NO. 55019-9-II; NO. 55029-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ANDREW LARRY SIMMONS and MICHAEL MYRON SIMMONS,

Petitioners (Appellants/Defendants),

v.

STATE OF WASHINGTON

Respondent (Plaintiff).

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPENDIX

1. INTRODUCTION

Andrew and Michael Simmons are enrolled members of the Cowlitz Indian Tribe, which is a Federally recognized Tribe with ancestral lands in Southwest Washington and a history of trading, fishing, and shellfish gathering along the entire coastline of Washington into what is now Canada. The Simmons were cited for unlicensed harvesting of shellfish. They had gathered fifty razor clams (a stable of the Indian diet) at the beach where such clam are and have been most prevalent. This was over the daily harvest limit of fifteen clams imposed by State Fish and Game law. The Simmons produced their Tribal identification and asserted their right to gather shellfish within the area where their tribe had historically gathered shellfish. At trial, the undisputed evidence, presented through a tribal elder, the Simmons had gathered shellfish historically eaten by Cowlitz people from a beach where the Cowlitz people had historically gathered such shellfish.

The Cowlitz have no formal treaty with the United States. There is also no Act of Congress limited or abrogating the hunting and fishing rights of the Cowlitz People. Under the Indian Commerce Clause and U.S. treaty power, Indian rights can only be limited or abrogated by treaty or Act of Congress. As there is no applicable treaty or Act of Congress, the Cowlitz Tribe retains hunting and fishing rights, including the right for its members to gather shellfish at the places where tribal members have historically done so.

The Simmons were convicted of something they have a right to do. This conviction violates both Federal Indian Law and State civil rights law as applied to Indian rights. This Court should overturn and vacate those convictions and exonerate the Simmons,

2. ASSIGNMENT OF ERROR

2.1. The District Court erred when it failed to dismiss the citations for unlawful wild shellfish gathering against Defendants when presented with proof that Defendants were enrolled members of the Cowlitz Tribe engaged in gathering shellfish at a location where the Cowltiz Tribe had historically done so (a "usual and accustomed place").

2.2. The District Court erred when it subsequently convicted Defendants of unlawful wild shellfish gathering and imposed fines on Defendants.

2.4 The Superior Court erred when it affirmed these erroneous decisions of the District Court.

3. ISSUES REALTED TO ASSIGNMENTS OF ERROR

3.1. Did the Defendants have a right, as members of the Cowlitz Tribe, to gather wild shellfish where and when they did so, such that their doing so was not a violation of Washington State law?

Yes.

4. STATEMENT OF THE CASE

The Defendants/Appellants, Andrew and Michael Simmons, are enrolled members of the Cowlitz Indian Tribe, a Federally recognized tribe. (RP 5/31/19 p. 20 ll 14-17.) The Simmons dfendants were cited for unlicensed harvesting of shellfish after they were found with fifty razor clams, over the daily harvest limit of fifteen clams. The Simmons defendants produced their Tribal identification and asserted their right to harvest shellfish within the traditional area where their tribe had harvested shellfish. They proved that they were enrolled Cowltiz Indians with the rights that result from that tribal membership. (RP 5/31/19 p. 29 l. 13 – p.30, l. 4.)

There is no formal treaty between the Cowlitz Tribe and the United States abrogating any indigenous rights of the Cowlitz People. (RP 5/31/19 p. 20 ll 14-17; p.26, l.1 - p.27, l.19.) There is also no Act of Congress that abrogates any indigenous rights of the Cowlitz People. There are two Executive Orders that purport to recognize or abrogate indigenous rights in Southwest Washington, where the Cowlitz People lived, but these Orders were not ratified or authorized by Congress. (RP 5/31/19 p. 27 l. 22 - p.28, l.16.) The Cowlitz Tribe, unlike the Confederated Tribes of the Chehalis, have never conceded the effectiveness of executive orders that purport to limit their ancestral rights, including their ancestral title and their rights to hunt and fish and gather shellfish in their traditional hunting, fishing, and gathering locations. (RP p. 27, l. 4 -p.28, l. 3.)

The Cowlitz people had a hunting and gathering culture, subsisting on game, fish and shellfish. (RP 5/31/19 p. 25, ll 9-18.) They hunted in a large area of Southwest Washington they controlled. (RP 5/31/19 p. (RP 5/31/19 p. 20, l. 14 – p.21, l. 17.; p. 22, l. 16 – p.23, l. 5.) However, the usual and accustomed fishing and shellfish gathering locations of the Cowlitz were more extensive than their controlled territory, extending not only throughout the Cowlitz River watershed, but also up the Washington Coast into what is now Canada, along established coastal trade routes extensively used by the Cowlitz people. (RP 5/31/19 p. 23, l. 11 – 24, l.25.) This includes Copalis beach, the location where the Simmons gathered razor clams. This was established at pretrial through undisputed evidence, presented through a tribal elder. The State did not cross-examine or call any rebuttal witness. ((RP 5/31/19 p. 29 l. 9; p. 30 ll. 24-25.).

Based on a misapplication of an 1865 Executive Order and a misinterpretation of the case *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (1996), the District Court convicted the Defendants of unlawful shellfish harvesting. The Superior Court affirmed the conviction on the grounds that *Confederated Tribes* was dispositive and had the effect of abrogating the shellfishing rights of the Cowlitz Tribe. The *Confederated Tribes* case is inapplicable here. It was based both on an inapplicable exception to the normal Canons of Indian Law and on a fatal concession of the Confederated Tribes within that litigation.

Further, the Superior Court uncritically applied *Confederated Tribes* even though it is uncontested that *Confederated Tribes* relied on the effectiveness of an Executive Order, without any applicable treaty or Act of Congress, and even though the United States Supreme Court recently ruled that the rights of indigenous people cannot be abrogated by Executive Order unsupported by Treaty or Act of Congress. *McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (July 9, 2020).

Finally, the Superior Court did not address the Simmons' argument that the Simmons and the Cowlitz Tribe have rights protected by Washington State civil rights law in addition to any Federal rights addressed in *Confederated Tribes*. (*Confederated Tribes* did not address any issues of state civil rights.)

5. SUMMARY OF ARGUMENT

All Indians have reserved rights associated with their ancestral use and occupancy of land in the United States. These rights are not established by or dependent on treaties, although sometimes tribes have expressly reserved certain rights by treaties. If a tribe has not expressly reserved a right by treaty, they nonetheless have implied reserved rights. These are subject only to the plenary power of Congress under the Indian Commerce Clause. In other words, the rights of Indian Tribes, including the hunting and fishing rights, can be limited or abrogated only by treaty or Act of Congress. More, unless implementing the terms of a treaty or statute or fulfilling trust obligations to Indians, Presidential Executive Orders are ultra vires in Indian Country.

There is no applicable treaty or Act of Congress affecting the hunting and fishing rights of the Cowlitz people. Therefore, there has not been a lawful abolition of those rights through Federal plenary power, which is exclusively vested in Congress under the Indian Commerce Clause. However, there are Executive Orders, which must be liberally construed, absent competing tribal interests, in a manner that preserves and protects Indian claims of reserved rights. If, as here, and as in the *McGirt* case, there is no possible interpretation of an Executive Order except as an act taking something from Indian people, rather than providing some benefit to, or protecting some right of Indian people, then the Executive Orders are *ultra vires* and ineffective.

6. ARGUMENT

6.1 Canons of Federal Indian Law.

American Indian Tribes, and their enrolled members, have a special legal status in American law. This special status applies particularly to the application of state law to enrolled tribal members. There are two over-arching principles: (1) the plenary power of Congress (and only Congress, to the exclusion of the Executive Branch of government or state governments) under the "Indian Commerce Clause" (Art. 1, Sec. 8, Clause 3) of the U.S. Constitution, and (2) the default "trust obligations" of the U.S. Government owed to Indians and Indian Tribes. The District and Superior Courts' failures to apply these black-letter legal principles resulted in its erroneous conviction of the Simmons defendants.

The ultimate foundation of American Indian law is the "Marshall Trilogy" of cases – *Johnson v. M'Intosh,* 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia,* 30 U.S. (5. Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Chief Justice Marshall's opinions in those cases declared critical and longstanding rules that determine the relationship between the Federal government, states, and Indian Tribes. More critically, the Trilogy provided a legal framework for analyzing and interpreting the law when Indians and Indian Tribes are involved. The Court failed to apply this framework, and that failure is clear error.

Johnson announced the "Doctrine of Discovery" as the foundation for land titles in the United States. *M'Intosh*, *Id.*, at 574. The Marshall Court held that Indian Tribes did not own the land in fee title. Rather, the European nations and their American successors acquired fee simple title in the land by virtue of discovering the land. However, the Court announced that Indian Tribes did have the right of possession and use and that this right could be extinguished *only by the Federal government through purchase or conquest. M'Intosh* at *574.* While this, at first glance, seems like a sweeping divestiture of Indian rights, it is actually a limited and circumspect one. Unless there is a Federal statute, enacted by Congress under the Indian Commerce Clause, Indians and Indian Tribes are presumed to retain their rights, including the right to use and occupy land, except when they directly conflict with the enumerated powers of the Federal government.

> *Tribal powers are not implicitly divested by virtue of the Tribes' dependent status.* This Court has found such a divestiture in cases where the exercise of tribal sovereignty *would be inconsistent with the overriding interests of the National Government,* as when the Tribes seek to engage in foreign relations, alienate their lands to non-Indians without Federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) (emphasis added).

This conclusion is reinforced by the second of the Marshall Trilogy cases – *Cherokee Nation, supra. Cherokee Nation* held that Indian Tribes were not "foreign nations." Rather, while Indian Tribes retained aspects of nationality, they were a unique category of state called "domestic dependent nations." The conclusion is that Indian Tribes are "dependent" on the United States, creating a special trust relationship between the United States and the Indian Tribes within its borders. Subject only to statutes passed by Congress under its Indian Commerce Clause plenary power, all laws and regulations that affect or could affect Indians and Indian Tribes must be interpreted through this lens of trustee/beneficiary status. Specifically, all Executive Orders must be interpreted as actions of a trustee serving the interests of a beneficiary and all state law must be interpreted as subordinate both to Federal law and to this Federal/Tribal relationship. Further, States do not have the power to abrogate indigenous rights at all.

That final implication was elaborated in the final case in the Trilogy, Justice Marshall ruled that that the laws of the State of Georgia do not extend into Indian Country where they conflict with indigenous rights. *Worcester, supra,* laid the framework for analyzing disputes involving Indian Tribes by looking first to Indian treaties and then Acts of Congress. Further, this framework implies that Indians and Indian Tribes have pre-existing rights, and, through treaties, may alienate some rights while reserving others. The most obvious of these reserved rights is the right to land – called a "Reservation" – which is land reserved to the Indian Tribe when it gives up its other land within its historical range. However, hunting, fishing, and other rights are also part of the "use rights" of Indians and Indian Tribes and are reserved by them unless expressly relinquished by a Treaty or taken by an Act of Congress.

Based on the Marshall Trilogy, all claims of Tribal Rights must be analyzed through a prescribed legal framework, and it is error for a court (as here) to depart from that framework. First, Indians had unrestricted use and occupancy rights and reserve those rights unless divested of them by Act of Congress. *M'Intosh, supra,* at 574. Second, Federal authority in the field of Indian affairs is both exclusive (Federal Constitutional Supremacy) and plenary (Indian Commerce Clause, when exercised by Congress). *Worcester, supra* at 561. Third, Indian Tribes are nations and otherwise retain their sovereign authority and rights (including use and occupancy rights to land and resources). *Cherokee Nation, supra,* at 15-20.

Further, any such loss of indigenous rights is limited by the Federal Government's trust obligations. (See, for example, *United States v. Kagama*, 118 US. 375 at 384 (1886).) This rule has two relevant corollaries. First, executive orders, and any other law or regulation, other than an Act of Congress under the Indian Commerce Clause, must be interpreted as the Indians would have understood it and with the recognition that the Indians are presumed to be the beneficiaries of such actions by the government. *Cherokee Nation, supra,* at 17-18. Second, Tribes are not granted rights by treaty. Rather, they reserve some rights by treaty and give up other rights through treaty. Therefore, absent an Act of Congress, a tribe without a treaty has all the rights that could have been reserved by it through a treaty. (See, for example, *United States v. Idaho*, 533 U.S. 262 (2001).)

6.2 Application of Canons to Tribal Fishing Rights

These principles apply to use rights, such as hunting and fishing rights, as well as to the occupancy rights that provide for the establishment of Indian Reservations. Indian reserved rights are founded on the occupancy and use of the land prior to its being part of the United States. That is, indigenous people had an established way of life and have the right to maintain those life-ways on and within their traditional lands (and not just on the lands reserved within the boundaries of an established reservation). It is well-established that

hunting or fishing was an integral part of the Indian way of life. Thus, hunting and fishing rights are presumed to be reserved rights that. persist unless surrendered by treaty or divested by Act of Congress, neither of which has happened.

For example, in *Pioneer Packing* Co. *v. Winslow,* 159 Wash. 655, 294 P. 557 (1930), the Court held that Indians own reservation fish "by the same title and in the same right as they owned them prior to the time of the making of the treaty." Further, treaties provide for retention by the Indians of hunting and fishing rights, both on and off the reservation, indicating that hunting and fishing rights are a part of the aboriginal title which may be ceded by treaty or reserved by the Indians. Once established, an extinguishment of Indian rights "cannot be lightly implied." *United States v. Santa Fe Pac.* R. Co., 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941).

The Boldt Decision established Indian reserved rights to fish in their usual and accustomed places. *United States v. Washington I*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975). This has since been clarified to include the reserved right to harvest shellfish in all usual and accustomed places, including (unlike hunting rights) on private lands, excluding only cultivated, artificial shellfish farms. *United States v. Washington II*, 873 F.Supp. 1422, 1441 (W.D.Wash.1994), aff'd 157 F.3d 630, 643 (9th Cir. *1998*), cert, denied, 119 S. Ct. 1376 (1999).

6.3 Tribal Hunting and Fishing Rights in Absence of Treaty

The most definitive treatment of this subject is in the seminal case *State v. Coffee*, 97 Id. 1185, 556 P.2d 905 (1976). The rights involved in that case are almost exactly analogous to the rights involved in this case – although the result of the cases are different as a result of differences in facts of the cases.

In *Coffee*, an enrolled member of the Kootenai tribe was convicted of unlicensed killing of deer when she hunted on private land in Idaho. Like the Cowlitz Tribe, the Kootenai Tribe was a recognized Indian Tribe but did not have a formal treaty with the United States. Like the Cowlitz Tribe, the Kootenai Tribe were subsequently assigned to a treaty group. Indian treaty-making in Idaho and Washington occurred at the same historical moment and used the same treaty template. That template reserved Indian hunting rights to "open and unclaimed land" and fishing rights (including shell-fish gathering) to "usual and accustomed places." In *Coffee* the Court ruled that the reserved rights of non-treaty tribes are co-extensive with the rights reserved in treaties by treaty tribes. The reasoning is that, because treaty tribes had those pre-existing rights to reserve and, by reserving them, did not give them up, a non-treaty tribe must also retain those rights. Coffee was convicted because, although she had a reserved right to hunt on "open and unclaimed lands" without a license, she had hunted on private, regulated lands, where there was no reserved right. If she had hunted on public lands – open and unclaimed

lands – she would have been within her rights and the conviction would have been overturned.

While not expressly citing to the *Coffee* case, *Coffee* analysis was adopted by the Washington State Supreme Court in *State v. Stritmatter*, 102, Wn. 2d 516, 688 P.wd 499 (1984). The Stritmatter analysis starts with the "well accepted tenant for the construction of Indian treaties [] that a treaty is 'not a grant of rights to the Indians, but a grant of rights from them [and] a reservation of those not granted.'" *Stritmatter* at 521. From this analysis, the Court concluded that the rights of non-treaty, Federally-recognized tribes are more, not less, extensive than the similar, reserved rights of treaty tribes because "the tribe has not granted away any of its exclusive fishing rights."

Applying these principles here, the Simmons have and were exercising shellfish harvesting rights they have as members of the Cowlitz Tribe. These rights are different from and more permissive than the shellfishing rights of most citizens of Washington, which are subject to state regulation and granted by state law. The Simmons rights are Indian rights, subject to regulation only by Federal law, which pre-empts any inconsistent state regulation.

6.4 Misreading of *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (1996).

The rulings here rest on misreading of *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (1996). *Confederated Tribes of Chehalis v. Washington* is not solid ground for any ruling in this case, given both the

procedural posture and reasoning in the decision and subsequent rulings of the United States and Washington Supreme Courts.

First, the rulings are contrary to the internal logic of *Confederated Tribes, Id. Confederated Tribes*. Unlike the current case, in which members of the Cowlitz Tribe were asserting their own reserved fishing rights, *Confederated Tribes* involved a claim by the Chehalis Tribe that they had come to possess fishing rights reserved by the Quinault treaty tribes in the Quinault treaty even though the Chehalis were not signatories to that treaty. Further, and critically, they asserted these rights despite the objection of the Quinault treaty tribes, who intervened as parties in the *Confederated Tribes*. Because the *Confederated Tribes* case involved a dispute between tribes, the normal canons of Federal Indian law did not apply.

The critical passage in the *Confederated Tribes* case, which follows immediately after the statement of general principle above, is:

> The rules of construction, however, are of no help to the Tribes in their claim to Quinault fishing rights because of the countervailing interests of the Quinaults. The government owes the same trust duty to all tribes, including the Quinault. See *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.) (government has same fiduciary relationship with the Northern Cheyenne Tribe as it does with the Crow Tribe), cert. denied, *Crow Tribe of Indians v. EPA*, 454 U.S. 1081 (1981). We cannot apply the canons of construction for the benefit of the Tribes if such application would adversely affect Quinault interests. See *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) ("No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians.").

Confederated Tribes, supra, at 340.

Here, the Superior Court ruled that there is no meaningful distinction between the rights asserted by the Chehalis Tribe in the *Confederated Tribes* case and the rights asserted by the Simmons Defendants. On that basis, the Superior Court uncritically applied what it misunderstood to be the outcome of the *Confederated Tribes* case (a complete divesture of indigenous rights in Southwest Washington despite the absence of any treaty or Act of Congress having that effect). This was error.

First, unlike the Chehalis Tribe, the Defendants are asserting rights directly reserved by the Cowlitz Tribe, rather than rights claimed by assumption from the Quinault Tribe. The Defendants are claiming the right to gather shellfish in the Cowlitz's usual and accustomed places. Therefore, there is no countervailing interest of another tribe implicated in this case. As a critical extension of that, no other tribe has intervened to oppose the Simmons Defendants' exercise of their Tribe's reserved shellfish gathering rights.

Further, the keystone of the *Confederated Tribes* case was that the trust canon of Indian law did not apply because there were Indian interests on both sides of the argument. That is not the case here. Therefore, the Canons apply and require reversal of the conviction of these Defendants.

Moreover, in *Confederated Tribes*, the Court expressly re-affirmed the limitation on executive orders as applied to indigenous rights, but used that

against the Confederate Tribes, which had asserted rights under those Executive Orders, despite the absence of express language in the Executive Orders reserving or granting (as the Confederated Tribes were seeking a right to fish in the usual and accustomed place of another tribe, rather than in its own historic fishing grounds) that could be liberally construed in favor of the Confederated Tribe, and any such interpretation of the Executive Orders would have been a construal against the rights and interest of the Quinault Tribe.

> Courts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996). Any ambiguities in construction must be resolved in favor of the Indians. *Parravano*, 70 F.3d at 544. These rules of construction "are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985).

Confederated Tribes at 340.

The United States Supreme Court has taken this principle even further in its recent decision in *McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (July 9, 2020). *McGirt* unequivocally states that the Indian Commerce Clause of the U.S. Constitution provides that only Congress has the power to abrogate Indian reserved rights without a treaty agreed to by the Tribe, and that any action by a state or by the Executive Branch of government, unless it is grounded on an Act of Congress or Treaty or taken for the benefit of Indian People under the Federal trust obligation, is *ultra vires.*

It is undisputed here that there is no Treaty or Act of Congress abrogating any rights of the Cowlitz Tribe. Therefore, applying the Canons of Indian Law reaffirmed in *McGirt, Id.*, the Defendants had the right to harvest shellfish in the Cowlitz's usual and accustomed place for such harvesting. The evidence of this was the testimony of tribal elder Robin Torner, which establishes the historic harvest and harvest location, and which was not controverted by the Prosecution at trial. Therefore, not only was the Superior Court's interpretation of *Confederated Tribes, supra,* a misinterpretation of that case, it is a misinterpretation that violates both the letter and the spirit of the entirety of Federal Indian law.

While the Superior Court's decision was based on an uncritical, but incorrect, misinterpretation of *Confederated Tribes* as precedent, holding that there are no indigenous rights applicable in Southwest Washington, the prosecutor advanced a fall-back argument that the Defendants were barred from asserting rights by *res judicata* or collateral estoppel. The Cowlitz Tribe was not a party in the *Confederated Tribes* case. Therefore, that case and the specific ruling that arose from that case does not have any *res judicata* or collateral estoppel effect on the Cowlitz Tribe or its members. Cowlitz Tribal rights were not adjudicated in that proceeding. If the *Confederated Tribes* case is to have any legal affect in this proceeding, it is only as a statement of general law and then only if it is consistent or reconcilable with the Supreme Court decision in *McGirt.*

Further, the precedential and *stare decisis* effects of an appellate decision are strictly limited to arguments raised in and decided by the court issuing the decision. Issues, even if apparently addressed in a decision, are *dicta* and not *holdings* if those issues were not fully raised and argued in the appeal. (See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007) (plurality opinion) (quoting *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006)): ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." (quoting *Id*.)) The portion of the *Confederated Tribes* case relied on by the State fits that category.

No party in the *Confederated Tribes* case raised the issue of the exclusivity of Congressional Power under the Indian Commerce Clause or challenged the applicability of the two Executive Orders analyzed in that case given that they did not rest either on a Treaty or an Act of Congress. In fact, the Confederated Tribes appear to have argued that the executive orders were effective but operated to preserve, rather than limit or abrogate, their hunting and fishing rights. (They made this argument despite the absence of an express reservation of hunting and fishing rights in the executive orders, essentially treating the executive orders as the equivalent of a treaty or Act of Congress demarcating the rights of the tribe even though it did not expressly include off reservation hunting and fishing rights as a right of the tribe.

This was a fatal concession of the Confederated Tribes, and one that the Cowlitz Tribe has never made.) The applicability of the executive order relied on by the State in this case was conceded by the Chehalis in the *Confederated Tribes* case and was not decided by the Court as a precedential holding. That portion of the *Confederated Tribes* case must be analyzed as *dicta* and, when so analyzed, proves inconsistent with the precedential rulings of higher courts.

The Cowlitz Tribe was not a party to the *Confederated* Tribes case and has never conceded that its rights have been limited or abrogated by executive order. Rather, the Tribe has expressly asserted its rights, noting that those rights are preserved in the absence of a treaty or Act of Congress limiting or abrogating them. (See RP p. 27, l. 4 -p.28, l. 3.)

Under the Canons, the court must interpret the 1865 and 1873 Executive orders through the President's trust obligations to the Cowlitz people. The State and the District Courts fail to liberally construe those orders in favor of a broad recognition and protection of Cowlitz reserved rights. In fact, the State and the District Courts argue that the 1865 Executive Order operates to extinguish otherwise reserved rights of the Cowlitz people, including the Defendants.

The President does not have the plenary power to extinguish reserved Indian rights. Only Congress can, and there is no applicable Act of Congress that has extinguished the reserved hunting and fishing rights of the Cowlitz people. Lacking plenary power, the President is obligated to act as a trustee for

the benefit of the Indian Tribes and in a manner that preserves their rights (including the shellfishing rights asserted here). If there is a possible interpretation of the 1865 Executive Order that comports with this obligation, that interpretation controls. If there is no such interpretation, then the Executive Order is *ultra vires* and invalid. In either case, there is no lawful and proper interpretation of the Executive Orders that could divest the defendants of their rights to harvest shellfish.

6.5 State Civil Rights Law Also Protects the Simmons here

Just as the parties in *Confederated Tribes* did not raise the strong limitation on Executive plenary power recognized in *McGirt*, the *Confederated Tribes* case did not involve any assertion of civil rights under state law. *Confederated Tribes* was limited to Federal questions and Federal rights.

On July 10, 2020, the day after the issuance of the *McGirt* decision, the Washington State Supreme Court issued an equally relevant and dispositive Order vacating the decision *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916), (a decision which upheld the conviction of a Yakama tribal member for fishing with a gaff hook in a usual and accustomed fishing location of the Yakama People). (Order 13083-3, attached hereto as Appendix I.) That the Washington Supreme Court felt it was worthwhile to reach back more than a hundred years to undo an unjust conviction of an Indian for fishing underscores the importance of this Court hearing and reversing this case, which repeats that same injustice today.

There are two critical observations to be made from the decision represented by that order. First, the Washington Supreme Court noted that the key question was whether the fishing (or shellfish harvesting) was at a "usual and accustomed place." If so, it is legal. However, there is an even more important point to be drawn from Order 13083-3. It appears to declare a new (indeed a novel) stage of State and Tribe relations as sovereigns that share space by recognizing and protecting indigenous rights under State law in addition and supplementation to Federal law. In its analysis, the Supreme Court appears to be both strongly reaffirming its previous holding in *Stritmatter* while also questioning the reasoning in *State v. Cheyenne*, 165 Wn. 2d. 10, 195 P.3d 521 (2008) (which does not apply here in any case as it involved a challenge to a sentence, rather than a conviction, for violation of state fishery regulations and involved a member of the Chehalis Tribe, whose rights, unlike those of the Cowlitz, are clouded by the *Confederated Tribes* case).

In its Order, the Washington Supreme Court included State civil right and due process considerations in its ruling and did not merely limit its ruling to the strict and rigid confines of Federal Indian Law. In making this ruling in this way, the Washington Supreme Court pronounced legal principles, applicable in Washington State, that protect the rights of Tribes and members of Tribes in Washington. Further, these State civil rights protections are

broader and more protective than the protections offered by Federal Indian Law.

Just as the State can be more protective, but not less protective, of Federally guaranteed general civil rights, Washington State can be more respectful, but not less respectful, of Tribal rights and sovereignty than Federal Law requires. The Supreme Court appears to have stated a policy of being more protective and respectful of Tribal Rights than required by Federal Law.

The Superior Court failed to address this point. That is a gap in the Superior Court decision that requires, at a minimum, a remand. The decision was based entirely on the *Confederated Tribes* case, which has no bearing on whether there is a state civil rights protection of indigenous rights such as those asserted by the Simmons defendants.

7. CONCLUSION

The Defendants/Appellants, Andrew and Michael Simmons, are enrolled members of the Cowlitz Indian Tribe, a Federally recognized tribe. The Simmons were cited for unlicensed harvesting of shellfish after they were found with fifty razor clams, over the daily harvest limit of fifteen clams. The Simmons produced their Tribal identification and asserted their right to harvest shellfish within the traditional area where their tribe had harvested shellfish. At trial, the undisputed evidence, presented through a tribal elder, was that the

Simmons had harvested clams in a location where the Cowlitz people have historically and traditionally done so.

The Cowlitz have never entered a formal treaty with the United States. Because Indian rights can only be limited or abrogated by treaty or Act of Congress, and there is no treaty, only an applicable Act of Congress could have limited or removed the fishing rights the Simmons exercised here. There is no applicable Act of Congress. Therefore, the Cowlitz Tribe retains hunting and fishing rights, including the right for its members to gather shellfish at usual and accustomed locations (under *Boldt II*). In violation of both Federal Indian Law and State civil rights law as applied to Indian rights, the Simmons were convicted of something they have a right to do. This Court should overturn and vacate those convictions and exonerate the Simmons,

SUBMITTED this 2nd day of April, 2021.

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Attorney for Appellants Simmons

CERTIFICATE OF SERVICE

I certify that on the date signed below, I e-filed the foregoing document with this Court, and e-served it upon Respondent's attorneys.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 2nd day of April, 2021, in Olympia, Washington.

/s/ Doreen Milward
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APPENDIX I

SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. ALEC TOWESSNUTE, Respondent.	)	**O R D E R** No. 13083-3

"The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all." Open Letter from the Washington State Supreme Court to the Members of the Judiciary and the Legal Community (June 4, 2020). Injustice has many faces and forms, and some of its history lies in the past opinions of this court. Such past opinions can continue to perpetrate injustice by their very existence. Today, we address one of those historical injustices.

On May 15, 1915, the State charged Alec Towessnute, a Yakama tribal member, with multiple fishing crimes. These criminal charges stemmed from the fact that he was fishing in the usual and accustomed waters of the Yakama tribe the day before. The charging document filed in Benton County stated that Mr. Towessnute was fishing with a "gaff hook in the Yakima river . . . more than five miles away from any Indian Reservation." Information, May 15, 1915. On

the 29th of May, C.W. Fristoe, Benton County Prosecuting Attorney, and Francis Garrecht, United States Attorney and Attorney for Mr. Towessnute, filed a Stipulation. They agreed that Mr. Towessnute was a Yakama tribal member, that he had engaged in fishing in the Yakima River without a state issued fishing license, that he used an unpermitted fishing hook, and, critically, that the fishing took place "in the usual and accustomed fishing places of the members of the confederated tribes and bands of Indians known as the Yakima Nation." The Stipulation further stated that the United States had entered into a treaty with the Yakama Nation on June 9, 1855 (ratified by the U.S. Senate on March 8, 1855) and that the area where Mr. Towessnute fished "has been used and enjoyed by said Indians during the fishing season of each and every year since said treaty was made, that said fishing place has from time immemorial been used and enjoyed by said Indians and their ancestors and known by the Indian name of "Top-tut."" Information, para. 3 & 4.

Mr. Towessnute objected to the charges. Relying on the Stipulation, he explained that Benton County had no jurisdiction over the matter because he had committed no crime by exercising his treaty fishing rights. The trial court judge agreed: on June 10, 1915, Benton County Superior Court Judge Bert Linn entered a final judgment in the matter, dismissing all the charges against Mr. Towessnute.

The Benton County Prosecutor's Office, however, disagreed. The Prosecutor filed a Notice of Appeal to this court and it was fully briefed. This court issued the opinion that gives rise to this matter now before the court: *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916). In that opinion, the court reversed the trial court's decision to dismiss the charges, mandated that the criminal charges be reinstated, and overruled Mr. Towessnute's objections. The record in

this matter following the mandate of the Washington State Supreme Court cannot be located, so it is not clear whether Mr. Towessnute was convicted of the offenses with which he was charged -- though a companion case to his did result in a conviction, which was vacated in 2015.

In 2015, the descendants of Mr. Towessnute, represented by attorney Jack Fiander and supported by the Washington State Attorney General, sought vacation of any record of conviction against Mr. Towessnute. Given that such a conviction could not be proven by the record, the trial court declined to take any action.[1]

Mr. Fiander brought this matter to our court's attention again, in 2020, seeking remedial action to right the injustice against Mr. Towessnute and the Yakama Nation. The Washington Attorney General supports this request for the court to take action in this matter, and the court agrees that it can and should act.

The opinion in *State v. Towessnute* is an example of the racial injustice described in this court's June 4, 2020 letter, and it fundamentally misunderstood the nature of treaties and their guarantees, as well as the concept of tribal sovereignty. For example, that old opinion claimed: "The premise of Indian sovereignty we reject . . . Only that title [to land] was esteemed which came from white men, and the rights of these have always been ascribed by the highest authority to lawful discovery of lands occupied, to be sure, but not owned, by any one before." *Id.* 89 Wash. at 482, 154 P. at 807. And that old opinion rejected the arguments of Mr. Towessnute and

[1] Under RCW 9.96.060(4), "Every person convicted prior to January 1, 1975, of violating any statute or rule regarding the regulation of fishing activities, including, but not limited to, RCW 75.08.260, 75.12.060, 75.12.070, 75.12.160, 77.16.020, 77.16.030, 77.16.040, 77.16.060, and 77.16.240 who claimed to be exercising a treaty Indian fishing right, may apply to the sentencing court for vacation of the applicant's record of the misdemeanor, gross misdemeanor, or felony conviction for the offense. If the person is deceased, a member of the person's family or an official representative of the tribe of which the person was a member may apply to the court on behalf of the deceased person."

the United States that treaties are the supreme law of the land. It also rejected the Yakama Treaty's assurance of the tribal members' right to fish in the usual and accustomed waters, in the usual and accustomed manner, as the tribe had done from time immemorial. This court characterized the Native people of this nation as "a dangerous child," who "squander[ed] vast areas of fertile land before our eyes."

Today, we take the opportunity presented to us by the descendants of Mr. Towessnute, their counsel, Mr. Fiander, the Washington State Attorney General, Robert Ferguson, and by the call to justice to which we all committed on June 4, 2020, to repudiate this case, its language, its conclusions, and its mischaracterization of the Yakama people, who continue the customs, traditions, and responsibilities that include the fishing and conservation of the salmon in the Yakima River. Under the Rules of Appellate Procedure (RAP) 1.2(c), this court may act and waive any of the RAP "to serve the ends of justice." We do so today. We cannot forget our own history, and we cannot change it. We can, however, forge a new path forward, committing to justice as we do so.

Therefore, it is hereby ordered:

That the mandate issued by this court in 1916 is recalled and any conviction existing then or now against Mr. Towessnute is vacated.

DATED at Olympia, Washington, this 10th day of July, 2020.

Stephens, C.J.

Johnson, J.

Gordon McCloud, J.

Madsen, J.

Yu, J.

Owens, J.

Montoya-Lewis, J.

González, J.

Whitener, J.

DESCHUTES LAW GROUP, PLLC

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