11-753

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In the Matter of the Civil Commitment of:
KEVIN AARON BEAULIEU

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Public Law 280 (18 U.S.C. § 1162 and 28 U.S.C. (1360) give the State of Wisconsin jurisdiction to involuntarily civilly commit a member of a federally recognized Indian tribe who is a legal resident of his tribal reservation under Minnesota's Commitment and Treatment Act (Minn. Stat. Ch. 253B?)

2. Was Minnesota's involuntary civil commitment of Beaulieu contrary to, and/or an unreasonable application of this Court's clearly established law limiting Public Law 280's grant of civil jurisdiction to private civil matters?

LIST OF PARTIES

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES & CONGRESSIONAL ACTS

MINNESOTA CASES

MINNESOTA STATUTES

NEW MEXICO CASES

IOWA CASES

OTHER SOURCES

JURISDICTION

Under Supreme Court Rule 13 a petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review. Notice of Entry of Order for In the Matter of the Civil Commitment of: Kevin Aaron Beaulieu, A10-699 (Minn. App. Aug. 31, 2010) was August 30, 2011.

PETITION

Appellant herein, Kevin Beaulieu, lost his right to further review in Minnesota by the Minnesota Supreme Court when the 4-3 *Johnson-Desjarlait*[1] (herein after *Johnson*) majority held and declared in their Syllabus of the Court that

> 1. Minnesota's civil commitment statute, Minnesota Statutes chapter 253B (2010), falls within the express grant of jurisdiction in 28 U.S.C. § 1360(a) (2006).
>
> 2. Because the civil commitment of appellants as sexually dangerous persons for conduct committed on and off reservation does not unduly interfere with tribal sovereignty and is not otherwise preempted by federal law, the exceptionally strong state interests in protecting public safety and rehabilitating the mentally ill support the state's enforcement of its civil commitment law against tribal members.
>
> Affirmed.

Id. at 136. The Minnesota Supreme Court states that it *affirmed* the Appellate Court's *Johnson*[2] decision which Syllabus of the Court clearly indicated that

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[1] *In the Matter of the Civil Commitment of Jeremiah Jerome JOHNSON*, and *In the Matter of the Civil Commitment of Lloyd Robert Desjarlais*, 800 N.W.2d 134, Nos. A09–2225, A09–2226. July 20, 2011.

[2] *In the Matter of the Civil Commitment of Jeremiah Jerome JOHNSON*, and *In the Matter of the Civil*

> *The state does not have jurisdiction pursuant to Public Law 280 to civilly commit an enrolled member of a federally recognized Indian tribe as a sexually dangerous person under the Minnesota Commitment and Treatment Act.* But in the absence of express congressional consent, the state does have jurisdiction to civilly commit an enrolled member of a federally recognized Indian tribe as a sexually dangerous person under the commitment and treatment act where, as here, federal law does not preempt state jurisdiction and *exceptional circumstances* exist.

Id. at 276. (Emphasis Added). Clearly there is a disagreement as Minnesota having jurisdiction under Public Law 280. Additionally, the Appellate Court misunderstands express congressional consent, federal preemption with regard to Indians and Tribes and how *exceptional circumstances* relates to natural resource management and not on-reservation, Indian civil liberty deprivation concepts by a State sponsored, funded and prosecuted *civil* commitment.

In his Concurrence, Minnesota Supreme court Justice Page noted that

> I join Justice Meyer's concurrence. I write separately because ***<u>although I agree with the court that the State's</u>***

Commitment of Lloyd Robert Desjarlais, 782 N.W.2d 274, Nos. A09-2225, A09-2226, May 18, 2010, Review Granted Aug. 10, 2010.

> ***interests justify jurisdiction even without an express grant from Congress***, I disagree with the court's reliance on "rehabilitating the mentally ill," *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 872 (Minn.1999), as an "exceptionally strong state interest" justifying the exercise of jurisdiction here, see *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987).

Johnson at 148. (Emphasis added). Justice Meyer's Concurrence clearly articulates many of the issues and questions surrounding this present petition and is presented in its entirety here

> I concur in the decision of the court under Part II and would hold that the State has jurisdiction to civilly commit appellants. ***I write separately because I do not agree with the majority's analysis under Part I and would not base our decision on jurisdiction under 28 U.S.C. § 1360(a) (2006).***
>
> Public Law 280 expressly confers upon Minnesota "jurisdiction over civil causes of action between Indians or to which Indians are parties ... to the same extent that such State has jurisdiction over other civil causes of action," and provides that "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 as they have elsewhere within the State." 28 U.S.C. § 1360(a). In *Bryan v. Itasca County*, the Supreme Court found that "the primary intent of [section 1360(a)] was to grant jurisdiction over private civil litigation involving reservation Indians in state court." 426 U.S. 373, 385, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). The Court indicated that section 1360(a) "seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians." *Bryan*, 426 U.S. at 383, 96 S.Ct. 2102.

Unfortunately, the Court "has not had much to say about how to determine whether a law seeks to adjudicate private rights, and thus falls within the bounds of [section 1360(a)], or is a regulatory scheme." *Burgess v. Watters*, 467 F.3d 676, 686 (7th Cir.2006). However, *Bryan* did hint in a footnote at which laws are subject to Public Law 280's express grant of civil authority. Quoting a law review article, the Court stated that " 'Congress intended 'civil laws' to mean those laws which have to do with private rights and status.' " Bryan, 426 U.S. at 384–85 n. 10, 96 S.Ct. 2102 (emphasis added) (quoting Daniel H. Israel and Thomas L. Smithson, *Indian Taxation, Trial Sovereignty and Economic Development*, 49 N.D. L.Rev.

267, 296 (1973) (internal quotation marks omitted)). Therefore, " 'civil laws ... of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc." *Bryan*, 426 U.S. at 384–85 n. 10, 96 S.Ct. 2102 (citation omitted). The Court indicated that such laws are civil adjudicatory and are subject to Public Law 280's express grant of jurisdiction. See id. (citation omitted).

Applying this analysis to Minnesota's commitment of sexually dangerous persons leads me to conclude that sexually dangerous person (SDP) commitment proceedings cannot be considered private causes of action to which an Indian is a party under section 1360(a) of Public Law 280. While, as the majority states, the commitment statute does not operate to regulate or proscribe behavior, the commitment provisions in our statute certainly provide for adjudicated proceedings. They also appear to constitute "an implementation of the state's sovereign responsibilities to protect its citizens from sexually dangerous persons and to treat and care for those persons." *In re Civil Commitment of Johnson*, 782 N.W.2d 274, 279–80 (Minn.App.2010). As the court of appeals in this case reasoned, the State is "heavily involved in SDP commitment" and "involuntary civil commitment, which

significantly deprives an individual of his or her liberty, is one of the most extreme forms of regulation conducted by the State." *Id.* Un-like civil commitments generally, where any person may petition for commitment, SDP commitment proceedings may only be instituted by the county attorney. Minn.Stat. § 253B.185, subd. 1(b) (2010). Additionally, the rights of patients committed as sexually dangerous persons may be severely limited by the State. Minn.Stat. § 253B.185, subd. 7(b) (2010). Statutory rights that may be limited include personal privacy, private communications, retention and use of personal property, management of personal financial affairs, meeting with visitors, corresponding with others, and making telephone calls. Id. These rights are subject to greater limitation for a person committed as a SDP than for a person who is civilly committed.

Further, the Court in *California v. Cabazon Band of Mission Indians* determined that *Bryan* "interpreted [section 1360(a)] to grant States jurisdiction over private civil litigation involving reservation Indians in state court." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) (emphasis added). Relying on *Cabazon's* reference to "private" litigation, the Iowa

> Supreme Court has rejected the characterization of *state*-initiated child support recovery proceedings as civil/adjudicatory under Public Law 280 because the applicable "provisions reveal pervasive state control." *State ex rel. Dep't Human Servs. v. Whitebreast*, 409 N.W.2d 460, 463 (Iowa 1987). The Iowa Supreme Court agreed with the district court's statement that "[c]learly it is the state which initiated this action and the state which will benefit by payments to the state treasury. It is hard to imagine this case as a 'private civil cause of action involving Indians.' " Id. at 464 (alteration in original). Similarly, it is difficult to characterize these state-initiated actions, which are intended to benefit the public at large and not a private individual and which are conducted pursuant to Minnesota's sovereign police powers, as private causes of action to which Indians are parties.

Id. (Emphasis added). (Justices Page and P..H. Anderson concurring).

While their *opinion* is not called a *Dissent*, three of the seven Justices "do not agree with the majority's analysis under Part I and would not base our decision on jurisdiction under 28 U.S.C. § 1360(a) (2006)." However, while that conclusion is correct, apparently Minnesota Justices still have need to exercise jurisdiction, which apparently leaves *exceptional circumstances* as the emergency, state jurisdictional

legal concept which can over come the Supremacy clause of the U.S. Constitution and any Acts of Congress, as well as the on reservation rights of sovereign tribes and Indians.

These jurisdictional conflicts occurs at many levels and between Public Law 280 states, but it seems always the State's interests prevail in state courts whenever needed, like *Bryan v Itasca County*[3] [Minnesota]. However, here Minnesota Courts are really doing the legislating for public safety concern's when the State's legislators and executive branch should be forging cooperative law enforcement agreements to properly and correctly fill and bridge the jurisdictional gaps for the benefit of citizens of both governments, tribal and state.

Here, Appellant Kevin Beaulieu challenged Minnesota's subject matter jurisdiction to *civilly* commit him under Public Law 280 as a tribal member residing on his reservation at the Minnesota Court of Appeals, his appeal was Stayed pending *Johnson*, and jurisdiction is the legal issue petitioned. A related question would be if Minnesota lacks civil jurisdiction, or is unilaterally asserting state jurisdiction for *exception circumstances*, does this jurisdictional exercise violate double jeopardy and ex post facto civil rights of on reservation Indians?

ARGUMENT

The Minnesota Attorney General's Supreme Court Brief arguments for *Johnson* dated October 12,

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[3] 426 U.S. 373 (1976). (overturning Minnesota's Supreme Court decision supporting state taxation of on reservation Indians.)

2010, clearly revealed the legal *uncertainty*[4] of how the State has gained subject matter jurisdiction over a tribal members on reservations, by trying to argue and defend three, conceptually-distinct sources of possible authority and the corresponding and mutually exclusive court decisions with regard to civil commitment of Indians. The confusion and/or intellectual dishonesty was pointed out in Petitioner's original *Appeal Brief* noting that

> In the recent case of *In re Civil Commitment of Johnson,* --- N.W.2d ----, 2010 WL 1971676, Minn. App., May 18, 2010, it appears that the court is attempting to reconcile the conundrum Justice Page's scathing dissent raised in *State v. Jones*, 729 N.W.2d 1 (Minn. 2007):
>
> > I fail to understand how we can conclude that the statute is civil and regulatory when applied to non-Native Americans and to Native Americans who reside off the reservation, while at the same time concluding that the statute is criminal and prohibitory when applied to Indians who reside on the reservation. Such a result is

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[4] See http://thesaurus.com/browse/uncertainty **Definition**: doubt, changeableness, **Synonyms**: ambiguity, ambivalence, anxiety, bewilderment, concern, confusion, conjecture, . . .unpredictability, vagueness, wonder, worry **Antonyms**: certainty, definiteness, security, sureness.

> absurd. *State v. Jones*, 729 N.W.2d 1, *Page dissent at* 17 (Minn.2007).

(See Minn. App. Ct., *Appellant's Brief* dated May 27th 2010 pp. 7-8).

As a result, the State in its *Johnson* brief argued three possible sources of jurisdictional authority; 1) Public Law 280's grant of *prohibitory* conduct jurisdiction, or 2) Public Law 280's grant of *civil* jurisdiction, or 3) the theory of *exceptional circumstances* since the *Johnson* Appellate Court correctly reasoned Minnesota's lack of subject matter jurisdiction under Pub. L. 280, civilly and criminally.

The short answer to these three (3) arguments is that none of the three are valid sources of state jurisdiction over Indians on reservations under federal Indian law and federal Indian case law. In fact, what the State's *Johnson* brief has shown is that the *Stone*[5]-test is so-ambiguously subjective that the Court of Appeals recently concluded a ***prohibitory***[6] outcome in *Gishiig*[7]. The Minnesota Supreme Court noted the

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[5] See *State v. Stone*, 572 N.W.2d 725 (1997), (MN Supreme Court's version of Cabazon analysis and factors).

[6] The State does point out in their brief that "'criminal' and 'prohibitory' are the same" and that "It is not the position of the Respondent [State] that SDP commitments are criminal . . . [however] . . . If this court concludes that the term criminal is of talismanic significance, then the respondent [State] agrees that analysis as a civil case is more appropriate.

[7] *In Re Giishig*, No. A07-616, 2007 WL 2601423 (unpublished), Minn. Ct. App. Sept. 2007), rev. denied

similar difficulty when they disagreed with the Court of Appeals analysis in *Jones*[8] saying

> In its decision, the court of appeals stated, "We are unable to find any meaningful distinction here between broad and narrow conduct" and "[t]he conduct at issue is Jones's failure to keep the authorities apprised of his residence address."[9]

Part of the reason the *Stone*-test fails in these Indian on a reservation circumstances is because it is too easily manipulated by Minnesota courts which openly ignore the panoply of federal laws relating to Indians like the Duro fix[10], and instead cherry pick a single word or term like "insanity" from a footnote cite in *Bryan v Itasca.*[11]

In *Johnson* the Minnesota Supreme Court's newest jurisdictional reliance is clearly stated and found

> In a footnote in *Bryan*, the Court quoted a law review article that is helpful

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(Minn. Nov. 13, 2007). (Copy in appendix per Minn. Stat. 480A.08, subd. 3 (2008).

[8] *State v. Jones*, 729 N.W.2d 1, (Minn.2007). (cert denied).

[9] *Id.*

[10] Duro fix, Act of Nov. 5, 1990, §§8077(b)—(d), 104 Stat. 1892—1893 (temporary legislation until September 30, 1991); Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation).

[11] *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976)

in discerning a dividing line between private litigation and civil regulation. *Bryan*, 426 U.S. at 384 n.10 (quoting Daniel H. Israel & Thomas L. Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D. L. Rev. 267, 296 (1973)). This article notes that "Congress intended 'civil laws' to mean those laws which have to do with private rights and status." *Id.* (quoting Israel & Smithson, supra, at 296). Thus, according to the quoted article, " 'civil laws . . . of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc." *Id.* (alterations in original) (quoting Israel & Smithson, supra, at 296). The article distinguishes those "private" laws from "laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc." Id. (quoting Israel & Smithson, supra, at 296). Applying this analysis to Minnesota's civil commitment statute leads to the conclusion that the statute falls within the express grant of jurisdiction to the State under Public Law 280.

We reach this conclusion based on the language of our civil commitment statute. The plain terms of the statute governing the proceedings, Minn. Stat. § 253B.185, provide for adjudicatory "commitment proceedings" that are held to

> determine the status of an individual as a sexually dangerous person or sexual psychopathic personality. Minn.Stat. § 253B.185, subd. 1. The commitment statute does not operate to regulate or proscribe behavior. Rather, the statute applies only to those "who are mentally ill and dangerous to the public" and to those "who are alleged or found to be sexually dangerous persons." Id. As the court of appeals reasoned in this case, the State "is heavily involved in [sexually dangerous person] commitment," and "involuntary civil commitment, which significantly deprives an individual of his or her liberty," could be considered "one of the most extreme forms of regulation conducted by the state." *Johnson*, 782 N.W.2d at 279-80. The issue in dispute in these proceedings, however, is not the regulation of behavior but the condition or status of a private individual.

Id. at 141-142.

Prior to the *Johnson* decision, in some cases Minnesota presumed that it had subject-matter jurisdiction because it was applying civil/regulatory or civil remedial for Indians on reservations, like in *Linehan*[12], until the Minnesota Court of Appeals

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[12] See *Johnson* at 139-140 citing *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 870–72 (Minn.1999) (holding that the civil commitment statutes are civil for ex post facto and double jeopardy purposes and noting that "the SDP Act was adjudged a civil and not a criminal law" in *In re*

recognized that Congress via Pub. L. 280 did not grant the kind of specific civil, jurisdictional authority necessary for civil commitment. As such, the Minn. App. Court was forced to rely solely on another of Minnesota's version of case law creations---like their civil commitment application of "exceptional circumstances" when a Red Lake tribal member is involved, in *In Re Beaulieu III*[13] declaring that

> However, even absent such express consent, a state may exercise its authority if the operation of federal law does not preempt it from doing so." (Citations omitted.) See also *Stone*, 572 N.W.2d at 731 (stating that "[t]he Supreme Court has not established a per se rule prohibiting the exercise of state jurisdiction . . . in the absence of an express congressional grant of jurisdiction").

Id. Here the Court of Appeals forgets that it is actually Congress, with plenary authority, not courts, that established the *per se* rule in 1953, in Public Law 280, and excepted Red Lake from Minnesota's grant of

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Linehan (Linehan III), 557 N.W.2d 171, 187–89 (Minn.1996)). Additionally the *Johnson* Court avoided those topics saying "We decline to revisit that analysis in this context."

[13] *In re Commitment of John Louis Beaulieu, III*, 737 N.W.2d 231, 235 (Minn. App. 2007). Referred to within as *Beaulieu III* to distinguish from actual Appellant Kevin Beaulieu herein.

jurisdiction. (See Pub. L. 280 28 U.S.C. §1360 and 18 U.S.C. §1162.)

The truth of the dilemma for Minnesota's quest for *legal* authority over Indians is in the *Jones*[14] reasoning stating that the state's interest in tracking convicted kidnappers is so high as to constitute an "exceptional circumstance," thus justifying the exercise of state jurisdiction absent express Congressional grant of jurisdiction[15]. The *Johnson* Court, just as in the Red Lake tribal member case, *In Re Beaulieu III* relied on "exceptional circumstances" noting that the

> Supreme Court cases "make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). Thus, in "exceptional circumstances," a State may "assert jurisdiction over the on-reservation activities of tribal members." *Cabazon*, 480 U.S. at 215, 107 S.Ct. 1083 (quoting *Mescalero*, 462 U.S. at 331–32, 103 S.Ct.

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[14] *State v. Jones*, 729 N.W.2d 1 (Minn. 2007).

[15] See Rachel L. Kraker, *Trumping Tribal Sovereignty One Sex Offender at a Time: How the Minnesota Court of Appeals' Decision in In Re the Commitment of Beaulieu [III] Disregards the Sovereignty of the Red Lake Band of Chippewa Indians and Sets a Dangerous Precedent for the Disposition of Civil Matters in Indian Country*, 31 Hamline L. Rev. 273, Winter, 2008. Citing to *Beaulieu*, 737 N.W.2d at 240.

> 2378) (internal quotation marks omitted). The question of whether "exceptional circumstances" allow State jurisdiction requires us to " 'weigh the competing interests at stake' within the 'specific factual context' presented." *Davis*, 773 N.W.2d at 72 (quoting *R.M.H.*, 617 N.W.2d at 64).

Id. at 144. ***Here, the Johnson Court cites to federal cases relating to state regulatory authority over on-reservation activities for exceptional circumstances, yet argue that Minnesota is only conducting a status determination instead of engaging in regulating conduct.*** Certainly the so-called *remedial consequences* associated with civil commitment serve as an additional deterrent for criminal sexual conduct.

This uniquely Minnesota, judicial pretzel logic is clearly infringing on the rights of Indians and Tribes, on all reservations in Minnesota's Indian Country. This false logic or legal fiction is, and will continue to be used at the lowest levels of regulatory cases to self-discover, self-grant and self-assume state jurisdiction over Indians---and as long as Minnesota courts rely on their own state versions of Indian case law and state precedents the courts created over the past decade---the state courts can and will find jurisdiction over Indians on reservations where none exists.[16]

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[16] See *State v Davis*, 773 N.W.2d 66, 68 (2009)(Cert. Denied). holding that the "State court has subject-matter jurisdiction over [Indian] appellant's traffic violations [on one of his Tribe's reservations] because Congress has not preempted Minnesota from enforcing its traffic laws

This very concern was expressed over a decade ago in *R.M.H.*[17] by the Dissent warning that

> The court goes on to state that "[i]n light of the Court's mandate that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,' **and because Pub. L. 280 unambiguously fails to distinguish between member and non-member Indians, state jurisdiction over *R.M.H.* is plainly lacking.**" Id. (internal citations omitted) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)). **The dissent expresses concern that the opinion of the majority clearly oversteps the bounds set out by Congress and the Supreme Court. *Id.* at 66-7. The dissent states that *State v. Stone* clearly holds that Minnesota does not have jurisdiction over minor traffic offenses committed by Indian people on Indian land, and for the majority to "[n]ow . . . ignore the plain language of Pub. L. 280 by holding that it does not apply to non-member**

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against appellant in state court." **(Here, the state of Minnesota is deciding tribal membership, thereby infringing on an exclusive, sovereign right of tribes).**

[17] *State v R.M.H.*,(2000)(Pet for Re'Hrg Denied Oct. 3, 2000).

Indians undermines not only Pub. L. 280 but also *Stone*."[18]

(Emphasis added). At the closing of their dissent in *R.M.H.* the Justices reiterated and warned that

> Congress and the Supreme Court have given states a clear directive in Pub.L. 280 and *Cabazon* that shapes and defines state jurisdiction over certain Indian activities on Indian reservations. **An attempt to carve out broader jurisdiction than has been granted to the states is inconsistent with the Supreme Court's mandate that tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States."** *Cabazon*, 480 U.S. at 207, 107 S.Ct. 1083 (quotation omitted). The rule of the majority undermines this carefully crafted conferral of limited state jurisdiction as applied in *Cabazon* and challenges well-established principles of Indian autonomy and self-government. See 480 U.S. at 207, 107 S.Ct. 1083 ("Indian tribes retain attributes of sovereignty over both their members and their territory") (quotation omitted). It overlooks "traditional notions of Indian sovereignty and the congressional goal of Indian self-

[18] See Kraker, N104, citing *R.M.H.*, 617 N.W.2d at 66 n. 2 (Stringer, J., dissenting)

> government, including its 'overriding goal' of encouraging tribal self-sufficiency * * * [,]" *Cabazon*, 480 U.S. at 216, 107 S.Ct. 1083 (quoting Mescalero, 462 U.S. at 334-335, 103 S.Ct. 2378). Finally, by ignoring the guidance provided by Congress and the Supreme Court regarding Pub.L. 280, we as a court ignore the long established and well respected dual federal and state court structure where both institutions ideally embody in their opinions "sensitivity to the legitimate interests of both State and National Governments." *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

(Id. at 67). (Emphasis added).

Here, the Minnesota Supreme Court was attempting to understand which federal laws apply, without any mention of the "*Duro* fix", an important federal law passed by Congress, which when missed or ignored led the majority to the wrong conclusion and holding. In 1990, shortly after the U.S. Supreme Court decided *Duro v. Reina*[19], Congress acted quickly to

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[19] *See Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), the United States Supreme Court had held that a tribe no longer possessed *inherent or sovereign authority* to prosecute a "nonmember Indian." But, soon after the Supreme Court decided *Duro*, Congress enacted new legislation "a fix" specifically authorizing a tribe to prosecute Indian members of a different tribe. See Act of Nov. 5, 1990, §§8077(b)—(d), 104 Stat. 1892—1893 (temporary legislation until September 30, 1991); Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation).

adopt and pass what is referred to as the *Duro* fix[20]. In December 2005, the Ninth Circuit Court in *Means*[21] reaffirmed that

> [i]n 1990 Congress responded to Indian tribes' concerns about the holding in *Duro* by amending the Indian Civil Rights Act[22] to say that the "powers of self-government" of Indian tribes "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[23] "All Indians" plainly includes Indians who are not enrolled members of the particular tribe exercising jurisdiction. . . .
>
> In addition to extending tribal criminal jurisdiction to "all" Indians, the 1990 Amendments make it plain that the definition of "Indian" is the same as "Indian" in the Major Crimes Act.[24]

(See *Means v Navajo Nation*, 432 F.3d 924, 929-31, (9th Cir. 2005)). Here instead, the *Johnson* court continues

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[20] *Id.* See "a fix" preceding FN.

[21] See *Means v Navajo Nation*, 432 F.3d 924, 929-31, (9th Cir. 2005).

[22] *See* Pub.L. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1892 (1990).

[23] 25 U.S.C. § 1301(2).

[24] 18 U.S.C. § 1153.

to cite to and follow *Duro v Reina* and doesn't seem to understand *U.S. v Lara*[25] pointing out that

> The Supreme Court "has emphasized that 'there is a significant geographical component to tribal sovereignty' and has 'consistently guarded the authority of Indian governments over their reservations.' " Id. at 64 (quoting *Bracker*, 448 U.S. at 151, 100 S.Ct. 2578). Supreme Court precedent also suggests that "tribal interest in self-governance is limited to relations between a tribe and its own members, not all Indians generally." Id. (citing ***Duro v. Reina***, 495 U.S. 676, 695, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160–61, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978)).

Id. at 146. (Emphasis added). Minnesota courts fail to consider <u>all</u> of the federal laws, together, relating to Indians and Tribes and therefore cannot integrate competing legal concepts important to tribal sovereignty and rights and powers of Tribes and Indians.

After *R.M.H.*, the state began deciding which Indians were to be treated as non-Indians for purposes

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[25] *U.S. v Lara*, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420, 72 USLW 4277, 04 Cal. Daily Op. Serv. 3331, 2004 Daily Journal D.A.R. 4703, 17 Fla. L. Weekly Fed. S 219

of state traffic enforcement and also state income taxation, targeting non-member Indians on reservations for what became the new battleground for state *desired* jurisdiction.[26] Early on the Minnesota Appellate Court in *Hart* had the benefit of the *U.S. v Lara* decision and discussed *Lara*, *Oliphant*, *Wheeler*, *Duro v Reina* and the Congressional Duro fix, the Appellate Court still missed the *express* preemptive effect of the Duro fix and left it for the Minnesota Supreme Court ***to determine whether to reevaluate if R.M.H. is still good law.*** However, review was denied.[27]

It is easy to see that the *Hart* Court misunderstood how Congress speaks to Indian tribes and states through federal statutory language and Acts and questioned why the U.S. Supreme Court, in *Lara*

> did not address Indian tribes' inherent sovereignty over prosecutions for civil/regulatory offenses. More importantly, the Court did not address states' authority to prosecute nonmember Indians under criminal or civil law or whether states may have concurrent jurisdiction over nonmember Indians. As the Court stated, "the change at issue here is a limited one.... [T]his case involves no

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[26] See *Davis* generally.

[27] See *State v. Hart*, 2006 WL 1229587 (Minn.App). May 09, 2006), review denied (Jul 19, 2006)(R'hrg Denied). (Emphasis added). In *Hart*, the defendant was a Red Lake enrollee, non-MCT member, on driving on a MCT reservation.

> interference with the power or authority of any State.[28]

Id. The *Lara* Court did not mean---that if states were already misinterpreting or skipping over any federal statutes *preempting* state jurisdiction in Indian country, like the *Duro* fix, Public Law 280 or the ICRA with regard to nonmember Indians on any reservation---for the State to continue infringing on tribal sovereignty and jurisdiction without interference. Most-likely, the *Lara* court gave the benefit of the doubt to Minnesota expecting that it was properly following Congress' acts and laws and *their* Supreme Court rulings.

In 2004, the *Lara*,Court held that the Civil Rights Act of 1968 recognizes and affirms in each tribe the "inherent power" to prosecute nonmember Indians.[29] Certainly because of jurisdictional respect between sovereigns and deference to each Tribe, it would not be appropriate for the United States Supreme Court to "address Indian tribes' inherent sovereignty over prosecutions for civil/regulatory offenses" (especially without an actual controversy in *Lara*) because Indian tribes' inherent sovereignty

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[28] *Lara* at 1636.

[29] See ICRA, § 1301(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

belongs to each tribe (domestic dependant nation) and its members' respectively, and it would be much like Iowa defining Minnesota's inherent sovereignty. Moreover, the U.S. Supreme Court, like Congress, speaks generally to all tribes, all states and all people with their laws and decisions in Indian Country. Cherry-picking phrases from cases instead of following the law has led to a decade of unnecessarily wasted legal resources and prevented tribal and state agreements by cloaking the problem with assumption of jurisdiction.

Over the past decade, and since the Minnesota Supreme Court's holding in *R.M.H.*, Minnesota courts have been judicially creating and assuming jurisdiction contrary to the rights of Tribes and Indians and limited Congressional authority, under the theory that the United States Supreme Court can authorize the *creation* of state jurisdiction, when whatever *exceptional circumstances* may arise.

Jurisdiction.

The State of Minnesota, as a Public Law 280 prosecutor and government, should know and understand and be able to articulate and declare ahead of time, just *what jurisdiction* it is rightfully exercising to deprive the liberty of Indians on reservations for what are clearly entitled civil matters. This minimal burden of proof is expected, in advance, under the Bill of Rights. Minnesota seems to believe they have civil/regulatory/remedial and criminal double jeopardy figured out for non-Indians, but that does not mean those principles simply apply entirely and the same way in Indian Country, under a limited civil grant of jurisdiction.

Whether recognized or not, the Minnesota Court of Appeals has ruled on the constitutionality of the federal statute, Public Law 280, by declaring Minnesota no longer requires Congressional authorization to assume subject-matter jurisdiction, contrary the United States Constitution and the Supremacy clause. See Art. 1, Sec. 8. ("The congress shall have the power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). As a consequence every lower court relying on Pub. L. 280 to civilly commit an enrolled tribal member on his reservation has departed far from the accepted and usual course of federal Indian law.

Once the Minnesota Court of Appeals discovered its lack of subject-matter jurisdiction under Pub. L. 280 in *Johnson*, it was left no other choice but to over-reach to "exceptional circumstances" to fill the jurisdictional gap. Just in case, Minnesota's Supreme Court in *Johnson*, doubled-down and cherry-picked the word or term "insanity" from *Bryan v Itasca* for civil jurisdiction.

In Re Giishig.

The Minnesota Appellate Court in *In Re Giishig*[30] found jurisdiction under Pub. L. 280 for *prohibitory* authority without explaining how it is not the same as *criminal*, nor how it eludes traditional double jeopardy commenting about the district court saying

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[30] *In re Giishig*, Not Reported in N.W.2d, 2007 WL 2601423 (Minn. App. 2007).

> The court finds that sex offender commitment statutes are prohibitory and, therefore, this court has jurisdiction in this matter.
>
> We agree. Based on the *Stone* factors, the conduct for which appellant is being committed violates the state's criminal public policy and "threaten[s] grave harm to person or property." *Stone,* 572 N.W.2d at 730.

Id. at 13. The *Giishig* Court was unable to find double jeopardy because its reasoning and analysis show the treatment is remedial and civil?

The legal question in Indian Country is, *if Minnesota does not have a civil jurisdiction grant from Congress* under Pub. L. 280 to civilly commit an Indian on the reservation, what *jurisdiction* is Minnesota exercising the second time?

Exceptional Circumstances.

Exceptional circumstances is not a jurisdictional grant and argument for civil commitment, but more aptly described judicial need for exigent circumstances for Minnesota's laws to be enforced. The real reason the Minnesota Court of Appeals and three of seven Minnesota Supreme Court Justices could not find *regular*, state authority or jurisdiction is because it does not exist. Congress did not grant it and the Tribes retain it inherently.

Unfortunately and contrary to Minnesota's wishes, the U.S. Supreme Court can only recognize and declare when a state *already has jurisdiction existing*

at law. Puyallup[31] is the only *exceptional circumstance* case where the State was allowed to regulate the on reservation fishing by Indians. The actual exceptional circumstance was that the State of Washington has a *federal, non-Indian treaty right* to harvest the salmon resource in common with the Puyallup members. Washington State has had that jurisdiction for 150 years, the U.S. Supreme Court did not *create a judicial remedy* called "exceptional circumstances" for emergency grant or assumption of State jurisdiction over Indian Country.

Similarly, U.S. Supreme Court Indian tax law cases simply support states' rights, to collect state taxes, from non-Indian sales on reservations within that state's boundaries.[32] The U.S. Supreme Court is without any constitutional power to grant *exceptional circumstances* jurisdiction to states, over Indians on reservations, its role is to decide cases and controversies.[33] As such, Minnesota's courts cannot rely on their own, decade long, self generated *stare decisis dictum* state case law providing for back-up, emergency, I need it right now, this is Minnesota's self-declared exception to Public Law 280—to trump

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[31] *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977).

[32] See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that state could require "smoke shops" on reservation to collect state sales tax from non-Indian customers).

[33] See U.S. Const., Amd. 3, Sec. 2 Original Jurisdiction - The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . .

Congress and infringe on the rights of tribes because of *exceptional circumstances.*

Important to note is that Washington is a Pub. L. 280 state, and it has never attempted to use the term *exceptional circumstances* over the past 40 years as a new judicial doctrine to other authority or jurisdiction to civilly commit reservation Indians. Compare Minnesota's frequent citing to and or use *exceptional circumstances* since 1997in *Stone*, then *R.M.H.*, *Jones*, *Morgan*, *Beaulieu III*, *Johnson*, *Desjarlait*, and now Appellant *Beaulieu* herein.. This same line of state cases support the assertion that in the absence of an express grant of jurisdiction from Congress, Minnesota can still check to see if it is preempted, using its own preemption test and analysis, which like Minnesota's *Stone*-test can easily be manipulated and outcome oriented.

Minnesota's developed judicial reasoning in *R.M.H.* results in sending Indian fines to state court and subsequently to tax on reservation Indians' income when they not on their reservations of enrollment, contrary to *Bryan v Itasca.*[34] The *R.M.H.* Court cited

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[34] See *R.M.H.*, 617 N.W.2d at 63 (stating, "[o]ur analysis rests heavily on the status of R.M.H. as a nonmember Indian."). R.M.H. argued that because he was an enrolled member of the Forest County Potawatomi Community he was entitled to the same protection from state jurisdiction as members of the White Earth Tribe based on the court's holding in *Topash v. Commissioner of Revenue*, 291 N.W.2d 679 (Minn. 1980) (concluding federal Indian jurisdiction includes all Indians regardless of their membership status and therefore preempts state jurisdiction to tax a nonmember Indian). Id. However, the court rejected this argument and stated that *Topash* was

case law that was reversed by an express act of Congress a decade prior under the Duro fix. In *Johnson*, the Minnesota Supreme Court just cited to *Duro v Reina* again, 20 years later. Minnesota courts wrongly decided *Bryan v Itasca* which was overturned by the U.S. Supreme Court, and then used *R.M.H.* to now tax Indians living and working on reservations other than where they are enrolled.

R.M.H. is traffic case involving a 15 year-old, Potawatomi boy without a drivers license, and son of a White Earth enrollee on White Earth reservation. Minnesota uses *R.M.H.* to make an end run around the Supreme Court's Bryan decision to tax at least some Indians on reservations. Minnesota's *Topash* case correctly followed the *Bryan* U.S. Supreme Court and Congress, but Minnesota chose to reverse its holding to apply taxes after *R.M.H.* was not corrected.

In *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*[35] St. Thomas' Law Professor Taylor describes how

> Justice Thurgood Marshall, in *McClanahan*, reiterated the importance of federal preemption.[36] He looked at the

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no longer good law in light of the Supreme Court's decisions in *Oliphant* and *Colville*. Id. at 63-65.

[35] See Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians,* 91 Marquette L. Rev. 917, 971 (2008).

[36] 91 Marq. L. Rev. 917, 957, See *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 165 (1973) ("We hold that by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive

treaties and relevant federal legislation.[37] He also recognized the importance of the Navajo Nation's sovereignty and included this as an important consideration, primarily because the Navajo Nation, like the Cherokee Nation, had a political identity that existed before the arrival of the Europeans and also had entered into treaties with the United States.[38] He noted, however, that 20th century Supreme Court cases had given states latitude over non-Indians within Indian Country.[39]

A careful reading of his opinion shows that Justice Thurgood Marshall's use of the phrase "reservation Indians" refers to Indians who were within Indian Country whether or not members of a particular tribe. This is demonstrated by his reference to federal criminal jurisdiction in which the federal government, and not the state government, asserts criminal jurisdiction over crimes committed within Indian Country 1) by one Indian against another Indian or 2) by or against an Indian and involving a non-Indian. In these cases, the federal criminal jurisdiction arose so long

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province of the Federal Government and the Indians themselves. The tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources").

[37] Id. See id. at 173-74.

[38] Id. See id. at 168.

[39] Id. See id. at 172

> as the person was an Indian. The specific tribal membership of the Indian was unimportant.[40] Under the relevant statutes, the federal policy of excluding state authority over Indians within Indian Country, irrespective of tribal membership, was quite clear.[41]

Taylor correctly argues that

> The *McClanahan* case is a good example of how the federal preemption

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[40] Id. See id. at 171 (Justice Marshall relies on *Williams v. Lee*, 358 U.S. 217, 219-220 (1959), which emphasizes that "if a crime was by or against an Indian, tribal jurisdiction or that expressly conferred by Congress has remained exclusive." The Court in *Williams v. Lee* relies on the decision of *Donnelly v. United States*, 228 U.S. 243, 252 (1912), which involved federal jurisdiction over a murder on the Hoopa Valley Reservation of a man who was a member of the Klamath Tribe. The federal statute in question merely referred to the murder of an Indian within Indian Country and not to his membership in the specific tribe. The facts in the Donnelly case indicate that the phrase "reservation Indian" means an Indian who is on a reservation whether or not he is a member. This distinction becomes important when we consider the effect of *Duro v. Reina*, 495 U.S. 676 (1990) and the federal legislation that superseded the holding in *Duro*. See discussion infra).

[41] Id. at 958. See, e.g., *Donnelly v. United States*, 228 U.S. 243, 252 (1912) (the term "Indian" in the Major Crimes Act included an Indian who was on the Hoopa Valley Reservation but was a member of the Klamath Tribe).

> law works. No specific treaty or law said that Arizona (or states generally) could impose their income taxes on reservation Indians.[42] Nonetheless, Justice Marshall read the totality of the treaties and federal legislation as having a general preemptive effect.[43] Given this approach, Arizona had to point to a specific piece of federal legislation authorizing its income taxation of reservation Indians.[44] It could point to no such statute, and, accordingly, it lost its case in the Supreme Court.[45]

Minnesota is preempted if it has not granted express authority from Congress. Topash needs to be corrected as Minnesota is illegally *taking* personal property from Indians on reservations, their freedom from Minnesota taxation! Or in the present case, Petitioner's personal freedom and liberty.

Preemption.

The State argued in its *Johnson* Response brief to the Minnesota Supreme Court that

> While the *Atcitty* court criticized this Court's decision in *Jones*, **it also based much of its decision on the statutory language of the Adam Walsh Child Protection and Safety Act**. *Atcitty*, 146

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[42] Id. at 962, See *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 167-71 (1973).
[43] Id. See id. at 173.
[44] Id. See id. at 178-79.
[45] Id.

> N.M.at 788, 215 P.3d at 97)(citing 42 U.S.C. 1691 (2006)(providing that a federally recognized tribe may be included as a jurisdiction "[t]o the extent provided and subject to the requirements of [S]ection 16927.

(emphasis added). The State points out the very problem Minnesota has with its preemption analysis--why see what else Congress has said about Indians and tribes, the Acts and federal statutes about state jurisdiction over Indians?

As such, the *New Mexico v Atcitty*[46] case is provided in its entirety as a model preemption guide for Minnesota. *New Mexico v Mescalero*[47] is often cited by this Court for exceptional circumstances, but like Washington State, New Mexico has not attempted to assert state jurisdiction using exceptional circumstances to reach a sex offender for registration, who is an Indian on a reservation.

Because New Mexico does not have a grant of Pub. L. 280 jurisdiction, and the *Johnson* Appellate Court also recognized the same this is true for Minnesota for civil commitment, both States' courts would need to look for other Congressional authorization or be preempted, as the *Atcitty* court conducted.

In short the *Atcitty* Court looked to the sex offender registration laws from Congress looking for application to Indian Country noting that

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[46] *New Mexico v Atcitty,* 146 N.M. 781, P.3d 90, NM App. Ct. (2009)

[47] *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324,334,103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

> In 1994 Congress established a nationwide program for sex offender registration know as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Program, which is codified at 42 U.S.C. § 14071 (1998). [48]
> * * *
> In 1996 the Jacob Wetterling Act was amended, in what came to be known as "Megan's Law," to require states to develop a program to disseminate information to the community about registered sex offenders.[49]
> * * *
> A plain reading of the Jacob Wetterling Act and Megan's Law demonstrates that Congress intended for the states to be the primary information gatherers and compliance enforcers for a national sex offender registration regime. See 42 U.S.C. § § 14071, 14072.[50]
> * * *
> Neither the Jacob Wetterling Act or Megan's Law mentions or addresses Indian tribes, tribal jurisdiction, or state jurisdiction in Indian country in any way. In addition, the State has not cited any legislative history indicating any consideration of the way the two acts affect or would operate in Indian country.

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[48] See *Atcitty* Sect 24

[49] *Id.* at Sect 25.

[50] Id at Section 27.

> {28} The specific question presented then is whether the two statutes can be deemed an express statement by Congress that state sex offender registration laws shall apply in Indian country. We hold that they cannot.[51]

Finally the *Atcitty* court noted that

> At least one commentator has opined that
>
> > While the litigation [in *Jones* had] called attention to what many observers considered to be a gap in the nation's ability to track sex offenders and likely spawned congressional attention to the matter in SORNA [the Adam Walsh Child Protection and Safety Act], the law's enactment implicitly conceded the defendant's argument in *State v. Jones* and, in any event, SORNA now occupied the field, imposing a clear federal mandate of registration.[52]
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> {31} We agree with this assessment. The Adam Walsh Child Protection and Safety Act, 42 U.S.C. 16911 (2006), provides

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[51] Id at Sections 27 and 28.

[52] See Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country*, 6 Ohio St. J. Crim. L. 3, 13 (2008).

> avenues for Indian tribes to become jurisdictions that participate in the national sex offender registration regime. See id. § 1691 1(10)(H) (providing that a federally recognized Indian tribe may be included as a jurisdiction "[t]o the extent provided and subject to the requirements of [S]ection 16927 of this title"). An Indian tribe may elect to participate as a jurisdiction under the Adam Walsh Act by passing a "resolution or other enactment of the tribal council or comparable governmental body." Id. § 1 6927(a)(1)(A). **Although the Adam Walsh Act gives Indian tribes the opportunity to become participating jurisdictions, the remaining provisions of Section 16927 evince Congress' intent to ensure territorial coverage by other jurisdictions should a tribe prove unable or unwilling to become a participating jurisdiction.**

Id. (Emphasis added).

After the *Jones* decision by the Minnesota Court of Appeals in 2005, Congress adopted the Adam Walsh Act in 2006, which recognized the inherent power of tribes over their members in Indian Country but also gave a deadline for Tribes to step-up and declare the Tribe's jurisdiction by July 27, 2007. Tribes needed to adopt their own laws, or they could delegate their role to the state if a Pub.L. 280 tribe, or a failure of the tribe to act by the deadline and the state may assume that exercise of jurisdiction.

After the July 26, 2005 Court of Appeals decision in Jones, the White Earth Reservation adopted a sex offender registration ordinance September 6, 2005, for tribal members on the reservation.[53] Under Public Law 280 (c) Congress provided for a mechanism for Pub.L. 280 tribes to demonstrate their right to jurisdiction, or retrocede state jurisdiction for civil areas by excepting a state's authority if and when

> (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Id.

Unfortunately for Minnesota's tribes, this Minnesota Supreme Court in Jones decided on March 22, 2007, some four (4) months before the Congressional deadline for tribes, that Sex Offender registration ***for Indians only on the reservations was criminal***, using two different jurisdictional legal theories ways with a concurrence majority (2-2-3), and without any double jeopardy consideration or analysis. The *Jones* Supreme Court openly disregarded Congress in 2007, who had clearly spoken on the issue in 2006, which clearly preempted the area of law (SORNA) and

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[53] See http://www.whiteearth.com/data/upfiles/files/WEPredatoryOffenderregistrationcode.pdf

provided a sunset and fail-safe mechanism to close the jurisdictional gaps in Indian Country. The *Jones* Supreme Court openly and intentionally infringed upon the rights of tribes and Indians on reservations. This was the opportunity to develop a cooperative tribal/state law enforcement agreement. On information and belief White Earth is presently preparing a civil commitment code.

Arguably, Minnesota case law and legal analysis needs to get itself right with the U.S. and Minnesota Constitutions, federal statutes and laws protecting Tribes and Tribal members' rights as citizens of the state, the United States and of Indian nations. This intellectual dishonesty needs to be corrected, just as Minnesota's civil commitment laws struggled with *Linehan*, *Blodgett*, *Boutin* and *Kaiser* for concepts of double jeopardy and ex post facto applications. But Indian Country needs a recognition of the different applications of federal Indian law on Indian Pub. L. 280 double jeopardy, criminal/prohibitory, civil/regulatory and civil remedial jurisdiction, and how the State can/should work cooperatively obtain jurisdiction to be applied to Indians on reservations. The framework was set up by Congress for SORNA and ignored if not kicked to the curb by Minnesota.

Proper Legal Authority and Solutions.

The real solution to closing the jurisdictional gaps of concern between Minnesota as a Public Law 280 state and Tribes and reservations (including Red Lake), for any issue, including SDP/SPP commitment, is to recognize that similar frameworks and procedures must be adopted by *cooperative agreement* similar to those provided for cooperative traffic and criminal law

enforcement[54] and other Tribal-State Agreements with Minn. Dept. of Human Services (DHS) for ICWA-MIFPA Title 4E and Minnesota Family Preservation Act (MFPA) for employment services. This means the State legislature and governor must work together---and with each tribal government---to share and/or provide for concurrent jurisdiction where none exists, to close the jurisdictional gaps. Otherwise, Minnesota must lobby Congress for additional legal authority for these *exceptional circumstances*.

The *Kennerly*[55] decision essentially stops states from assuming new jurisdiction without first obtaining the consent of the Indians affected. Minnesota has assumed new jurisdiction under *exceptional circumstances*.

Minnesota needs to give the respect due to the Tribes. Certainly the same or similar, if not heightened, *exceptional circumstances* exist for sex offenders who live blocks outside Minnesota borders in Superior, Wisconsin, or Fargo and Grand Forks, North Dakota as an example. Minnesota does not petition for other citizens to be civilly committed because the live exceptionally close. Or does Minnesota recognize its lack of jurisdiction and establish working relationships with neighboring states' law enforcement to develop frameworks and agreements for SDP/SPP people who live a stone's throw from Minnesota?

Tribes, and therefore Indians on the reservations, deserve the same respect, mutually

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[54] Minn. Stat. 626.90 et. seq. authorizing cooperative law enforcement agreements

[55] *Kennerly v. District Court of Ninth Judicial Dist. of Mont., U.S.Mont.*, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971).

cooperative agreements and common protection schemes that the other citizens of the United States of America receive across other borders from Minnesota. The institutional memory of the Minnesota Supreme Court for Indian Country has been a part of the dissent since the warnings of over-reaching in R.M.H.'s dissent.

"State court jurisdiction over matters involving Indians is governed by federal statute or case law."[56] Moreover, "[t]he [U.S.] Supreme Court has consistently recognized that Indian tribes retain *attributes of sovereignty over both their members and their territory*."[57] This sovereignty is dependent upon, and subordinate to, only the Federal Government, not the States."[58]

CONCLUSION

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[56] *Gayle v. Little Six, Inc.*, 555 N.W. 2d 284, 289 (Minn. 1996).

[57] *Stone* at 728, citing *Cabazon* at 207. (Emphasis added). See also *Opinion of the Solicitor of the Department of the Interior on the Powers of Indian Tribes* 55 I.D. 14 Oct. 25, 1934 submitted as part of the Senate record for the adoption of the Indian Reorganization Act declaring that "under section 16 of the Wheeler-Howard Act (48 Stat. 984, 987) the 'powers vested in any Indian tribe or tribal council by existing law' are those powers of local self-government which have never been terminated by law or waived by treaty." See also Summary 8. "To administer justice with respect to all disputes and offenses of or among the members of the tribe, other than the ten major crimes reserved to the Federal courts. The Minnesota Chippewa Tribe adopted its original Constitution." See also Indian Civil Rights Act of 1968 ICRA) as amended.

[58] Id. See also Supremacy Clause.

This Court needs to educate and provide direction to state courts in Public Law 280 states. Tribes need and deserve some *res judicata* and *collateral estoppel* from state courts[59] for Indian Country issues so both the state and tribes may see how to grow together.

There is only one solution, and that is to get Minnesota case law corrected. For legal practioners, tribes and judges, everyone must be able to rely on true principals of federal Indian law and tribal sovereignty, rather than the compounding uncertainty of Minnesota's Indian Country case law. Therefore, this matter must be dismissed for lack of jurisdiction under Public Law 280 and because Congress has not provided any other express jurisdictional authority for Minnesota over Indians on reservations.

Frank Bibeau
Attorney for Petitioner

[59] Compare *State v Johnson* 1999 and *State v Losh* 2009 (Driving after revocation was civil regulatory for nearly a decade until a MCT Mille Lac enrollee was cited on the MCT Leech Lake Reservation for driving after revocation, which the Minnesota Supreme Court decided the Leech Lake Reservation didn't have sufficient interest in a different MCT member).