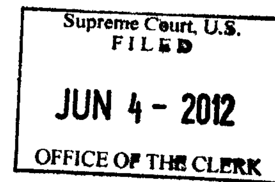

11-1485
No.

In the

Supreme Court of the United States

CHRIS YOUNG personal representative of the
ESTATE OF JEFFRY YOUNG

Petitioner

v.

JOSEPH S. FITZPATRICK, individual police officer,
CHRISTOPHER E. DAUSCH, individual police
officer, and JOHN SCRIVNER, individual police
officer

Respondents

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

PETITION FOR WRIT OR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Police Officers, Employed by the Puyallup Indian Tribe, But Trained, Certified, and Cross-Commissioned by the State of Washington, and Armed, Equipped, and Provisioned by the United States, Are Subject to the Constitution, U.S. Civil Rights Laws, and State Tort Law;

2. Whether the Shelter or Conceal Clause of the Treaty of Medicine Creek, and Additional Sources of Federal and State Law, Preempts Any Claims of Qualified Immunity by Individual Puyallup Tribal Police Officer Defendants in a Suit for Violation of the Constitution, U.S. Civil Rights Laws, and State Tort Law.

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5. *Young v. Duenas*, Court of Appeals of the State of Washington, Division I, NO. 66969-9-1, Order Regarding Appellant's Motion to Dismiss Defendant Duenas, Defendant Isadore, and the Negligent Hiring/Retention/Training Claim, May 11, 2011 (Notation Ruling);

6. *Young v. Duenas*, Superior Court of the State of Washington, Pierce County, NO. 10-2-06346-9,

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8. *Young v. Puyallup Indian Tribe*, Puyallup Tribal Court, Puyallup Indian Reservation, Washington, No. PUY-CV-04/09-068, Order on Motion to Strike and Dismiss, January 26, 2010;

9. *Young v. Puyallup Indian Tribe*, Puyallup Tribal Court, Puyallup Indian Reservation, Washington, No. PUY-CV-04/09-068, Sua Sponte Motion and Order to Appear for a Pretrial Conference, January 4, 2010; and

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10. *Young v. Duenas*, 164 Wn.App. 343, 262 P.3d 527 (Div. I, 2011).

II. BASIS FOR JURISDICTION

The Washington State Court of Appeals rendered the Decision Below on September 12, 2011. The Decision Below was subsequently published. The Washington State Supreme Court denied the Petition for Review.

This court has jurisdiction because the Decision Below is repugnant to the Constitution, treaties, or laws of the United States. 28 USC 1257(a).

III. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

1. U.S. CONSTI. amend. IV.
   "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

2. U.S. CONSTI. amend. VII.
   "The right of trial by jury shall be preserved."

3. U.S. CONSTI. amend XIV, cl. 3.
   "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

4. Treaty with the Nisqualli, Puyallup, Etc. 1854, Art. 8, U.S. – Puyallup Ind. Tribe, 2 Kappler 663, 10 Stat. 1132 (1854) ("Treaty of Medicine Creek, or, "Treaty")
   "And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial."

5. 42 U.S.C. § 1981(a).

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory ... to the full and equal benefit of all laws and proceedings for the security of persons."

6. 42 U.S.C. § 1981(c).
"The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

7. 42 U.S.C. § 1983.
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

8. 42 U.S.C. § 1988(b).
"In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985, and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

9. 25 U.S.C. § 1322(a).

"The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

10. 25 U.S.C. § 1324.
"Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have

appropriately amended their State constitution or statutes, as the case may be."

11. 25 U.S.C. § 1326.
"State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults."

IV. STATEMENT OF THE CASE

1. Factual Background

Dr. Jeffry Young was killed one evening in the spring of 2007 after wandering onto the Puyallup Indian Reservation in Pierce County, Washington.

There is no question that Dr. Young was behaving erratically that day. He identified himself at the tribal clinic as a doctor[1] and said he needed to see his patients, even though he had no such patients. He then proceeded to identify two different tribal

[1] Dr. Young has a Ph.D. from Berkeley.

employees as the anti-Christ and asked each for protection from the other.

But there is also no question that he was passive and non-violent. The investigative reports by the City of Tacoma and the U.S. Bureau of Indian affairs establish that he was unarmed and non-threatening. He never raised his voice, kicked, punched, or otherwise harmed, or even threatened to harm, the police officers in anyway.

Nonetheless, the police officers decided to take him into custody.[2] Accordingly, they kicked his feet out from under him so that he fell face-down onto the pavement. The officers then piled on top of him, so that several hundred pounds of officers, plus Dr. Young's own three hundred or so pounds, weighed heavily on his lungs and heart. They also stunned Dr. Young three or four times with a Taser and cuffed him by his wrists and ankles.

A fourth officer then appeared and noticed that Dr. Young's lips were blue and he had stopped breathing. The officers then removed the cuffs, performed CPR, and called an ambulance.

It was too late.

One of the officers called his wife on his cell phone and stated: "I can't believe I just killed a man with my own hands."

Dr. Young's forensic pathologist, Dr. Carl Wigren, determined that Dr. Young died of cardiac dysrhythmia, induced by hypoxia, caused by the strain and excessive force and weight the officers applied to his lungs and chest. The Pierce County

[2] Dr. Young was never arrested or charged with any kind of offense.

coroner determined that the cause of death was excited delirium.

The police officers were employed and commissioned by the Puyallup Indian Tribe, a federally recognized Indian Tribe and successor-in-interest to the Puyallup Indians that signed the Treaty of Medicine Creek with the United States in 1854. *Treaty of Medicine Creek*, 10 Stat. 1132 (1854).

The police officers were trained and certified by the State of Washington. They were also cross-commissioned by the State, pursuant to an agreement with Pierce County and the City of Tacoma, and a separate agreement with the City of Fife. They were armed, equipped, and provisioned by the United States, pursuant to a P.L. 96-638 Indian Self Determination Act contract with the U.S. Bureau of Indian Affairs.

2. Procedure

Dr. Young filed a complaint alleging violation of civil rights and various state-law torts in Puyallup Tribal Court in November, 2009. The defendants in the tribal court lawsuit were the Puyallup Indian Tribe, the three individual police officer Defendants here, the chief of police, and the security guard.

The tribal court refused to hear Dr. Young's motion for default. It then scheduled what it deemed a "Sua Sponte Motion and Order to Appear for a Pre-trial Conference." This order was issued without any briefing of any kind from either party. It establishes the tribal court's interest in dismissing the case with prejudice "because the court lacks subject matter jurisdiction based upon the doctrine of sovereign

immunity." *Young v. Puyallup Indian Tribe*, Puyallup Tribal Court, Sua Sponte Motion and Order to Appear, Jan. 4, 2010.

Dr. Young then filed a motion to dismiss his own case. It was granted. *Young v. Puyallup Indian Tribe,* Puyallup Tribal Court, Order on Motion to Strike and Dismiss, January 26, 2010.

Dr. Young then filed another complaint in Pierce County Superior Court. While the claims were virtually the same as those in tribal court, the parties were not. The Puyallup Indian Tribe was not a party. In addition, the police chief and the security guard were subsequently dismissed.

The Defendants brought a CR 12(b)(1) motion to dismiss. The Superior Court granted the motion.[3] Dr. Young moved for reconsideration. The motion was denied.

Dr. Young appealed to the state court of appeals. The court of appeals affirmed, addressing all of the federal questions raised in this Petition. The paragraph in the Decision Below addressing the shelter or conceal clause of the Treaty is as follows:

> Young next argues that the 1854 Treaty of Medicine Creek constituted a limited but express Congressional abrogation of the Puyallup Tribe's sovereign immunity. 10 Stat. 1132

[3] The Superior Court Order did not make any findings or any specific reference to the legal arguments made by either party, including Dr. Young's arguments concerning the shelter or conceal clause and the other matters of federal law. However, the hearing included a vigorous discussion of federal Indian law and the issues raised in this Petition.

> (1854). He argues that under the treaty, the Puyallup Indians shall not "shelter or conceal offenders against the laws of the United States, but deliver them up to the authorities for trial." 10 Stat. 1132, art. 8 (1854). Young's argument is unpersuasive. The treaty is inapplicable on its face. The tribe is not concealing any offenders accused of violating United States law. Additionally, waiver of tribal sovereign immunity must be explicit and unequivocal. *Santa Clara Pueblo*, 436 U.S. at 59. The language of the treaty does not constitute such an explicit or unequivocal abrogation of sovereign immunity here. Young also expressly conceded to the Puyallup Tribe's sovereign immunity in his brief.

Decision Below at 8.

The Decision Below was subsequently published. Dr. Young petitioned for review to the Washington Supreme Court. The petition was denied.

3. Standard of Review

This Petition comes to this Court on a motion to dismiss for lack of subject matter jurisdiction. Thus, the standard of review is the light most favorable to the non-moving party. *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 120, 147 P.3d 1275, 1282 (2006) (Madsen, J., concurring) ("On review, this court may consider the evidence presented in support of, and opposition to, the CR 12(b)(1) motion, viewing

the evidence in the light most favorable to the nonmoving party.") Here, Dr. Young is the non-moving party.

V. ARGUMENT FOR ALLOWANCE OF WRIT

1. This Court Should Grant the Petition to Ensure that Tribal Police Officers Who Are Trained, Certified, and Cross-Commissioned by the State, and Armed, Provisioned, and Equipped by the United States, Are Subject to U.S. Civil Rights Laws.

U. S. citizens should be protected by the civil rights laws of this country everywhere within the jurisdiction of the United States. However, U.S. civil rights laws do not apply to tribal government.

The various Indian tribes in what is now the United States were not invited to the Constitutional Convention and did not send delegates. *See, e.g. Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 756, 118 S.Ct. 1700, 1704, 140 L.Ed. 981 (1998). Likewise, when Congress extended the Bill of Rights to the various states via the Fourteenth Amendment, it did not extend it to tribal government. *U.S. Consti, Amend.* XIV.

Thus, tribal government is not constrained by the Constitution. *Santa Clara Pueblo V. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 1675 (1978). Tribal government is free to violate the civil rights of its own tribal members and those who come within its

jurisdiction with virtual impunity, subject only to the Indian Civil Rights Act ("ICRA"). 25 USC 1302.

ICRA extends some, but not all, of the Bill of Rights to tribal government. *Id.* Two civil rights that most citizens take for granted, but do not apply to tribal government, are the right to a trial by jury in civil cases and the right to enjoy the privileges and immunities of citizens of other states. *Cohen's Handbook of Federal Indian Law* (LexisNexis: 2005) § 14.04[2].

Moreover, the Indian Civil Rights Act does not waive tribal sovereign immunity and is only enforceable in tribal court. *Santa Clara Pueblo* at 56 – 57. Thus, even the constraints it *does* impose on tribal government are subject to the caprice of the tribal court system.

Unfortunately, this case does not present this Court with the opportunity to extend the nation's civil rights laws to tribal government because the Puyallup Indian Tribe is not a party to this case and the party seeking review is not a tribal member.

However, this case *does* present this Court with the opportunity to extend the nation's civil rights laws to non-tribal members who find their civil liberties threatened by non-tribal member *employees* of tribal government in the Pacific Northwest. This category of persons includes virtually everyone who, like Dr. Young, find themselves traveling through, or visiting, an Indian reservation in the Pacific Northwest.

Police officers who are employed by a federally recognized Indian tribe, but trained, certified, and cross-commissioned by state law, and provisioned, armed, and otherwise equipped by the United States, ought to be held to the same Constitutional standards

as their state and federal colleagues. However, this is not the law of the State of Washington. This Court should grant this Petition to make it so.

2. This Court Should Grant the Petition in Order to Prevent Tribal Government from Depriving U.S. Citizens of Their Constitutional Rights Without the Citizen's Knowledge and Consent.

It is fundamentally unfair to deprive a U.S. citizen of his civil rights without his knowledge or consent. However, that is precisely what happened to Dr. Young. When he wandered onto the Puyallup Reservation that fateful evening, Dr. Young saw no evidence to indicate that he was entering into a foreign jurisdiction outside the reach of U.S. civil rights laws.

He did not, for example, show his passport to a customs official or meet people who spoke a foreign language. Neither did he see any signage, fences, longhouses, totem poles, or other indications that he had entered the territory of a quasi-sovereign nation and warning him that he was no longer protected by the Constitution.

Indeed, the Puyallup Reservation is one of the most urban in the country. One-fifth of the Reservation is within the city limits of Tacoma, the second largest city in the State of Washington. Richard Slagle, *The Puyallup Indian Tribe and the Reservation Disestablishment Test*, 54 Washington Law Review 653, 653 (1979). Other portions are

within the limits of other municipalities, all incorporated pursuant to state law, not tribal law.

In addition, the Puyallup Reservation is not, primarily, inhabited by tribal members. According to the latest U.S. Census, over 46,000 people live within the exterior boundaries of the Reservation. U.S. Census Bureau, *American FactFinder, Profile of Puyallup Reservation and off-Reservation Trust Land, WA*. 2010 data. However, only 420 or so of these people are enrolled members of the Puyallup Indian Tribe. U.S. Census Bureau, *American FactFinder, Census 2000 American Indian and Alaska Native Summary File (AIANSF)*.[4]

Likewise, land within the Puyallup Reservation is not, primarily, owned by tribal members or the United States in trust for tribal members. In 1977, the tribal land base was a mere twenty-two acres. *Puyallup Tribe v. Dept. of Game of Washington*, 433 U.S. 165, 174, 97 S. Ct. 2626, 2622, 53 L.Ed. 2d 667, 675 (1977). Today, it is not significantly different.[5]

Pursuant to the Decision Below, a U.S. citizen who wanders onto the Reservation and is killed by tribal police has no recourse in a court of law. While this might be acceptable if the citizen *knowingly* entered the Reservation and *knowingly* gave up his civil rights, it is completely *unacceptable* if he did not. This court should grant the Petition to protect unwary U.S. citizens from the laws of a foreign jurisdiction

[4] This writer does not know precisely how many people are enrolled members of the Puyallup Indian tribe today.
[5] The Tribe has acquired land through litigation, purchase, and gift from the United States since 1977. How many acres is unknown to this writer.

when the citizen is unaware that he is *in* a foreign jurisdiction.

3. This Court Should Grant the Petition to Protect U. S. Citizens from Tribal Court Systems that Lack Basic Guarantees of Fairness and Impartiality.

While the Puyallup tribal court was, by definition, competent to hear disputes between tribal members, it was *not* competent to hear the dispute between Dr. Young and the Defendants. A tribal court is not a court of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367, 121 S.Ct. 2304, 2314, 150 L.Ed. 398 (2001). It does not have jurisdiction over civil rights claims. *Id.* at 2315.

Even if tribal court *had* jurisdiction, it would not be required to exercise it consistent with Dr. Young's civil rights. While the Puyallup Tribal Constitution asserts jurisdiction over "all people" within the Reservation, *Puyallup Tribe Consti,* Art. I, it only recognizes the civil rights of members. *Id.*, Art. VII. Dr. Young had no rights under the tribal Constitution.

Federal law as articulated by the Decision Below does not provide Dr. Young with any meaningful rights either. As previously discussed, ICRA relies on *tribal* court to protect *federal* rights. *Santa Clara Pueblo* at 65. The only federal remedy for a deprivation of the civil rights guaranteed by ICRA is a writ of *habeas corpus* to federal court. 25 USC § 1303.

But here, Dr. Young was not imprisoned by tribal authority, rather, he was *killed* by tribal authority. *Habeas* relief was precluded by the *facts*, if not by the *law*.

Moreover, at least during the time period that Dr. Young was attempting to litigate in tribal court, the court did not maintain a written record of decisions. Thus, relevant tribal law did not exist outside the four corners of the published code.[6]

Today, the code consists of 15 titles published on the Internet, none of which establish, or even mention, any tribal-law analogue to any of Dr. Young's U.S. civil rights claims or his state-law tort claims. *See Puyallup Tribal Code*. When Dr. Young was in tribal court three years ago, tribal code consisted of one three-ring binder, two and one-half inches thick.

The so-called waiver of tribal immunity in the Puyallup Tribal Tort Claims Act was of no comfort to Dr. Young either. First, the tribal court did not appear to be aware of it. The tribal court, without any briefing from either party, and entirely on its own volition, brought a motion to dismiss Dr. Young's claims based on sovereign immunity. This was the very same sovereign immunity that the tribal tort claims act supposedly waived.

Even if the tribal court *had* been willing to consider the tort claims act, it would not have been

[6] If tribal law exists in the custom, usage, and memories of certain tribal members, it is unavailable to Dr. Young. Dr. Young has no history with the Puyallup Reservation, no personal relationship with any tribal member, and therefore has no way of knowing what tribal custom and usage might be, even if it does exist and is somehow part of tribal law.

much help to Dr. Young. The Tribal Tort Claims Act does not waive sovereign immunity for most of Dr. Young's claims. It is, afterall, a tort claims act, not a civil rights act. See Puyallup Tribal Code § 4.12.010 *et. seq*. This Court should grant the Petition so that Defendants like Dr. Young will be guaranteed a fair and impartial forum in which to vindicate their civil rights. Claims against police officers who are employed by an Indian tribe, but trained, certified, and cross commissioned by the state.

4. This Court Should Grant the Petition Because Existing Case Law Focuses on Indian Treaty *Rights* But Ignores Indian Treaty *Responsibilities*.

The Treaty of Medicine Creek imposes mutual rights and responsibilities on each side. However, case law to date has focused almost exclusively on Indian treaty *rights* and has been conspicuously silent on their treaty *responsibilities*.

The Treaty was signed the day after Christmas, 1854, between Governor Isaac Stevens, on behalf of the United States, and representatives from the Native American tribes and bands that lived in what is now Pierce County, including the Puyallups. *Treaty* at preamble.

During the next ten months, Stevens signed an additional nine treaties with other Indians residing between the Pacific Ocean to the west and the Judith River in Montana to the east and between the Canadian border to the north and the Columbia River to the south.

Per the terms of the Treaty, the Indians ceded sovereignty over a large swath of territory south of present-day Seattle and north of the Skookumchuck River. *Id.* at Art. 1. However, they retained two aspects of their former sovereignty over the ceded territory: 1) the right to take fish at usual and accustomed places in common with the citizens of the territory, ("fishing clause") and 2) the privilege to hunt, gather roots and berries, and pasture horses on open and unclaimed land. *Id.* at Art. 3.

The Indians also retained their aboriginal sovereignty over three small parcels of land. *Id.* at Art. 2.[7] However, tribal sovereignty, even on those parcels, was explicitly limited in eight ways. A local historian has summarized the treaty's limitations on the tribes' aboriginal sovereignty as follows:

1) Dependence on United States;
2) Friendship with whites and other Indians;
3) Delivery of lawbreakers to white authorities;
4) Prohibition of the sale or use of liquor;
5) Deductions from annuities to pay for stolen goods;
6) Abolition of slavery;
7) Prohibition of trade outside the United States; and
8) Exclusion of foreign Indians from the reservation;

Kent D. Richards, *Isaac Stevens: A Young Man in a Hurry*, (Washington State University Press: 1993,

[7] Two of the original three Reservations were moved and enlarged by Executive Order in 1857. *See, e.g.* Murray Morgan, *Puget's Sound*, (University of Washington Press: 1979) 130.

orig. pub. Brigham Young University Press: 1979) 200.

The fishing clause of the Stevens' Treaties has been the source of continuous litigation for the last half century. This Court has rendered seven different opinions regarding the fishing clause.[8] The Puyallups themselves were party to three of those seven cases.[9]

While Indian treaties *rights* have been litigated *ad infinitum*, Indian treaty *responsibilities* have been litigated scarcely at all. Indeed, this court has only discussed the shelter or conceal clause once before. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978) (holding that Indian tribes do not have criminal jurisdiction over non-members). Likewise, the shelter or conceal clause has only been mentioned in three different opinions in state court, including the Decision Below.[10]

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[8] The seven Supreme Court Stevens treaty fishing clause cases include the three Puyallup cases identified in the next footnote, plus the following: 1) *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); 2) *Seufert Brothers Co. v. United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1930); 3) *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); and 4) *Washington v. Washington State Commercial Passenger Fishing Vessel ("Fishing Vessel,")* 443 U.S. 658, 99 S.Ct. 3055 (1979).

[9] The three "Puyallup" cases are: 1) *Puyallup Tribe v. Washington Game Dept.* (*"Puyallup I"*), 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed. 689 (1968); 2) *Washington Game Dept. v. Puyallup Tribe*, (*"Puyallup II"*) 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed. 254 (1973); and 3) *Puyallup Tribe v. Dept. of Game of Washington ("Puyallup III)*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed. 2d 667 (1977).

[10] The shelter or conceal clause has been mentioned in the following state cases: 1) *State v. Schmuck*, 121 Wash. 2d 373, 850 P.2d 1332 (1993) (holding that tribal police officer has inherent

The shelter or conceal clause requires the Indians to deliver offenders against United States law to the authorities for trial:

> And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Treaty, Art. 8.

Here, the civil rights claims are laws of the United States. The authority for trial is Pierce County Superior Court. The Puyallups should deliver up the Defendants for trial. This Court should grant the Petition to bring a better balance between Treaty rights and Treaty responsibilities.

5. This Court Should Grant the Petition to Ensure that Stevens Treaty Case Law Is Grounded in the Historical Understanding of the Parties to the Treaties.

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sovereign authority to detain non-tribal members on public rights-of-way on the Reservation); 2) *State v. Eriksen*, 170 Wn.2d 209, 241 P. 3d 399 (2009) (holding that a tribal police officer has inherent sovereign authority to engage in fresh pursuit of non-tribal member across Reservation boundary); 3) *State v. Eriksen*, 172 Wash.2d 506, 259 P.3d 1079 (2011)(Reversing the previous opinion and holding that a tribal police officer does *not* have inherent authority to pursue suspects outside the Reservation boundary); and 4) The Decision Below. The second *Eriksen* case determined that the shelter or conceal clause was irrelevant because the relevant facts occurred off-reservation. *Eriksen* at 513, 1083. The Decision Below determined that the shelter or conceal clause was "inapplicable on its face." *Young v. Duenas*, 164 Wn. App. 343, 352, 262 P.3d 527 (Div.1 2011).

Dr. Young's right to a fair trial is grounded in the contemporaneous understanding of the parties to the Treaty. This understanding takes precedence over the Defendants claims of sovereign immunity because treaties are the supreme law of the land. *Cohen* at § 5.01[3], U.S. Consti. Art. VI, cl. 2.

The goal of treaty interpretation is to determine what the parties meant by the terms of the treaty. *United States v. Washington*, 157 F.3d 630, 642 (9th cir. 1998). It is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.* 443 U.S. 658, 675, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

Two narratives from treaty time shed light on how the parties to the treaties understood them – the story of Leschi and the story the Muck Creek Five.

Chief Leschi is perhaps the most well-known Native American leader of the Nineteenth Century in what is now Washington State. Kelly Kunsch, *The Trials of Leschi, Nisqually Chief*, 5 Seattle Journal of Social Justice 67, 67 (2006). Students of history will find Leschi's "X" mark third from the top after Stevens' own signature on the Treaty. *Treaty* at 663.[11] They will also find him in the history books as a ring leader of the Indian Wars of the Pacific Northwest.

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[11] One witness to the treaty Council, the Nisqually Indian John Hiton, asserted fifty years after the fact that Leschi refused to sign the treaty and, in fact, tore it up, threw it at Steven's feet, and stormed off, never to return. SuAnn Reddick and Cary C. Collins, *Medicine Creek to Fox Island*, 106 Oregon Historical Quarterly No. 3 (2005) 383.

Leschi was hung in February, 1858, after a white jury convicted him of killing a white volunteer officer named Colonel Moses.[12] Some of Leschi's white contemporaries and many, if not most, of today's historians, view him as innocent. In the alternative, they believe that Col. Moses' death was excusable because Leschi and his followers were at war with the settlers. *See Kent D. Richards* at 256 – 312, Morgan at 101 – 135, Richard Kluger, *The Bitter Waters of Medicine Creek* (Knopf: 2011).

Washington's legislature asked the Washington Supreme Court to "re-try" Leschi in 2004, a century and half after his execution. *Kunsch* at 67. In Leschi's third trial, he was found not guilty. *Id.* at 68.

Regardless of Leschi's guilt or innocence, he was captured and tried in a territorial court. Nothing in the Treaty or the doctrine of sovereign immunity protected him from the operation of federal law. The contemporaneous understanding of the treaty, by the whites and the Indians, was that offenders against the laws of the United States would be held accountable in a court of law.

Here, the analogy between Leschi and the Defendants is imperfect. Leschi was accused of a capital crime – murder. The Defendants are accused of a civil rights crime. However, neither Leschi nor Col. Stevens distinguished between U.S. civil law or U.S. criminal law. To them, it was all U.S. law. There is no principled reason to extend the writ of U.S. law over crimes, but not over civil rights violations.

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[12] Leschi was found guilty after his second trial. The first trial ended in a hung jury. *See* Morgan and Richards, *supra*.

A better analogy from treaty times is between the Defendants and the Muck Creek Five. Whites and Indians had lived together in the South Sound in relative harmony for some twenty years before the coming of Col. Stevens. Many of these settlers were former employees of the Hudson's Bay Company who had intermarried. *Richards* at 274, *Morgan* at 122. Others were, as Richards put it, "half-breeds." *Richards* at 274.

When war broke out, many of the in-laws and half-breeds saw no reason to abandon their homesteads and move into town or a cramped blockhouse with their neighbors. *Id.* Gov. Stevens deemed this treason. During a "sweep" of the Upper Nisqually and Puyallup rivers, Steven's volunteer militia stumbled upon five of the "half breeds" who lived at Muck Creek, seized them, and locked them up. *Morgan* at 122.

Outraged by the detention of U.S. citizens without charges or representation, two volunteer lawyers then engaged in a 160-mile roundtrip canoe journey to the nearest judge to obtain a writ of *Habeas Corpus* on behalf of Defendants. *Id.* Stevens then declared martial law and closed the territorial court. *Id.* The judge attempted to hold court anyway, but eventually decided to go to jail himself, rather than risk a gun battle between the federal deputies and Stevens' militia. *Id.*

Because Stevens had closed the territorial court, the Muck Creek Five were tried by a military court. The military court eventually dismissed the cases on the grounds that it lacked authority over civil charges, such as treason. *Morgan* at 126 – 129, *Richards* at 282 – 285.

Here, the Defendants are in a legal posture similar to the Muck Creek Five. While the Muck Creek Five were brothers-in-law and/or half-siblings to various members of the Puyallup and Nisqually tribes, the three police officers are *employees* of the Puyallup Tribe. While the territorial court of the treaty-making era had jurisdiction over the civil allegation of treason, the state court of today has jurisdiction over the civil rights claims.

Neither the Treaty nor the principle of sovereign immunity should be allowed to protect today's Defendants from trial. This court should grant the Petition to interpret the Treaty of Medicine Creek consistent with the parties' intent.

6. This Court Should Grant the Petition to Ensure that Stevens Treaty Case Law is Grounded in the Legislative History of the Treaties.

Dr. Young's right to a fair trial is also based on the legislative history of the Treaty. One of the best sources for this history is House Report No. 474. *H.R. Report 474*, 23rd Cong., 1st Ses. (1834). This report establishes that non-Indians living in Indian country because of their jobs, and non-Indians traveling through Indian country, were protected by, and subject to, United States law.

> Officers, and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulations, must necessarily be placed under the protection of, and subject to,

> the laws of the United States. To persons merely travelling in the Indian country, the same protection is extended.

Id. at 18.

Here, the Defendants are officers and their presence on the Reservation is a direct result of the Treaty. They should be subject to the laws of the United States.

More directly, Dr. Young was travelling through the Reservation. Therefore, he is protected by the civil rights laws of this country. He did not abandon his civil rights when he wandered onto the Reservation.

Furthermore, H.R. Rep. 474 provides that federal Indian agents, not the tribes themselves, are supposed to remove "unprincipled white men" from Indian country. *Id.* at 98.

Here, the tribe did not wait for the federal agents to remove Dr. Young. Instead, it engaged in self help, with tragic results.

H.R. Rep. 474 also contains a concrete proposal to enforce federal law against law breakers in Indian country.

> The commissioners, therefore, beg leave very respectfully to suggest the expediency of organizing this Indian territory for the sole purpose of enforcing the laws of the United States, as far as they are applicable to the Indian country. One governor, a secretary, a marshal, a

> prosecuting attorney, and a judiciary, with adequate clerks, will be necessary. The Board has not been able to decide upon the number of judges.

Id. at 101. This recommendation addresses the need to enforce federal law against individual Indians, their agents, and virtually everyone else in Indian country. The sole purpose of organizing the Indian Territory was to enforce U.S. law on individual offenders.

Here, the Defendants are living in Indian country and subject to federal law. This Court should grant the Petition to interpret the Treaty consistent with the legislative intent of the treaty-making era.

VI. CONCLUSION

This court should grant this Petition to protect the civil rights of U.S. citizens who find themselves subject to tribal jurisdiction without their knowledge and consent. The historical record establishes that U.S. civil rights laws protected non-tribal members traveling through, or in, Indian country. Nothing in today's corpus of federal Indian law should be allowed to supersede that historical understanding.

Dr. Young had absolutely no reason to believe that, when he wandered into the foyer of the tribal health clinic that fateful evening, he would automatically forfeit his life, his civil rights, and any hope his heirs might have for justice.

What happened to Dr. Young was unconstitutional, unacceptable, and completely

avoidable. If the officers had acted within the bounds of the Constitution, Dr. Young would still be alive today. This Court should grant the Petition to give Dr. Young a chance to hold his killers accountable.

Respectfully submitted,

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