the land on which Petitioners committed their crimes lies within Indian country. As was true of *Conway, Ute V* nowhere suggests that alleged Uintah band members can hunt without a state permit on the non-Indian-owned land at issue here. Consequently, any reliance by Petitioners on *Ute V* would have been unreasonable.[4]

The second issue raised by Petitioners – whether the juvenile court properly considered all elements of the offense with which the juvenile was charged – presents another fact-specific question not ruled upon

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diminishment of Indian country within the northern section only.

[4] The Utah Supreme Court did express concern with the following passage from *Ute V*: "Under our approach, the Tribe and the federal government retain jurisdiction over all trust lands, the National Forest Lands, [and] the Uncompahgre Reservation. . . ." Pet. App. 56 (quoted in Pet. App. 5-6, ¶ 12). This language must be read in the context of the language that follows it: "Indian country extends to all trust lands, the National Forest lands, [and] the Uncompahgre. . . ." Pet. App. 57. Together, the fair import of these statements is that trust lands, National Forest lands, and the Uncompahgre remain Indian country, governed by the general jurisdictional rule that, unless the perpetrators and any victims are non-Indian, the tribe or federal government will have jurisdiction. *See Solem*, 465 U.S. at 465 n.2. That is precisely how the Utah Supreme Court ultimately read that language from *Ute V*.

by the Utah Supreme Court. *See* Pet. 14. Moreover, Petitioners have inadequately briefed the issue, both in the Utah appellate courts and now in their Petition for Certiorari. *See* Sup. Ct. R. 24(1)(i). Petitioners present their argument in one conclusory sentence, devoid of record citations, wholly failing to articulate their specific argument or any implications of a general or recurring nature that would compel certiorari review. *See* Pet. 14. This claim does not warrant certiorari review by this Court. *See United States v. Reading*, 228 U.S. 158, 160 (1913) (declining to reach inadequately-briefed issue).

Finally, the third issue – whether the trial judge was biased against the adult petitioners – presents yet another fact-based question of state law. *See* Pet. 14. Petitioner Reber filed a motion to disqualify the trial judge, who correctly certified the matter to the presiding judge of the district, as mandated by the Utah Rules of Criminal Procedure. R. 277, 293. The presiding judge denied the motion, describing it as "woefully late," untimely by almost 11 months and unjustified by any good cause. R. 295. Even on the merits, Petitioners' complaint that the trial court maintained it "was under no obligation to follow federal law" is incorrect on its face. Pet. 9. The trial court simply made the unremarkable observation that it was not bound by the rulings of federal courts of appeals. Pet. App. 99-105. Nonetheless, the court consistently applied federal Indian law in explaining the legal rationale underlying its jurisdictional rulings. Resp. App. 2-4, 15-21. Under these circumstances,

there is no conceivable justification for certiorari review by this Court.

Although Utah appellate courts have not ruled on the first three questions presented, Petitioners nonetheless want this Court to consider them. This Court does not typically review questions in the first instance that have not been addressed below, *Adarand Const., Inc. v. Mineta*, 534 U.S. 103, 109-10 (2001); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). This case presents no exceptional circumstances that would warrant departure from that usual practice. *See Duignan v. United States*, 274 U.S. 195, 200 (1927) (explaining that only in exceptional cases will his Court review questions not first ruled upon below).

Had Petitioners wanted a full hearing on these state law issues, they had the opportunity to file a petition for rehearing in the Utah Supreme Court. Petitioners could have requested a remand to the Utah Court of Appeals for full consideration of the issues that had been raised but not considered when that court disposed of the case on jurisdictional grounds. Instead, Petitioners chose to forego that remedy and seek from this Court a ruling in the first instance on these state law questions. Because state court is the proper forum for resolution of state law issues, because the Utah Supreme Court has not ruled on these issues, and because they present no exceptional circumstances warranting review by this Court, the Petition should be denied.

II. The two questions presented concerning the Ute Partition Act are not dispositive of the jurisdictional issue before this Court and have not been ruled upon by the Utah Supreme Court.

Petitioners present two questions related to the proper legal interpretation of the Ute Partition Act: whether the Act expelled the Uintah band from the Ute Indian Tribe; and whether the Act affected non-Utes born prior to its enactment. Pet. i. These questions are not dispositive because the Utah Supreme Court referenced the Ute Partition Act only to explain a secondary ground for holding that Petitioners are not Indian. Because even absent the secondary ground, the primary ground would independently defeat Petitioners' claim of Indian status, certiorari on the two Ute Partition Act questions is not warranted.

To explain its conclusion that Petitioners had failed to establish that they were Indian, the Utah Supreme Court relied on this Court's decision in *Rogers*, articulating the controlling two-part test for determining Indian status. Pet. App. 9-12, ¶¶ 21-26. A person claiming Indian status must satisfy both parts of the test. The first part requires that the claimant establish "a significant degree of Indian blood." *Id.* at 9, ¶ 21. No court has ever held that 1/16 Indian blood, to which Petitioners stipulated, satisfies the first part of the *Rogers* test. *Id.* at 9, ¶ 22.

Because Petitioners did not satisfy the first part and *Rogers* requires that both parts be satisfied, the Utah Supreme Court rejected Petitioners' claim of Indian status.

Moreover, the Petition does not challenge either the applicability of the *Rogers* test or the Utah Supreme Court's ruling that 1/16 Indian blood is insufficient to satisfy the first prong. Petitioners have thereby conceded the correctness of these matters for purposes of certiorari review.

The Utah Supreme Court also offered a secondary rationale for rejecting Petitioners' claim under the first prong of *Rogers*, noting that "[e]ven were we to conclude that 1/16th Indian blood meets the requirement in *Rogers*, defendants would still fail to establish their Indian status." *Id.* at 9, ¶ 23. The Utah Supreme Court explained that because the ancestors through whom Petitioners claimed Indian status were on the Ute Partition Act final termination roll, Petitioners had zero Indian blood for purposes of the *Rogers* blood quantum analysis. *Id.* at 9-10, ¶ 23 (quoting *Von Murdock*, 132 F.3d at 541). Whether Petitioners have zero Indian blood, as the Ute Partition Act teaches, or 1/16 Indian blood, as they themselves stipulated, makes no difference to the outcome of the case. Either way, they are not Indians under *Rogers*. For this reason, certiorari review of issues related to the Ute Partition Act is not warranted.

The Petition ignores *Rogers* entirely. Instead, it focuses on the Court's secondary reference to the Ute Partition Act, seeking to bootstrap issues not addressed by the Utah Supreme Court into a certiorari-worthy stance. However, Petitioners' insistence that they are members of the Uintah band, that the Uintah band exists separately from the Ute Indian Tribe, and that the Ute Partition Act has no effect on their hunting rights are irrelevant to the disposition of the jurisdictional issue. It turns on the *Rogers* test. Because Petitioners stipulated they have no more than 1/16 Indian blood and their Petition does not challenge the *Rogers* test, the inquiry ends. Petitioners are not Indian for purposes of criminal jurisdiction in Indian country. No further analysis is necessary.

III. The decision of the Utah Supreme Court is correct.

The writ should also be denied because the Utah Supreme Court correctly held that the State of Utah has jurisdiction over Petitioners under *Solem*, 465 U.S. at 465 n.2. The court correctly ruled both that Petitioners are not Indian and that hunting is a victimless crime. Neither of these holdings conflicts with decisions of the Tenth Circuit or any other federal court of appeals.

First, as discussed above, the Petition does not challenge the Utah Supreme Court's conclusion that 1/16 Indian blood falls well short of the quantum

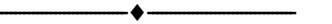
required by the first prong of the *Rogers* test. Nor does the Petition cite any cases holding that 1/16 Indian blood is sufficient under *Rogers*. For this reason alone, the Utah Supreme Court correctly rejected Petitioners' claim of Indian status. Having failed one prong of the *Rogers* test, Petitioners cannot prevail in their attempt to establish Indian status.

Although the Utah Supreme Court need not have reached the second *Rogers* prong, having done so, it correctly rejected Petitioners' claim that the Uintah band enjoyed a separate existence from the Ute Indian Tribe, thus according Petitioners the right to hunt without a state permit. Pet. App. 11, ¶ 25. The Tenth Circuit, deciding a claim identical to Petitioners' here, has squarely held that Uintah band members possess no right to hunt and fish independent of the Ute Indian Tribe. *See Von Murdock*, 132 F.3d at 541, *cert. denied*, *Von Murdock v. United States*, 525 U.S. 810 (1998). Without offering a cogent legal rationale for departing from this settled law, Petitioners seek to relitigate the matter and evade federal caselaw that is directly on point. *See also United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985) (and cases cited therein). The Utah Supreme Court properly rejected this attempt.

Second, the Utah Supreme Court correctly held that hunting is a victimless crime and, accordingly, that the Ute Indian Tribe was not the victim of Petitioners'

poaching.[5] Pet. App, 8-9, ¶ 19. Because the Petition for Certiorari does not challenge the ruling that hunting is a victimless crime, the ruling is not subject to further review by this Court. Moreover, the ruling is correct. *See Montana v. United States*, 450 U.S. 544, 563-65 (1981) (tribe lacks a regulatory interest in hunting by non-Indians on land geographically located within Indian country but neither owned nor held in trust for an individual Indian or Indian tribe); *Douglas*, 431 U.S. at 284 (tribe lacks a property interest in the deer because no entity can claim a proprietary property interest in wild animals on the hoof).

Because the decision of the Utah Supreme Court is firmly rooted in a correct interpretation of governing federal law, certiorari should be denied.



[5] The Ute Indian Tribe itself has never claimed to be a victim. The Tribe has filed amicus curiae briefs on behalf of the State's position in the Utah Court of Appeals, in the Utah Supreme Court, and in this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARK L. SHURTLEFF
Utah Attorney General
KIRK M. TORGENSEN
Chief Deputy Attorney General
J. FREDERIC VOROS, JR.*
Chief, Criminal Appeals Div.
JOANNE C. SLOTNIK
Assistant Attorney General
Counsel for Petitioner
Utah Attorney General's Office
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
(801) 366-0180

**Counsel of Record*