No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOEL ANTHONY ROY,

Petitioner,

v.

THE STATE OF MINNESOTA,

Respondent.

On Petition for Writ of Certiorari
To The Minnesota Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE STATE OF MINNESOTA LACK SUBJECT-MATTER JURISDICTION OVER THE PRESENT CONTROVERSY BECAUSE POSSESSION OF FIREARMS IS "CIVIL-REGULATORY" IN THIS PARTICULAR CASE?

2. DOES THE PETITIONER HAVE A RIGHT TO POSSESS FIREARMSTHAT IS PROTECTED AS A RESERVED RIGHT IN THE 1854 AND 1855 TREATIES WITH THE CHIPPEWA?

3. DID THE MINNESOTA APPELLATE COURT IMPROPERTLY DENY REVIEWOF THIS MATTER BECAUSE THE MINNESOTA COURT OF APPEALS FAILED TO ADDRESS OR REVIEW THE RELEVANT AND APPLICABLE 1854 AND 1855 TRF \TIES WITH THE CHIPPEWA?

4. DO PETITIONER'S TREATY RIGHTS BELONG TO HIM AS AN INDIVIDUAL TRIBAL AS WELL AS A TRIBAL AND BAND MEMBER OF THE MINNESOTA CHIPPEWA TRIBE, AS WELL AS COLLECTIVELY TO THE BANDS THAT ARE SIGNATORY TO THE TREATIES OF 1854 AND 1855?

5. DOES THE PETITIONER HAVE A TREATY RIGHT TO POSSESS FIREARMS AS A PRE-EXISTING RIGHT IN LIGHT OF THIS COURT'S 2008 DECISION IN *UNITED STATES V. HELLER* (2008 WL 2520816)?

LIST OF PARTIES

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

Petitioner:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE STATUTES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUES

TREATIES

PETITION

This case is distinguishable from all prior reviewed treaty rights cases involving an Indian in Indian Country under the Federal Gun Control Act of 1968, because Petitioner Roy's Tribe's treaties actually contain language and provisions for trade treaties which provided firearms to the Chippewa as part of the valuable consideration. Particularly, the 1854 and 1855 Treaties with the Chippewa were trades for lands that became Minnesota and Wisconsin. The 1854 Treaty consideration included "two hundred guns, one hundred rifles, . . . three hundred dollars' worth of ammunition, . . . to be distributed among the young men of the nation, at the next annuity payment.[1] Similarly, in the 1855 Treaty the United States provided for five (5) more annum payments for $300.00 worth of powder and $100.00 worth of shot and lead for the Chippewas' firearms.[2]

Petitioner is an enrolled member of the Minnesota Chippewa Tribe (MCT) who was residing on the Leech Lake (MCT) Reservation in the State of Minnesota, which is a Public Law 280 state, when he was charged and convicted under *state law* for being a state convicted felon in

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[1] Art. IV, Treaty with the Chippewa, 1854, Sept. 30, 1854, 10 Stat., 1109, Ratified Jan. 10, 1855, Proclaimed Jan. 29, 1855.

[2] Art. III, Treaty with the Chippewa, 1855, Feb. 22, 1855, 10 Stat., 1165, Ratified Mar. 3, 1855, Proclaimed Apr. 7, 1855.

possession of a firearm. Petitioner asserted a treaty right defense for possession of the firearm on the reservation as well as an inherent civil right as a tribal member to possess a firearm comparable to the individual right to bear arms as described in District of Columbia v Heller[3] for the Second Amendment. Petitioner was not engaged in any other criminal conduct when he was in possession of the firearm. The rifle was in its gun case, with a Leech Lake Reservation Hunting Permit, during hunting season on the Leech Lake Reservation.

These issues, which the Minnesota Court of Appeals failed to consider, research and analyze properly, are continuing to reoccur. A decision by this Court clarifying the state's authority to prosecute tribal members for the state offense of felon in possession of a firearm without infringing on actual Chippewa treaty rights without a proper Public Law 280(b) analysis of Congressional intent, is therefore necessary.

Gun possession, at least for Minnesota's Chippewa Bands, implicates sovereign rights reserved under Treaties with the Chippewa of 1854 and 1855 with the Untied States federal government— also the individual inherent right to bear arms as all people understood it at the time of the Second Amendment in District of Columbia v. Heller[4]—are in fact separate and distinct from the State of Minnesota and the United States. Minnesota v. Mille Lacs Band of

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[3] District of Columbia v. Heller, 554 U.S. __(2008)
[4] Id.

Chippewa Indians, 526 U.S. 172, 194-208 (1999) (affirming the existence of Chippewa usufructuary rights stemming from treaties). See also U.S. v Bressette and Nahgahnub, 761 F. Supp. 658, 662 (D. Minn. 1991), (the court concluded that the 1854 treaty reserved full usufructuary rights for the Chippewa and additionally concluded, as did the Voight[5] court, that the Chippewa also reserved full usufructuary rights on the territory ceded in 1842. The Court further noted that "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." Bressette citing United States v Dion, 476 U.S. 734, 739-740, (1986) (emphasis added in Bressette).

The Minnesota Supreme Court denied review of the Minnesota Court of Appeals decision, which relied primarily on United States v. Gallaher, 275 F.3d 784, 789 (9th Cir. 2001); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1292 (7th Cir. 1974); and United States v. Fox, 557 F. Supp. 2d 1251, 1255 (D. N.M. 2007). However, none of these cases used in the Minnesota Court of Appeals decision involve Chippewa, or Chippewa treaties with the United States.

The Court of Appeals also ignored the part of Gallaher that clearly states that "In order to

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[5] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Voight, 700 F.2nd 341, C.A. Wis., 1983

exempt tribal members from a federal law of otherwise general applicability, the treaty itself must specifically so provide." Gallaher citing United States v. Sohappy, 770 F.2d 816, 820 (9th Cir. 1985); United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1975). The Gallaher court found that the Colville Treaty contained no such specific, limiting language. Here, the Minnesota Court of Appeals has completely ignored the specific treaties cited by Appellant (1854 and 1855 Treaties with the Chippewa). See State v. Roy, A08-116, p. 5 (Add Westlaw cite).

The Minnesota Appellate Court also cited to a Wisconsin Appellate Court decision, State v. Jacobs, 735 N.W.2d 535 (Wis. Ct. App. 2007), as *similar*. However, in Jacobs the treaty tribe was the Stockbridge-Munsee tribe, not the Chippewas, so actually the case is not similar because the Wisconsin case involved a different Indian tribe, a different state, and different treaties with different and unique treaty terms.

In a recent cigarette trafficking case in Washington State, the Smiskin[6] Court noted that

> Federal laws of general applicability are presumed to apply with equal force to Indian tribes. See *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995); *United States v.*

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[6] See U.S. v. Smiskin, 487 F.3d 1260, 07 Cal. Daily Op. Serv. 5485, 2007 Daily Journal D.A.R. 7070, C.A.9 (Wash.), May 18, 2007 (NO. 05-30591, 05-30590)

Farris, 624 F.2d 890, 893 (9th Cir. 1980). We held in *Baker* that the CCTA is a law of general applicability. See 63 F.3d at 1484. There are three established exceptions, however, that preclude the application of an otherwise generally applicable federal law to Indian tribes. See id. at 1485; *Farris*, 624 F.2d at 893-94. The Smiskins argue that this case falls within the Indian treaty exception. As we explained in *Baker*, a "federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if . . . the application of the law to the tribe would abrogate rights guaranteed by Indian treaties."[7] 63 F.3d at 1485 (internal quotation marks omitted). ***Congress must therefore expressly apply a statute to Indians in order to abrogate their treaty rights***. See *Farris*, 624 F.2d at 893

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[7] "The other two exceptions, which do not apply here, arise if the statute is silent regarding applicability to Indian tribes and either: (1) the law touches "exclusive rights of self-governance in purely intramural matters" or (2) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians." Baker, 63 F.3d at 1485 (alteration in original)."

> ("[I]t is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians.").

(Id. at 5844)(Emphasis added). The actual Treaties with the Chippewa of 1854 and 1855 of Petitioner Roy's tribe must be considered by this Supreme Court because no State Court below addressed appellant's clearly articulated Public Law 280(b) defenses. When the Gun Control Act[8] is viewed as a "federal statute of general applicability that is silent on the issue of applicability to Indian tribes [it] will not apply to them if . . . the application of the law to the tribe would abrogate rights guaranteed by Indian treaties." Id.

The critical question, then, is whether applying the State of Minnesota's felon in possession of firearm statute against Chippewa tribal members who possess a firearm on a treaty reservation violates the Chippewa Treaties of 1854 and 1855. The Court pointed out that

> The text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in

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[8] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213

> the Indians' favor. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999) ("Mille Lacs Band"); see also *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect [tribal] interests . . . .").

(Id. at 5845-46). Certainly the Chippewa in the treaties of 1837, 1842, 1854 and 1855 would have understood that they had the inherent and individual right to bear firearms, for hunting, defense and other purposes, separate and distinct as their own sovereign nation. The recent Smiskin Court reiterated and declared that

> The Supreme Court's jurisprudence makes clear, however, that we must interpret a treaty right in light of the particular tribe's understanding of that right at the time the treaty was made[9], and *Baker* addressed a

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[9] Id. Mille Lacs Band, 526 U.S. at 201-02 (noting that similar language in two treaties may have different meanings because the Court examines

> different tribe, a different treaty, and a different right.

Id. As such, the Supreme Court of the United States must look at the relevant treaties cited by Petitioner and which are applicable to these circumstances, especially because no other courts have done so. Then the Court would need to find evidence of where and when Congress *acted* to eliminate the Chippewas' treaty right to bear arms and also compensated the tribe for loss of the right. See Menominee Tribe of Indians v United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). (the Menominee Reservation was terminated but no mention of other treaty rights were included in the Congressional Act, and as such, the Menominee continue to enjoy the rights to hunt, fish and gather in the same exact territory of the original reservation boundaries, still today).

When Congress granted the State of Minnesota criminal jurisdiction under Public Law 280, that jurisdiction was expressly limited to preclude the infringement 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

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"the historical record and . . . the context of the treaty negotiations to discern what the parties intended by their choice of words"); Fishing Vessel, 443 U.S. at 675 ("Accordingly, it is the intention of the parties . . . that must control any attempt to interpret the treaties.").

regulation thereof." Public Law 83-280, 67 Stat. 588-89 (1953) (codified as amended at 18 U.S.C. § Section 1162(a) (1994)).

This Court has never considered whether the state can strip a tribal member of an inherent and separate *civil right* guaranteed by another sovereign nation—his Indian tribe—and then prosecute him under *state law* for exercising that right on that Sovereign's territory. Effectively, that is what occurred in this case, a complete failure to follow all of Public Law 280, not just section (a) which grants some jurisdiction, but also section (b) which requires examining federal laws, federal statutes, and treaties as sources of exceptions to state jurisdiction. By virtue of a *state* conviction, Roy was prosecuted for possessing a firearm in Indian Country, a right guaranteed to him not by the state government, but by the treaties of his Chippewa Tribe, a separate sovereign. Recently, in United States v. Lara, 541 U.S. 193 (2004), the United States Supreme Court recogn:ed the continuing vitality of the principle that Indian tribes are separate sovereigns. See id. at 210 (holding that Double Jeopardy protections were not implicated by separate federal and tribal prosecutions because a tribal prosecution is not merely an extension of federal power, but a prosecution by a separate sovereign entity).

In this respect, Roy's case presents very different circumstances than those at issue in all the other Indian "on-reservation" Supreme Court cases, because they dealt with treaties void of firearms, express hunting and gathering rights,

and they were pre-Heller (supra). Consequently, those other decisions concluded that Indians still had on-going hunting rights without firearms and no diminishment of tribal treaty rights. Here, the Chippewa treaties express a right to firearms and ammunition and who was to get them was self-regulated by the bands and headmen according to the Treaties. In fact Chippewa treaties provided tens of thousands of dollars for "just engagements" to push the Lakota Sioux out of the region.[10]

Additionally, the United States Supreme Court determined in District of Columbia v. Heller that the Second Amendment guarantees the individual right to possess and carry weapons[11] which the Second Amendment codified as a pre-existing right.[12] Here, Heller recalled back to the time of Revolutionary War when everyone had weapons for all kinds of purposes, offensive, defensive and for hunting.[13] These are the same broad purposes and principles that Indians would have used to view their inherent right to bear arms and how Indians would have understood the rights of the individual to bear arms. This same concept of each, individual, Chippewa's right to bear arms is inextricably tied to usufructuary (inherent and treaty) harvesting rights of the Chippewa bands, which were expressly retained

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[10] See Arts. 4 and 12, Treaty with the Chippewa 1854 and Art. 3, Treaty with the Chippewa, 1855.
[11] Heller, 2008 WL 2520816 (U.S.)) at 10
[12] Id.
[13] Id. At 14.

and not surrendered in any treaty, nor taken away by any Act of Congress as required.

Minnesota is a "Public Law 280" state. Applying the traditional test for differentiating between criminal and civil/regulatory laws for the purpose of state-court jurisdiction—the test articulated by the United States Supreme Court in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987), the statute defining the offense of felon in possession is more consistent with a civil/regulatory statute than a criminal statute.[14] The structure of the statute alone suggests that it is civil/regulatory. See Cabazon, 480 U.S. at 211 n.10 (in categorizing a law as criminal or regulatory, a court must examine the law in detail). Unlike a typical criminal statute, Minn. Stat. § 609.165 does not simply define an offense and provide a penalty. Instead, the statute primarily concerns the restoration of civil rights after a person has been convicted of a criminal offense.[15] The statute details how and when civil rights are to be restored. It identifies the civil rights that are restored by Minnesota. It specifies what the order of discharge must contain. And in addition to the explicit prohibition on firearms possession, the statute contains a few exceptions to this prohibition, which are noted in two separate subsections of the statute.

Moreover, the statute's emphasis on "civil rights" again raises the question of whether a

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[14] Minn. Stat. § 609.165

[15] Id. See Appendix

state civil right is separate and distinct from a tribal civil right, which is inherent and treaty based for the Chippewa. Because there is such a distinction, the state lacks subject matter jurisdiction under Pub. L. 280(b) to enforce the statute against Petitioner Roy. Because Petitioner's case presents an issue of first impression that will have state and national impact, resolution of the issue by this Court is absolutely necessary.

Finally, the district revoked Petitioner's Stay of Execution because he had exhausted his state appeal rights and told him he could seek his Stay at the United State Supreme Court. Consequently, Petitioner has been forced to begin his sentence with regard to the State's felon-in-possession conviction and is presently incarcerated. As such, a Habeas Petition will need to be filed.

Accordingly, this Court must grant a Writ of Certiorari.

CONCLUSION

Petitioner respectfully prays and requests that his Writ of Certiorari be granted in this case, to review the decision of the Minnesota Court of Appeals because the legal analysis in the Minnesota decision is void of any relevant and meaningful Public Law 280(b) treaty analysis of the actual Treaties as cited and provided by Petitioner, particularly the 1854 and 1855 Treaties with the Chippewa, wherein the actual valuable consideration traded for lands that

became Minnesota included "two hundred guns, one hundred rifles, . . . three hundred dollars' worth of ammunition, . . . to be distributed among the young men of the nation, at the next annuity payment.[16]

The United States knew the Chippewa had guns, wanted guns, traded for guns with other people and nations, such as the United States, the French, and other tribes and bands. The United States employed the Chippewa against the Sioux.[17] Here, the Minnesota courts are intentionally ignoring the Petitioner's clearly stated defenses, treaty rights, and right to bear arms like Heller, but from the treaty bands of the Minnesota Chippewa Tribe. In fact the Minnesota Court of Appeals noted Petitioner's defense[18] and then completely avoided any analysis of those same treaties. Instead, Minnesota asserts jurisdiction in direct violation of treaty provisions and the limited Congressional grants of jurisdiction to the states in Public Law 280. The Minnesota Court of Appeals decision relied on and piggy-backed on federal prosecutions under the Federal Gun Control Act in other states, with

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[16] Art. IV, Treaty with the Chippewa, 1854, Sept. 30, 1854, 10 Stat., 1109, Ratified Jan. 10, 1855, Proclaimed Jan. 29, 1855.

[17] See FN 7, Art. IV, Treaty with the Chippewa, 1854, Sept. 30, 1854, 10 Stat., 1109, Ratified Jan. 10, 1855, Proclaimed Jan. 29, 1855 compensation for just engagements.

[18] See page 6 of Minn. App. Decision dated May 15, 2009 in Appendix.

other Indians, and involving different treaties with different and unique terms. Yet Minnesota's courts choose to ignore more relevant Congressional Acts like the exceptions to the grant of state jurisdiction in Public Law 280(b).

Petitioner has lost his liberty under a state judicial system avoiding his express defenses and very respectfully requests that his Writ of Certiorari be granted as the Petitioner's treaty and Public Law 280 defenses deserve actual, honest and intellectual analysis by the Supreme Court of the United States, as his liberty is at stake.

Respectfully submitted,

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