No. 11-753

In The
Supreme Court of the United States

KEVIN AARON BEAULIEU,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LORI SWANSON
Attorney General
MATTHEW FRANK
Assistant Attorney General
Counsel of Record
OFFICE OF THE MINNESOTA
ATTORNEY GENERAL
445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 757-1448
matthew.frank@ag.state.mn.us
Attorneys for Respondent

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

BLANK PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

Respondent Clearwater County, Minnesota respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision of the Minnesota Court of Appeals, for which the Minnesota Supreme Court denied a petition for discretionary review. The opinion of the Minnesota Court of Appeals is unpublished, but can be found at *In re Beaulieu,* No. A10-699, 2010 WL 3397335 (Minn. Ct. App. Aug. 31, 2010) (unpublished). The opinion is reproduced on the non-numbered pages at the end of the Petition.

JURISDICTION

The Minnesota Court of Appeals issued its opinion on August 31, 2010. In an Order filed on November 16, 2010, the Minnesota Supreme Court granted a petition for discretionary review, but stayed the matter pending its decision in *In re Johnson,* No. A09-2225. The Minnesota Supreme Court issued its opinion in *Johnson* on July 20, 2011. *In re Johnson,* 800 N.W.2d 134 (Minn. 2011). By order dated August 16, 2011, the Minnesota Supreme Court vacated its previous order granting review in this case and denied the petition for discretionary review. The Minnesota Court of Appeals issued a judgment on August 30, 2011. Petitioner filed the petition on November 25, 2011, which is more than 90 days past the Minnesota Supreme Court's order denying discretionary review

but within 90 days of the judgment. This Court's jurisdiction to review the decision of the Minnesota Court of Appeals on a writ of certiorari is based on 28 U.S.C. § 1257(a) (2010).

STATEMENT OF THE CASE

This case concerns whether Minnesota State courts have jurisdiction to order civil commitment pursuant to Minnesota's sexually dangerous person statute, Minn. Stat. § 253B.185 (2010), of an enrolled member of an Indian tribe about to be released from a Minnesota State prison. The federal government has not provided for such commitment and the tribe has no provisions in place for the commitment or treatment of sexually dangerous persons.

Petitioner began sexually offending when he was 12 or 13 years of age. Petitioner fondled the genital area of his cousin, who was four years of age.[1] When Petitioner was approximately 14 years of age, he began sexually assaulting his sister. Petitioner abused his sister multiple times over several years, when his sister was between 8 and 11 years of age. Petitioner used force in some of the sexual assaults and sexually penetrated her many times. At the commitment trial,

[1] These facts are taken from the trial court's findings of fact, conclusions of law, and order for initial commitment. In his petition for writ of certiorari, Petitioner does not challenge the sufficiency of any of the trial court's findings of fact.

Petitioner testified that he sexually assaulted his sister both on and off the reservation. Based on this conduct, Petitioner was adjudicated delinquent in Clearwater County District Court for criminal sexual conduct in the first degree in March 1997.

In August 1996, when he was 15 years of age, Petitioner sexually assaulted a female who was approximately 9 years of age. That same year, Petitioner sexually assaulted another child who was nine years of age. In March 1997, charges for these offenses were dismissed as part of the resolution of the charges involving his sister.

As a condition of the delinquency case, Petitioner enrolled in a sex offender treatment program. Petitioner failed to participate satisfactorily with the program and the treatment team decided to discharge him for lack of progress in December 1998. In January 1999, the court ordered Petitioner placed in a residential treatment program. Petitioner completed his high school education in that program. Petitioner also completed the sex offender treatment program and was discharged in August 2000 with a recommendation to continue in an aftercare program. By October 2000, Petitioner began missing aftercare sessions regularly and by May 2002, staff discharged him from the aftercare program.

In March and July 2001, when he was 19 years of age, Petitioner sexually assaulted a woman he had briefly dated. Petitioner pled guilty to one count of criminal sexual conduct in the fourth degree. In

February 2002, the court stayed a prison sentence and placed Petitioner on probation. After several alleged probation violations, including failing to complete sex offender treatment, Petitioner asked to execute his sentence on June 24, 2002, and the court sentenced him to 21 months in prison.

In June 2001, Petitioner sexually assaulted a girl who was 15 years of age. The prosecutor charged Petitioner with two counts of criminal sexual conduct in the third degree and one count of criminal sexual conduct in the fourth degree, but dismissed those charges as part of the plea agreement in the case described immediately above.

Petitioner served his prison sentence from July 1, 2002 to December 30, 2002. On January 19, 2003, Petitioner cut off his electronic bracelet (required as a condition of his supervised release) and left his house without permission. Petitioner failed to make arrangements to begin outpatient sex offender treatment and used alcohol and other drugs in violation of his release conditions. At a hearing, Petitioner admitted the violations of his release conditions and he returned to prison for 150 days. While in prison, Petitioner completed a chemical dependency treatment program. Petitioner was released from prison on September 16, 2003.

Just over a month later, Petitioner again absconded from supervision. He also failed to start sex offender treatment. After admitting the violations of his release conditions, Petitioner returned to prison.

At the commitment trial, Petitioner admitted that he used alcohol regularly while on supervised release in violation of his conditions. In prison, Petitioner asked to serve the remainder of his prison sentence so that he would not have supervision upon his release.

When Petitioner was nearing his release date, the Minnesota Department of Corrections notified the Clearwater County Attorney that Petitioner may be a candidate for civil commitment as a sexually dangerous person. Prior to Petitioner's release from prison, the Clearwater County Attorney filed a petition for civil commitment of Petitioner as a sexually dangerous person and a sexual psychopathic personality under Minn. Stat. § 253B.185 (2010). That statute provides that the court shall commit the person to a secure treatment facility if the petitioning party proves that the person has engaged in a course of harmful sexual conduct, the person has mental disorders, that as a result of those disorders the person lacks adequate control of their harmful sexual behavior, and the person is highly likely to reoffend sexually. Minn. Stat. § 253B.02, subd. 18c (2010); *In re Ramey,* 648 N.W.2d 260, 268 (Minn. Ct. App. 2002). The sexual psychopathic personality statute contains similar requirements using different terms. Minn. Stat. § 253B.02, subd. 18b (2010).

The court appointed two psychologists to examine Petitioner and offer opinions to the court on whether Petitioner met the criteria for commitment. Dr. Thomas Alberg, the first court-appointed psychologist opined that Petitioner met the criteria for

commitment as a sexually dangerous person. Dr. Robert Reidel, appointed by the court at Petitioner's request, opined that while Petitioner was highly likely to reoffend, he was not highly likely to reoffend sexually, and therefore did not support commitment. The court held a trial on the commitment petition. Following testimony from Petitioner and the two court-appointed psychologists, the trial court issued an order dismissing the petition. At the commitment trial, Petitioner testified that he would have to stay out of the reservation area in order to stay sober and out of trouble, so he was thinking about moving to other cities in Minnesota.

Petitioner was released from the security hospital on June 23, 2008. Within a week of his release, Petitioner began using alcohol again.

On August 9, 2008, Petitioner, who was 26 years of age, attempted to sexually assault a woman who was 18 years of age. While the victim was sleeping, Petitioner pulled the bed covers off her and repeatedly tried to grab her genital area, even after she awoke and protested. Petitioner pled guilty to attempted criminal sexual conduct in the fourth degree. On March 23, 1999, the court stayed a prison sentence and placed Petitioner on probation. The court ordered Petitioner to complete a sex offender treatment program and have no contact with past victims as conditions of probation. Petitioner was released from jail on April 8, 2009. Later that day, Petitioner had contact with one of his prior victims and asked her if he could stay with her. That contact occurred

off the reservation. After a hearing on April 13, 2009, the court found Petitioner in violation of his probation and executed the prison sentence.

While Petitioner was serving that prison sentence, the Department of Corrections notified the Clearwater County Attorney that Petitioner had previously been referred for commitment and had returned to prison for another sex offense conviction. Prior to Petitioner's release from prison, the Clearwater County Attorney filed a petition with the court to commit Petitioner as a sexually dangerous person and a sexual psychopathic personality. The court appointed Dr. Reidel to serve as the first court-appointed examiner. At Petitioner's request, the court appointed Dr. James Gilbertson to serve as the second court-appointed examiner. Clearwater County retained Dr. Rosemary Linderman to serve as an expert witness.

Based on their interviews with Petitioner, Petitioner's testimony at the trial, and their review of all the records, Dr. Reidel and Dr. Gilbertson both opined that Petitioner met the criteria for commitment as a sexually dangerous person and a sexual psychopathic personality. Dr. Linderman also opined that Petitioner met the criteria for commitment. Specifically, the doctors all agreed that Petitioner engaged in a course of harmful sexual conduct and a habitual course of misconduct in sexual matters. The doctors also agreed that Petitioner has recognized sexual, personality, or other mental disorders and that as a result of these disorders, Petitioner lacks the ability

to adequately control his sexually harmful behavior. Finally, the doctors all opined that Petitioner is highly likely to sexually reoffend if released into the community. They each opined that Petitioner was a danger to the community and was in need of inpatient, intensive, and long-term sex offender treatment in a secure setting.

The court held a trial, at which it received numerous exhibits and heard testimony from Petitioner, Dr. Reidel, Dr. Gilbertson, and Dr. Linderman. Following the trial, the court issued detailed findings of fact and conclusions of law on November 24, 2009. The court found that Petitioner met the criteria for commitment as a sexually dangerous person and a sexual psychopathic personality and ordered his initial commitment. Following the statutorily-required review hearing, the court ordered the commitment be indeterminate.

Petitioner filed an appeal of the trial court's commitment order. On appeal, for the first time, Petitioner asserted a lack of jurisdiction because he is an enrolled member of the White Earth Band of Ojibwe. Petitioner also challenged the sufficiency of the evidence to support the civil commitment. In an unpublished opinion released on August 31, 2010, the Minnesota Court of Appeals affirmed the commitment order. *In re Beaulieu,* No. A10-669, 2010 WL 3397335 (Minn. Ct. App. Aug. 31, 2010) (unpublished).

In its opinion, the Minnesota Court of Appeals first recognized that the issue of the court's jurisdiction could be raised for the first time on appeal. *Id.*, at *1. The Court then turned its attention to whether the provisions of 18 U.S.C. § 1162 or 18 U.S.C. § 1360 (commonly referred to as Public Law 280) provide jurisdiction to the State of Minnesota to pursue civil commitment. The Court noted that another panel of the Minnesota Court of Appeals had recently held that Public Law 280 did not provide jurisdiction to the State of Minnesota, citing to *In re Johnson,* 782 N.W.2d 274 (Minn. Ct. App. 2010), *aff'd,* 800 N.W.2d 134 (Minn. 2011). *Id.*, at *2.

But the Court of Appeals also noted that the Court of Appeals Panel in *Johnson* held that the State of Minnesota had jurisdiction because of the existence of "exceptional circumstances" and federal law did not preempt the state's jurisdiction. *Id.* Being constrained to follow the opinion of the Court of Appeals Panel in *Johnson,* the court held that the State of Minnesota had jurisdiction to commit Petitioner as a sexually dangerous person and a sexual psychopathic personality. *Id.* The court expressed sympathy for Petitioner's arguments about the potential for productive cooperation between the State of Minnesota and the White Earth Band of Ojibwe to "address mutual interests in protecting the public from SDP and SPP persons and in treating those afflicted with such disorders." *Id.* The court concluded:

> While Indian self-governance and self-sufficiency are not encouraged when this

> state takes control of an Indian sex offender, such action is necessitated at this time because [Petitioner] has offered no evidence that the White Earth Band of Ojibwe has a civil commitment law or that it has any structure in place to treat SDP or SPP individuals. Thus, we conclude, as did this court in *Johnson*, that federal law does not preempt state jurisdiction, and exceptional circumstances exist to permit this state to exercise subject-matter jurisdiction over the SDP/SPP civil commitment involving [Petitioner].

Id.

Petitioner filed a petition for discretionary review with the Minnesota Supreme Court. By that time, the Minnesota Supreme Court had granted review of the Court of Appeals' decision in *In re Johnson.* The Minnesota Supreme Court granted the petition for discretionary review, but stayed the matter pending its decision in *In re Johnson.*

On July 20, 2011, the Minnesota Supreme Court issued its opinion in *In re Johnson,* 800 N.W.2d 134 (Minn. 2011). The Court held that Public Law 280's grant of jurisdiction over civil causes of action (18 U.S.C. § 1360(a)) conferred jurisdiction on Minnesota courts for civil commitments under the sexually dangerous person statute. *Id.,* at 144. The Court also considered the state interests in protecting the public from sexual offenders who are highly likely to reoffend, the lack of federal regulation in the area of

civil commitment, and the effects on tribal self-government, and concluded that Minnesota courts have jurisdiction to commit enrolled tribal members under the sexually dangerous person statute. *Id.,* at 144-48. The Court held, "Specifically, in light of the exceptionally strong State interests presented, the fact that Congress has not pervasively regulated this area of the law, and the minimal intrusion on tribal sovereignty, we conclude that Minnesota's enforcement of chapter 253B is not preempted. We therefore hold that the state has jurisdiction to civilly commit appellants." *Id.,* at 148.

Based on its decision in *Johnson,* the Minnesota Supreme Court vacated the order granting review, and denied further review of the Court of Appeals' decision in Petitioner's case. Petitioner has now filed this petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

There is no sound reason for the Court to grant review in this case, let alone the requisite "compelling reasons." Sup. Ct. R. 10. The decision of the Minnesota Court of Appeals is consistent with the principles guiding the decisions of this Court with regard to the relationships between States and Indian tribes. In addition, there is no conflict with any decision of a state court of last resort or a United States Court of Appeals.

I. The Decision Of The Minnesota Court Of Appeals Is Consistent With Cases From This Court.

The White Earth Band does not have a sexually dangerous person commitment provision, the State's application of the sexually dangerous person statute in this case does not interfere with a federal regulatory scheme, and the State of Minnesota has a substantial and compelling interest in protecting all of its citizens from the harm caused by high risk sexual offenders. The Minnesota Court of Appeals' recognition of these principles in holding the State had jurisdiction in this case is consistent with this Court's decisions on State regulatory authority over tribes and their members.

The Court has rejected the notion that Indian tribal sovereignty is absolute or subject to the jurisdiction of only the federal government. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 147-48 (1973); *Williams v. Lee,* 358 U.S. 217, 220 (1959). This Court's jurisprudence in this area has long established that state laws may be applied to tribes and their reservations "unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe,* at 148. The concept of "inherent Indian sovereignty" is not a bar to state jurisdiction. *McClanahan v. State Tax Comm'n,* 411 U.S. 164, 172 (1973).

Instead, this Court looks to concepts of federal pre-emption in the particular matter before it. *Id.* But

traditional notions of federal pre-emption law are "generally unhelpful" in deciding whether state laws may be applied to tribes and their reservations because "[t]ribal reservations are not States, and the difference in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980). The traditions of Indian sovereignty and their semi-dependent status with the federal government provide a backdrop for the determination of whether federal law pre-empts the state law's application to the tribe. *White Mountain,* 448 U.S. at 143; *McClanahan,* 411 U.S. at 172.

This Court has identified basic guiding principles in determining whether a state can assert jurisdiction over a tribe or its members. *White Mountain,* 448 U.S. at 141. There is "no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *Id.,* at 142. Rather, this Court has recognized two "barriers" to the assertion of state authority over tribal members: "First, the exercise of such authority may be pre-empted by federal law. . . . Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.,* at 142 (quoting *Williams v. Lee,* 358 U.S. 217, 220 (1959)) (internal citations omitted). To assess whether these barriers prevent the assertion of state authority, this Court considers the "respective rights

of States, Indians, and the Federal Government." *Mescalero Apache Tribe,* 411 U.S. at 148.

A. The State's Interests.

In the analysis of whether a particular state law may be applied to a tribe or its members, the "applicable regulatory interest of the state must be given weight. . . ." *White Mountain Apache Tribe,* 448 U.S. at 144. The State of Minnesota has a strong interest in protecting all of its citizens from harmful sexual conduct by providing secure treatment to those with a history of harmful sexual conduct and whose personality, sexual, or mental disorders leave them without adequate control of their harmful sexual behavior and who therefore present a high risk of sexually reoffending.

This Court has recognized that states have "a legitimate interest under its *parens patriae* powers" to provide care and treatment to the mentally ill and "authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington v. Texas,* 441 U.S. 418, 426 (1979). "The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded." *Kansas v. Hendricks,* 521 U.S. 346, 363 (1997). Long ago, this Court upheld an equal protection challenge to Minnesota's original sex offender commitment law because the statute's terms "clearly show that the persons

within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control." *State of Minnesota ex rel. Pearson v. Probate Court,* 309 U.S. 270, 275 (1940).

Likewise, the Minnesota Supreme Court has consistently recognized the State's compelling interest in protecting the public from dangerous sex offenders. In rejecting a substantive due process challenge to the sexual psychopathic personality statute, the Minnesota Supreme Court stated, "Here the compelling government interest is the protection of the members of the public from persons who have an uncontrollable impulse to sexually assault." *In re Blodgett,* 510 N.W.2d 910, 914 (Minn. 1994). Rejecting a due process challenge to a sexually dangerous person commitment, the Minnesota Supreme Court stated, "Under its police powers, the state has a compelling interest in protecting the public from sexual assault. *Blodgett,* 510 N.W.2d at 914, 916. There is also a compelling interest in the care and treatment of the mentally disordered. *Cf. Addington,* 441 U.S. at 426, 99 S. Ct. at 1809-10 (noting such an interest as sufficient to justify civil commitment.)." *In re Linehan,* 557 N.W.2d 171, 181 (Minn. 1996), *vacated and remanded on other grounds,* 522 U.S. 1011 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999).

To commit a person as a sexually dangerous person, the petitioning party must prove that the person has engaged in a course of harmful sexual conduct, the person has mental disorders, that as a

result of those disorders the person lacks adequate control of their harmful sexual behavior, and the person is highly likely to reoffend sexually. Minn. Stat. § 253B.02, subd. 18c; *Ramey,* 648 N.W.2d at 268. Only persons who have mental disorders that affect their harmful sexual behavior and who have a high likelihood of sexually reoffending can be committed. The State has a substantial compelling interest in protecting members of the public from the high risk of sexual assault presented by these individuals if in the community and for providing treatment designed to reduce their risk.

This risk is not confined to the boundaries of any Indian reservation, for the person, if released into the community, is free to travel throughout the state. "A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 336 (1983). Here, Petitioner's high likelihood of sexually reoffending presents a risk to all citizens of Minnesota, whether on or off the reservation. Minnesota's interests in protecting the public from the harm caused by high risk sex offenders is particularly substantial here because Petitioner could sexually reoffend anywhere in the State, as he has done in the past.

B. The Tribal Interests.

This Court has recognized a tribe's interest in making their own laws and being governed by them.

Williams, 358 U.S. at 220. Minnesota's sexually dangerous person commitment statute does not prevent the Tribe from enacting and enforcing its own provisions for sexually dangerous person commitments. The White Earth Band simply has elected not to do so. In addition, the State's commitment statute does not interfere at all with the Tribe's economic development. In fact, the State's commitment statute benefits the Tribe in that the statute relieves the Tribe of the cost of committing and treating sexually dangerous persons.

To be sure, Minnesota's application of its sexually dangerous person statute interferes with the interests of the individual tribal member. But the tribal interests this Court considers in determining whether a State has jurisdiction over tribal members is the tribe's right to make their own laws and to be ruled by them, not the interests of an individual tribal member to be free from all reasonable state regulation. *Williams,* 358 U.S. at 220. Minnesota's sexually dangerous person statute does not interfere with the right of the White Earth Band to enact its own sexually dangerous person provision.

C. The Federal Interests.

Minnesota's commitment statute does not interfere with any federal regulation or federal purpose. Nor does it interfere with the federal goals of encouraging tribal self-sufficiency.

State jurisdiction is pre-empted by federal law if it interferes with, or is incompatible with federal and tribal interests reflected in federal law. *New Mexico v. Mescalero,* 462 U.S. at 334. The federal government has not taken any role in encouraging or regulating tribal action for the commitment of sexually dangerous persons. There is no comprehensive or pervasive federal regulation of this field. *See, e.g., id.,* at 338, 341 (recognizing "comprehensive scheme of federal and tribal management" of fishing and hunting on reservation and holding that concurrent state jurisdiction "not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development"); *White Mountain Apache Tribe,* 448 U.S. at 145, 148 (holding that federal government's regulation of harvesting Indian timber is "comprehensive" and "so pervasive as to preclude the additional burdens sought to be imposed").

Petitioner has not identified any federal and tribal regulatory scheme for the commitment of sexually dangerous persons. As previously stated, the White Earth Band does not have a provision for the commitment of sexually dangerous persons. There is a federal statute for the commitment of sexually dangerous offenders, but it only applies to those offenders in federal prison. 18 U.S.C. § 4248.

Furthermore, provisions of the federal sexually dangerous person statute indicate Congress's preference for states to take on the responsibility for

commitment and care of sexually dangerous persons. The statute requires that the Attorney General release a person committed as a sexually dangerous person to the State where the person resided if the State will accept them, and the Attorney General shall make all reasonable efforts to accomplish that transfer. 18 U.S.C. § 4248(d). If the State will not accept the transfer, the Attorney General must place the person in a suitable facility until the person is no longer in need of treatment or the State accepts responsibility. *Id.* This Court cited this provision as evidence that the federal commitment statute accommodates state sovereignty and state interests in the commitment and care of sexually dangerous individuals. *United States v. Comstock,* ___ U.S. ___, ___, 130 S. Ct. 1949, 1965 (2010).

Congress has acknowledged its responsibility to promote the health of Indians in the Indian Health Care Act. *See* 25 U.S.C. § 1601 et seq. The Act contains one provision referring to mental health services generally. 25 U.S.C. § 1621h. That provision sets forth the goals of studying issues related to improvement of mental health and securing services for Indians. But it has no provision specific to the commitment and care of sexually dangerous persons.

While generally recognizing its responsibility to improve mental health services to tribes, Congress has not enacted regulations for tribes to commit sexually dangerous persons. The federal government has not pre-empted this field, leaving it instead to the states.

In addition, when tribal members travel beyond reservation boundaries, they are subject to nondiscriminatory state laws applicable to all citizens of the state in the absence of express federal law to the contrary. *Mescalero,* 411 U.S. at 148-49. Petitioner committed sex offenses off the reservation. By travelling beyond the reservation to commit some of his sexual offenses, leading ultimately to his imprisonment in a State prison, Petitioner was subject to this nondiscriminatory State law.

In his petition, Petitioner spends a considerable amount of time questioning the Minnesota Supreme Court's decision in *In re Johnson* regarding Public Law 280's grant of civil jurisdiction. But the Minnesota Court of Appeals did not rely on Public Law 280 in finding jurisdiction in Petitioner's case. Petitioner also is critical of the use by Minnesota appellate courts of the terms "exceptional circumstances" to find jurisdiction. Although the Minnesota Court of Appeals did use that language in this case, it properly considered the interests of the State, the Tribe, and the federal government in a manner entirely consistent with this Court's decisions.

The State has a substantial and compelling interest in protecting its citizens from the harm caused by high-risk sex offenders in its communities. The White Earth Band has not enacted its own provisions for committing sexually dangerous persons. Nor has the federal government acted in this area to assist tribes with, or regulate such commitments. The

decision of the Minnesota Court of Appeals is consistent with the decisions of this Court.

II. There Is No Split Of Authority In Decisions Of State Courts Of Last Resort Or United States Courts Of Appeal.

The only other state appellate court to consider the issue presented here reached a decision that is consistent with the decision of the Minnesota Court of Appeals. The Wisconsin Supreme Court considered whether the State courts of Wisconsin have jurisdiction to order the civil commitment of an enrolled tribal member under its sexually violent person statute in *In re Burgess,* 665 N.W.2d 124 (Wis. 2003). Burgess was an enrolled member of the Lac du Flambeau Band of Lake Superior Chippewa Indians. *Id.,* at 127. Following his conviction for sexual assault of a child on the reservation, Burgess served a prison sentence in a State prison. *Id.* On the date of his release, the State filed a petition to commit Burgess as a sexually violent person under Wis. Stat. § 980.01. Before the trial, Burgess brought a motion to dismiss the petition on the grounds that he is an enrolled tribal member and the court lacked jurisdiction. *Id.* In response, the court contacted the Lac du Flambeau tribal court, which declined jurisdiction because the tribe had not yet passed a provision for commitment of sexually violent persons. *Id.,* at 127-28. The court denied Burgess's motion and the matter proceeded to trial. *Id.,* at 128. The jury found Burgess

was a sexually violent person and the court committed him to the custody of a State agency. *Id.*

On appeal, Burgess renewed his jurisdictional claim. The Wisconsin Court of Appeals found the State courts had jurisdiction and affirmed the commitment order. *In re Burgess,* 654 N.W.2d 81 (Wis. Ct. App. 2002). The Wisconsin Supreme Court granted his petition for review. *Burgess,* 665 N.W.2d at 128.

The Wisconsin Supreme Court first considered whether Public Law 280's grant of criminal jurisdiction (18 U.S.C. § 1162) provided the State courts with jurisdiction. Applying the analytical framework this Court enunciated in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), the Wisconsin Supreme Court held that the conduct covered by the sexually violent person statute was prohibited, not merely regulated, and so the Wisconsin State courts had jurisdiction under Public Law 280's grant of criminal jurisdiction. *Burgess,* 665 N.W.2d at 132.

The Wisconsin Supreme Court next considered whether Public Law 280's grant of civil jurisdiction (18 U.S.C. § 1360) provided jurisdiction. *Id.* The Court held that the adjudication of Burgess's mental health is a "status determination" which is more similar to adjudications like those involving insanity, rather than a regulation such as the power to tax. *Id.,* at 133. In addition, the Court noted that the tribal court did not have a provision for the commitment of sexually violent persons. *Id.* Based on those considerations, the Wisconsin Supreme Court held that the

State courts had jurisdiction to commit Burgess under Public Law 280's grant of civil jurisdiction. *Id.*

This holding is consistent with the decision in Petitioner's case. The Wisconsin Supreme Court held that the state court had jurisdiction over the sexually violent person commitment where the tribe did not have any provision in place for such a commitment. While the Minnesota Court of Appeals in this case did not rely on Public Law 280, the finding of jurisdiction is not in conflict with the decision of the Wisconsin Supreme Court.

Burgess filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Burgess v. Watters,* 467 F.3d 676, 680 (8th Cir. 2006). Two of the Judges of the Eighth Circuit panel disagreed with the Wisconsin Supreme Court's holding that Public Law 280's grant of criminal jurisdiction provided the State's courts with jurisdiction for sexually violent person commitments. *Id.,* at 686, 688. As to Public Law 280's grant of civil jurisdiction, however, the Eighth Circuit concluded that the Wisconsin Supreme Court's decision was not contrary to, or an unreasonable application of clearly established federal law. *Id.,* at 687. Accordingly, the Eighth Circuit affirmed the district court's decision denying the habeas petition. *Id.*

The decision of the Eighth Circuit is also consistent with the decision of the Minnesota Court of Appeals in this case. Applying the federal habeas standard of review, the Eighth Circuit concluded that

the decision of the Wisconsin Supreme Court finding jurisdiction for sexually violent person commitments was not contrary to decisions of this Court.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

LORI SWANSON
Attorney General
MATTHEW FRANK
Assistant Attorney General
Counsel of Record
OFFICE OF THE MINNESOTA
ATTORNEY GENERAL
445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 757-1448
matthew.frank@ag.state.mn.us