No. 11-753

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN AARON BEAULIEU,

Petitioner,

v.

STATE OF MINNESOTA

Respondent.

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

REPLY BRIEF IN SUPPORT OF 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 Minnesota 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.

Petitioner:

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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.

REASONS FOR GRANTING THE PETITION

Respondent suggests that

> there is no sound reason for the court to grant review in this case, let alone the requisite "compelling reasons." Sup. Ct. R. 10. [and] In addition, there is no conflict with any decision of a state court of last resort or the United States Court of Appeals.

(Resp. Br. at 11). These considerations are broad indicators the Court uses when examining regular state cases in conflict. Indian Country does not fit this mold as unique rights are at stake for tribes and Indians and often arise as Federal Questions. Here, Respondent suggests that until Indians and Tribes are judicially abused by another state, Minnesota should be allowed to continue depriving liberty of reservation citizens whether it has actual jurisdiction or not.

Also important to note is that this Court's Rules provide that

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were

> granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later . . ."

Sup. Ct. R. 15(2). Petitioner found no such suggestions in Respondent's Brief in Opposition.

Certainly liberty interests are more important than a state's right to tax, which in Indian country enjoys a presumptive bar from state infringement. Unfortunately, Minnesota is using traffic cases to get around this Court's rulings *Bryan v Itasca*, 426 U.S. 373 (1976), to tax *some* reservation Indians, on reservation incomes. Minnesota's Indian country case law continues to more towards results-oriented, arbitrary and capricious, unpredictable jurisdictional analysis under their "exceptional circumstances" jurisdictional doctrine.

A. Confusing and Inconsistent State Decisions

Petitioner argued that Minnesota Courts are in conflict with each other about whether they have criminal or civil P.L. 280 jurisdiction to exercise when *civilly* committing reservation tribal members. Moreover, that the Minnesota Supreme Court has created a self-declared Indian Country jurisdiction, their own *Cabazon*-like, pre-emption *State v Stone*, 572 N.W.2d 725 (Minn. 1997), balancing test deploying ***exceptional circumstances*** jurisdiction. Respondent

only discusses *Cabazon* in the context of the Wisconsin courts' struggles with their jurisdictional reasoning, saying "[w]hile 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." (Resp. Br. at 23).

Burgess filed Petition for Writ of Certiorari twice, first after the State Supreme Court decision in 2004 and then after his habeas petition to the Seventh Circuit. (See Docket No. 06-8943, *Burgess v Watters*, cert denied Feb. 20, 2007, and much is borrowed by Petitioner herein and the Burgess Petition should be included in this review's consideration). (Respondent incorrectly cites to *Burgess* as an Eighth Circuit decision, when the state of Wisconsin is within the Seventh Circuit).

Both the District Court and the Seventh Circuit acknowledged that Burgess raised significant jurisdictional claims, and both courts went so far as to suggest Burgess may well have been correct in his assertion that the state lacked jurisdiction. However, both courts ultimately ruled that they could not grant relief because of the posture of the case as a Habeas petition and the application of Anti-Terrorism and Effective Death Penalty act of 1996 (AEDPA). The courts ruled that this Court had not issued sufficiently clear rules to apply to the jurisdictional claim, and that even if this Court's rules were sufficiently clear, that Wisconsin's decision that it did have jurisdiction was neither unreasonably wrong nor contrary to this

Court's rules. Ironically, Seventh Circuit Judge Ripple found in his concurrence that

> In my view, the Supreme Court of Wisconsin reached a reasonable result when it determined that, for purposes of section 2 of Public Law 280, 67 Stat. 588 (1953), the commitment procedure under the Wisconsin Sexually Violent Persons Commitment Statutes, Wis. Stat. § 980 et seq. (chapter 980), ***is criminal in nature***.

Burgess, 467 F.3d at 688 (Emphasis added).

Beaulieu submits that this Court has enunciated clear rules precluding Minnesota from conducting involuntary civil mental commitments against tribal reservation Indians, and that Minnesota has unreasonably refused to follow this Court's pronouncements on Indian jurisdiction for many years. Minnesota has adopted rules allowing it to assert jurisdiction over reservation Indians that are completely contrary to this Court's prior pronouncements and Congressional Acts.

B. This Court has Set Forth Clearly Established and Unambiguous Rules Limiting a State's Jurisdiction Over Reservation Indians.

A state may not impose its authority over a tribal reservation Indian absent a specific grant of authority to do so from Congress.

> The Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory," and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." It is clear, however, that state laws may be applied to tribal Indians on their reservations ***if Congress has expressly so provided.***

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (citations omitted; emphasis added).

Only in the most exceptional circumstances may a state assert jurisdiction over the on-reservation activities of a tribal member. See e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-33 (1983):

> The sovereignty retained by tribes includes "the power of regulating their internal and social relations." A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that "'absent governing Acts of Congress,'" a State may not act in

> a manner that "'infringes[s] on the right of reservation Indians to make their own laws and be ruled by them.'" (citations omitted).

In Minnesota, the state's jurisdiction should be governed by Public Law 280, 18 U.S.C. § 1162; 28 U.S.C. § 1360. This Court has examined and explained the scope of jurisdiction conferred upon the state by Public Law 280 on more than one occasion.

> **In *Bryan v. Itasca County*, we interpreted § 4 [of PL 280] to grant States jurisdiction over private civil litigation involving reservation Indians in state court,** but not to grant general civil regulatory authority...Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations. The Act plainly was not intended to effect total assimilation of Indian reservations would result in the destruction of trial institutions and values. **Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under §**

> **2, or civil nature, and applicable only as it may be relevant to private civil litigation in state court.**

Cabazon, 480 U.S. at 208 (emphasis added, citations omitted).

C. Private, civil causes of action

This Court has ruled that the civil jurisdiction allowed by PL 280 is strictly limited to private litigation. PL 280's grant of civil jurisdiction was expressly intended only to allow the state to provide a judicial forum for the litigation of private civil disputes involving reservation Indians:

> Public Law 280 merely permits a state to assume jurisdiction over "civil causes of action" in Indian Country.

Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505, 513 (1991).

The general operative presumption from this Court's cases is that the state does not have jurisdiction absent a specific grant of authority. *Bryan v. Itasca County*, supra, has consistently been interpreted as precluding, not allowing, the state to impose its sovereign regulatory authority over Indian land. See e.g., *]*, stating that Bryan's rationale "precludes new state regulatory jurisdiction generally."

D. Exceptional Circumstances

Minnesota has created an alternative, subject-matter jurisdiction to use when the Public Law 280 jurisdictional granted from Congress is not enough to get at Indians on Minnesota reservations. Petitioner provides detailed analysis and argument in the original Petition beginning at pp 14-15 and explained at p 26 and beyond of the judicial abuses and intellectual dishonesty.

The result is that Minnesota *is regulating* reservation Indians' liberty whether it calls it a "status determination" a "civil adjudication" or "exceptional circumstances", the concepts have become a trend of confusion and result-oriented jurisprudence under Public Law 280. Respondent argues that

> [s]tate 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.

(Resp. Br. at 18). Respondent State goes beyond the grant of jurisdiction to use non-Public Law 280 analysis for their created, alternative jurisdiction pointing out that "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." (Resp. Br. at 19). It is important to understand that the Court's traditional approach to finding federal preemption in Indian affairs is not "balancing" in the sense that the court weighs interests of all the government involved and ignores the presumption of tribal jurisdiction and back drop of sovereignty. (See *Cases and Materials on Federal Indian Law*, Sixth Ed., by David H. Getches, Wilkinson, Williams and Fletcher, 2011, Conflicts Over Civil Jurisdiction, p 604.)

Respondent State uses this same legal analysis to find State jurisdiction at the lowest levels of infringement with civil regulatory, reservation traffic matters on reservations. In *State v Davis*, the Minnesota Supreme Court decided "State court has subject-matter jurisdiction over [Indian] appellant's traffic violations [on reservation] because Congress has not preempted Minnesota from enforcing its traffic laws against appellant in state court." (See No. 09-1002, *Davis v. Minnesota* cert denied, (2009)). Davis is an enrolled member of the Minnesota Chippewa Tribe, which has multiple reservations, but Minnesota follows *Duro v Reina,* 495 U.S. 676 (1990) instead of the

Congressional *Duro* fix[1], which results in more abuses of Indian civil rights and rights of tribes which have their own traffic codes, police and courts. Here, Respondent State is the predatory offender on historically disadvantaged, impoverished reservation Indians with treaty and federal rights separate and apart from the State of Minnesota.

E. Non-Compliance and Confusion

The real problem in Minnesota is that Minnesota does not want to enter into cooperative agreements with Tribes or approach Congress for the necessary and proper jurisdictional act. In an April 2009 Survey on State Compliance with the SORNA, "not one of the 47 states that responded . . . will meet the July 2009 compliance deadline."[2] "Two of the 47 states that responded to the survey indicated that they decline to answer its questions." (Id. at 1). Minnesota was one of the two states which responded, but declined to comment on the seven questions, which included:

#6 Do you have any federally recognized tribes in your state?

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[1] Duro fix, Act of Nov. 5, 1990, Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation).

[2] See SEARCH survey on State Compliance with the Sex Offender Registration and Notification Act, April 2009, at http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf by the National Consortium for Justice Information and Statistics.

[And;]

#7 Do you anticipate entering into cooperative agreements with one of more tribes before July 27, 2011?

(Id. at p. 6 and p. 35).

The Answer to #6 is there are 11 federally recognized Indian Reservations in Minnesota, of which 10 are PL 280 and one, Red Lake is exempted from PL 280. Minnesota was able to civil commit a Red Lake member because they used "exceptional circumstances". (See original Petition at 14 and 28).

The Answer to #7 is Evidently Not. The White Earth Reservation adopted a sex offender registration ordinance September 6, 2005, for tribal members on the reservation.[3] (See Petitioner's main brief at 36). Also, contrary to Respondent's assertion (Resp. Br. at 18) the White Earth Reservation adopted their Civil Commitment Code June 6, 2011, as part of the White Earth Band's Comprehensive Law and Order Code, Title 29. (This Civil Commitment Code has not been posted on their website at whiteearth.com *yet*, but was adopted as WERBC Res. No. 019-11-004).

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

"Minnesota has the highest per-capita rate of sex offender civil commitment in the country.[4]" The article continues saying that

> [t]he population of the Minnesota Sex Offender Program has quadrupled over the past decade and currently has more than 600 enrollees. Facilities at Moose Lake and St. Peter are projected to run out of beds next year. The number of indefinitely detained sex offenders is expected to double again over the next decade.
>
> Each individual enrolled in the civil commitment program costs the state $120,000 annually. That is more than three times the cost of incarceration in a state prison.

The article continues by noting that

> [t]he most dramatic potential change: creating indeterminate sentences for individuals convicted of serious crimes, which would allow them to be held in the

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[4] See *Legislators seek solution to sex offender dilemma* by Paul Demko, Jan. 2012 Session Preview 2012 Politics in Minnesota at politicsinmn.com.

> prison system for longer periods without resorting to civil commitment.

(Id. at S-7) The legal fiction legislatively created to avoid excessive punishment, now comes full circle and returns to excessive, indeterminate sentencing, which at least is correct in the severity of the crime(s) and will then rely on the proper *criminal* jurisdiction under PL 280.

F. Minnesota's 253B Law Does Not Involve Private, Civil Litigation.

As this Court succinctly stated, "...when a state seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280 it must be determined whether the law is criminal in nature...***or civil in nature, and applicable only as it may be relevant to private civil litigation in state court***." *California v. Cabazon*, supra 480 U.S. at 208, (emphasis supplied).

In case the Cabazon rule was not clear enough, this Court later wrote "Public Law 280 merely permits a state to assume jurisdiction over 'civil causes of action' in Indian Country." *Oklahoma Tax Commission v. Potawatomi Tribe*, supra 498 U.S. at 513.

All government initiated involuntary civil mental commitments, including SVP, SDP and SPP commitments are a proper exercise of a government's police powers. As such, these commitments are not in

any way akin to "private civil litigation." Here the very action of the case in state court dispels any notion of a private civil matter. The action by the state is wholly prosecutorial with the sole purpose to involuntarily confine Beaulieu in a state run custodial institution for the remainder of his natural life. That is not what this Court intended when they first used the term "private civil matter."

The leading case in the country concerning the jurisdiction of a state to conduct involuntary civil mental commitments against tribal reservation Indians concluded that such actions were not private civil matters, and that the state had no jurisdiction to conduct such proceedings:

> As the procedures heretofore outlined illustrate, the process of committing someone involuntarily brings the power of the state deep into the lives of the person involved in the commitment process. The power of the state intrudes no less if the subject is an Indian person living in Indian country. The nature of that intrusion is critical.
>
> ***
>
> In addition to the procedure for commitment and the accompanying penetration of state power, the fact of commitment itself must not be forgotten.

> Although an involuntary commitment is made to meet a grave human need (as well as to protect society from antisocial conduct), and is in no way intended as an act of punishment, the loss of freedom is analogous to that brought about through the application of criminal law. A person involuntarily committed is torn away from family, friends, and community; after commitment the person may be allowed no greater liberty than a person convicted of a criminal offense. One can scarcely conceive how the power of the state could be brought to bear upon a person with any greater severity.

White v. Califano, 437 F. Supp. 543, 549, (S.D., 1977), aff'd 581 F. 2d 697. While White was not decided under PL 280, its lesson is clear: involuntary civil mental commitments are not akin to private civil matters.

G. Recommendations

It is important that this Court look at these basic jurisdictional issues in Indian country both Public Law 280 and non-Public Law 280. It is apparent that other states with tribes, especially non-PL 280 states, still remember the rights of tribes to make their own laws and be ruled by them. Several Petitions for PL 280 non-compliance have been docketed with this Court

and include: *Burgess* 06-8943, *Davis* 09-1002, *Losh* 08-8522, and *Jones* 07-412.

CONCLUSION

Respondent Minnesota waived their right to respond to this Petition. Respondent avoids direct explanations in their Response Brief about how *Cabazon* is used in Minnesota, and their *Stone*-test. Minnesota does not want to comment publicly about SORNA and wants to avoid review here. It is obvious to Petitioner that Minnesota and Wisconsin both need this Court's review and direction, before this self-created, "exceptional circumstances" state right to ignore Congress, treaties and sovereignty spreads to more ridiculous, result-oriented decisions in Indian county throughout the nation.

Tribes and reservation Indians that are forced to live within the 1953 Termination Era law of Public Law 280 deserve to know that States cannot continue to escape judicial review and scrutiny. The concepts of *stare decisis* and *res judicata* are no longer reliable within Minnesota's judicially created Indian case law. Therefore, this Court must step-up and GRANT this Petition to protect rights of tribes and Indians self-determination, self-governance and the right to make laws and be ruled by them, by clarifying how pre-emption really works in Indian country, especially after a specific grant from Congress.

Respectfully submitted,

March 23, 2012

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Frank Bibeau
Attorney for Petitioner