UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

NORBERT J. KELSEY,

Petitioner,

v.

MELISSA LOPEZ POPE, *et al.*,

Respondents.

Case No. 1:09-cv-1015
Honorable Gordon J. Quist
Magistrate Judge Hugh W. Brenneman, Jr.

ANSWER OF RESPONDENT

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INTRODUCTION

The Tribal Court of the Little River Band of Ottawa Indians found Petitioner Norbert Kelsey—a member of the Tribe and, at the time, of the Tribe's governing Council—guilty of committing an act of sexual assault against a Tribal employee at the Tribe's Community Center. Just before sentencing, Petitioner suggested for the first time that the Tribal courts could not exercise criminal jurisdiction over him. The Tribal Court and the Tribal Court of Appeals received extensive briefing on the question of tribal jurisdiction and both determined that the Tribe could indeed exert criminal authority over Petitioner.

Before this Court, Petitioner challenges his conviction on two grounds. First, and principally, he argues that the Tribe may exercise criminal jurisdiction over its members only for incidents taking place within the bounds of its Indian country (generally defined as including a tribe's reservation, trust, and allotment lands). Second, he argues that the Tribe's prosecution of him violated his due process rights because the Tribe's own jurisdictional provisions purportedly foreclosed such a prosecution.

These arguments are grounded in expediency rather than in the law. Under well-established principles, tribes may exercise criminal jurisdiction over their members for actions bearing on internal tribal relations regardless of where those actions take place. Where, as here, Petitioner committed sexual assault against a tribal employee, his attempts to escape responsibility for his actions lack any basis in federal law. Petitioner's due process argument, meanwhile, rests on a wholly incomplete characterization of the Tribe's own jurisdictional provisions.

In the briefing that follows, Respondent does not address Petitioner's lengthy argument that the site of his crime, the Tribe's Community Center, falls outside of the Tribe's Indian

country. Rather, Respondent assumes for purposes of this litigation, as did the Tribal Court of Appeals, that the Community Center does not come within the Tribe's Indian country. Respondent believes that the authority of the Tribe's courts to exercise membership-based criminal jurisdiction over Petitioner is so clear as to render argument over the Indian country status of the Community Center wholly beside the point.

STATEMENT OF THE CASE

Petitioner does not directly confront any of the Tribal Court's findings of fact other than to indicate that he presented witnesses that disagreed with the prosecution's witnesses. *See* Verified Petition for Writ of Habeas Corpus ("Petition") ¶¶ 55-58. On habeas review, "findings of fact made by a state court are entitled to complete deference if supported by the evidence." *Combs v. Coyle*, 205 F.3d 269, 277 (6th Cir. 2000).[1] This presumption of correctness pertains both to "basic, primary facts" and to "implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility." *Id.* (internal quotation marks omitted).

A. Tribal History and Structure

The Little River Band of Ottawa Indians ("LRB" or the "Tribe") is a federally recognized tribe located in western Michigan. *See* 25 U.S.C. §§ 1300k-2(a) and 1300k(4). The United

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[1] Petitioner's claim is brought under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303. ICRA's habeas remedy tracks the remedies found in 28 U.S.C. § 2254 for federal court habeas review of state court convictions. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 891 (2d Cir. 1996) ("[T]he legislative history suggests that § 1303 was to be read coextensively with analogous statutory [habeas] provisions."). "Courts thus appear to look to the development of law under 28 U.S.C. § 2254 for guidance as to whether habeas relief is available in such matters under § 1303." *Id.* at 892; *Weatherwax v. Fairbanks*, 619 F. Supp. 294, 296 n.2 (D. Mont. 1985) ("This court has consistently found the law which has developed with respect to actions for habeas corpus relief under 28 U.S.C. § 2254 to be applicable by analogy to actions founded upon 25 U.S.C. § 1303.").

States first recognized and established a government-to-government relationship with the Tribe's political forbearers through the Treaty of Greenville in 1795. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the W. Dist. of Mich.*, 369 F.3d 960, 962, 967 (6th Cir. 2004) (discussing the political history of the Grand Traverse Band and noting that history to be "essentially parallel" with that of LRB); *see also* 25 U.S.C. § 1300k (noting the shared history of the Tribes). The Tribe entered into subsequent treaties with the United States in 1815, 1836 and 1855 and "maintained a government-to-government relationship with the United States from 1795 until 1872[.]" *Grand Traverse Band,* 369 F.3d at 961; *see also* 25 U.S.C. § 1300k(1).

In 1872, the Secretary of the Interior, in violation of the United States' solemn treaty obligations, illegally terminated federal recognition of the signatories to the Treaty of 1855, including LRB. *Grand Traverse Band*, 369 F.3d at 961 & n.2. LRB then endured over a century of federal neglect, until Congress enacted legislation in 1994 in which it reaffirmed federal recognition of the Tribe. 25 U.S.C. § 1300k-2. In doing so, Congress found that, despite the United States' abandonment of a formal relationship with LRB, the Tribe had "continued [its] political and social existence with viable tribal governments," *id.* § 1300k(6), and that its "members . . . continue to reside close to their ancestral homeland as recognized in the Manistee Reservation in the 1836 Treaty of Washington and [the Mason] reservation in the 1855 Treaty of Detroit." *Id.* § 1300k(4). Congress reaffirmed the Tribe's sovereign powers, expressly providing that "[a]ll rights and privileges of the Bands, and their members thereof, which may have been abrogated or diminished before September 21, 1994 are hereby reaffirmed." *Id.* § 1300k-3(a).

After its restoration to federal recognition, and pursuant to that legislation, *id.* § 1300k-6, the Tribe adopted a strict separation-of-powers Constitution that allocates authority amongst an executive, legislative, and judicial branch. *See generally* Constitution of the Little River Band of Ottawa Indians ("Tribal Constitution") (prior to the adoption of this Constitution, the Tribe had in place interim constitutions that were recognized in the restoration legislation).[2] The Constitution vests the judicial power of the Tribe in a Tribal Court of general jurisdiction and a three-member Tribal Court of Appeals. *Id.* art. VI, §§ 1-3. It mandates that "the Tribal Judiciary shall be independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive functions of government shall exercise powers properly belonging to the judicial branch of government." *Id.* § 9. It further mandates that "[t]he judicial powers of the Little River Band *shall* extend to . . . all civil and criminal matters arising within the jurisdiction of the Tribe *or to which the Tribe or an enrolled member of the Tribe is a party*," *id.* § 8 (emphases added), and authorizes the courts to review tribal laws to ensure they are consistent with the Constitution and to "rule void those ordinances and resolutions" that are not. *Id.* § 8(a)(2).

The Tribe has enacted comprehensive code provisions outlining the "purposes, powers, and duties of the Tribal Courts." Tribal Court Ordinance § 1.01. Among other matters, those provisions establish the courts' original and appellate jurisdiction and provide for judicial selection and compensation. The Tribe has further adopted rules of evidence, civil procedure, and criminal procedure. *See* Tribal Law Appendix at 66-72. And it has established a tribal bar,

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[2] All relevant tribal law materials from the Little River Band of Ottawa Indians that are not included in the Rule 5 Excerpts of the Record are included in the Tribal Law Appendix that Respondent is lodging with the Court.

an ethical code for attorneys practicing in tribal court, an ethical code for its judges, and rules for the recognition of foreign judgments. *Id.*

B. The Petitioner

Norbert Kelsey (the "Petitioner") has been an LRB member since February 10, 1998 (that is, after the Tribe was restored to federal recognition, but before it had adopted its present Constitution). As such, he has enjoyed the many privileges and immunities of tribal membership. The Tribe, for example, provides its members with various forms of assistance, and Petitioner has taken ample advantage of those benefit programs: he has received, among other things, "community well-being" and elder payments, tax subsidies, energy relief payments, college book stipends, and per capita payments from the Tribe's gaming operations. *See generally* Membership Assistance Program Ordinance; Membership Assistance Program Regulations No. R700-04:MA-02; Resolution 08-123-20 (Jan. 23, 2008).

Tribal members also enjoy significant opportunities to participate in tribal government. Members can attend and vote in the twice yearly General Membership meetings, where the membership adopts resolutions and ordinances to bind the government. Tribal Const. art. VII, § 1. Members may also vote in the Tribe's regularly held elections. *Id.* art. IX. Furthermore, Petitioner had an opportunity as a tribal member to vote on the adoption of the Tribal Constitution in 1998 and on the amendments to the Tribal Constitution in 2004. Tribal Constitution at 17 (Certificate of Results of Election).

At the time he committed his crime, Petitioner was an elected Tribal Council member. *See* Tribal Council Meeting Minutes (July 6, 2005). The Tribal Council, which consists of nine individuals, exercises the Tribe's legislative powers, including the power to "govern the conduct of members of the Little River Band and other persons within its jurisdiction." Tribal

Constitution art. IV, § 7(a)(1). As a council member, Petitioner deliberated and voted on numerous tribal laws, including amendments to the Law and Order Ordinance. Tribal Council Meeting Minutes at 14 (Oct. 4, 2006). He also received a variety of benefits, including an annual salary of at least $46,800, health and dental insurance, and access to a tribal retirement plan. Resolution 03-0419-100 (Apr. 19, 2003).

C. Petitioner's Tribal Court Conviction

On January 21, 2008, the Tribal Court convicted Petitioner of sexual assault. It found that, on July 2, 2005, Petitioner had assaulted a Native American tribal employee named Heidi Foster at the Little River Band Community Center ("Community Center"). When the assault occurred, Ms. Foster was employed by the Tribe as a Community Health Representative. ER 887.[3]

The Community Center is located in Manistee. According to Petitioner, it falls one-quarter of a mile outside of the Tribe's historic reservation boundaries. *See* ER 38; *see also* Petition ¶ 45.[4] At the time of the assault, the Community Center was the focal point for many of the Tribe's governmental, social, and cultural activities (the Tribe has just recently completed a new community building; the old community center continues to house tribal governmental offices and to host occasional tribal events). As the Tribal Court of Appeals stated, the Community Center had "been the center of Tribal community activities ever since it was

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[3] All materials required by Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts are contained in the Rule 5 Excerpts of the Record. All citations to those excerpts will be labeled "ER."

[4] As noted in the Introduction above, Respondent assumes for purposes of this litigation, as did the Tribal Court of Appeals, that the Community Center falls outside of the Tribe's Indian country. In doing so, Respondent makes no representations regarding the proper boundaries of the Tribe's historic Reservation, or regarding any other historic fact bearing on the scope of the Tribe's Indian country.

purchased." ER 7. "Tribal court offices were located [there] for many years." *Id.* "[T]he Center [was] a community gathering point to host varied and numerous tribal meetings, to serve community meals and to provide tribal office space for the conduct of the business of a tribal sovereign." *Id.*

Tribal ordinances define sexual assault as occurring when a person "subjects another person to any sexual contact; and . . . he knows or reasonably should know that the sexual contact is offensive to the victim; or . . . he is in a position of authority over the victim and used this authority to coerce the victim to submit." Law and Order Ordinance § 19.01(c)(1). Sexual contact is defined as "any intentional touching of . . . the breast of a female person . . . whether the touching is on the bare skin or on intervening clothing." *Id.* § 3.17.

The Tribal Court found "beyond a reasonable doubt that the sexual assault did occur and did occur as the victim described." ER 26. Ms. Foster described the assault as having taken place on July 2, 2005 at an Elders meeting, where she had gone to "request that people participate in Medicare part D . . . and to help [elders] fill out the forms they needed." ER 887-88. Ms. Foster stated that, at the meeting, Petitioner grabbed the name tag Ms. Foster wore on her blouse, "pulled out and looked down my blouse and then he turned around and did it again." ER 889. Ms. Foster further stated that this assault initiated a pattern of harassing actions that Petitioner took against her.[5] ER 890-96.

The Tribal Court sentenced Petitioner to one year of probation with six months in jail held in abeyance pending Petitioner's compliance with the conditions of probation. ER 29-30. As to those conditions, the Tribal Court ordered Petitioner to pay a fine, perform community

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[5] The Tribal Court found Petitioner not guilty of harassment because, while "[t]he Court understands that the victim may have felt harassed . . . there was not enough evidence or testimony for the Court to find that the Defendant actually was harassing the victim." ER 26-27.

service, and avoid speaking to female employees of the Tribe. *Id.* The Tribal Court later stayed all of Petitioner's sentence pending appeal except for the speech restriction. ER 31. That restriction expired on February 4, 2009. ER 17.

D. The Tribal Courts' Jurisdiction Analyses

On January 31, 2008, two weeks after Petitioner was convicted and well after the deadline set by the Tribal Court for motions practice, Petitioner filed a motion to vacate the judgment based on an alleged lack of subject matter jurisdiction. ER 649. On the same day, Petitioner filed a motion for an evidentiary hearing on the limits of the Tribe's jurisdiction. ER 664. According to the Tribal Court of Appeals:

> It is clear from a review of the record and transcripts, that Appellant-Defendant filed motion after motion in the proceedings below. It is also apparent [the] Tribal Court, in an effort to maintain judicial control of the proceedings and to create efficiencies in the conduct of the trial, set a deadline for the filing of any further motions by either party. . . . After the deadline passed and after the trial itself, but before sentencing, Appellant-Defendant filed motions challenging, for the first time, the jurisdiction of the Tribe. The Tribal Court summarily denied the motions based upon the previously-established deadline for the filing of motions.

ER 2.

After the Tribal Court denied Petitioner's motion, Petitioner filed a notice of appeal raising over twenty issues. ER 668-75. Petitioner then filed a motion before the Tribal Court of Appeals challenging the jurisdiction of the Tribe. ER 37. A month later, he filed a motion to remand to the Tribal Court and to disqualify Respondent. ER 128. The Tribal Court of Appeals found that the Tribal Court erred in denying the motion to vacate, notwithstanding the untimely filing of that motion, because the "courts of the Tribe must respond to each and every challenge to its jurisdiction." ER 2. As the Tribal Court had not made any factual findings with regard to jurisdiction, the Tribal Court of Appeals granted the motion to remand while denying the motion

for peremptory reversal and disqualification, stating that "nothing in the record or transcripts demonstrates bias on the part of the presiding judge." ER 2-3.

On remand, the Tribal Court requested and received briefing on Petitioner's motion to dismiss for lack of subject matter jurisdiction. The Tribal Court concluded that it had jurisdiction because "Defendant is a tribal member, his victim is a Native American, and the site of his crime was a facility owned by the tribe." ER 34.

Petitioner immediately filed another motion for peremptory reversal in the Tribal Court of Appeals. ER 182. After considering additional briefing presented by both parties, the Court of Appeals concluded that the tribal courts possess criminal jurisdiction over Petitioner under the circumstances of this case, holding that:

> The interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a Tribal employee in a public setting openly visible to other employees and Tribal members who were present. It also involves a Tribal Court finding that Defendant exercised political influence affecting the victim and the Tribe's welfare.
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> It is beyond dispute that Indian tribes have the inherent authority to man[a]ge their own affairs and domestic relations. There is no federal limitation over the exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe.

ER 8, 10.

Having concluded that federal law does not restrict the Tribe's ability to exercise criminal jurisdiction over one of its own members for a crime so strongly implicating the interests of the Tribe, the Tribal Court of Appeals examined tribal law to see whether it placed any limits on the tribal court's jurisdiction in this case. It held that the LRB Constitution required the Tribe to exert "jurisdiction over its members and territory . . . to the fullest extent . . . ." ER 9 (quoting

Tribal Constitution art. I, § 2). It further held that the Tribe had several ordinances governing its jurisdiction. It referenced the Tribe's Criminal Procedures Ordinance, which plainly authorizes the courts' exercise of jurisdiction over Petitioner in a manner consistent with the Tribal Constitution. *See* ER 10. It further found that another provision, the Law and Order Ordinance, restricts the jurisdiction of the tribal courts to Indian country, *see* § 4.03, and as such is an unconstitutionally narrow expression of the Tribe's jurisdiction. ER 9-10.

On February 17, 2009, Petitioner filed a motion to reconsider, which contained the same arguments as his earlier briefing regarding the Tribe's jurisdiction. ER 286. The Court of Appeals denied that request. ER 13. In that same ruling, the Tribal Court of Appeals also denied Petitioner's request for "a stay of the proceedings pending in this Court in order that he may pursue 'an appeal' in the federal courts." *Id.* The Court of Appeals stated that "the federal courts will undoubtedly reject such petition because Appellant has not exhausted his tribal remedies. There are numerous issues yet unresolved in this appeal." ER 13-14.

E. Petitioner's Ongoing Tribal Court of Appeals Proceedings

After this ruling, Petitioner filed his first brief on the substance of his conviction in the Tribal Court of Appeals. ER 301. This brief challenged the Tribal Court's admission of other acts evidence and the speech restriction found in the conditions of Petitioner's probation.

The Tribal Court of Appeals heard oral arguments on these issues on July 17, 2009. Nearly a month after oral arguments—and over five months after the Ruling on Petitioner's Request for Reconsideration—Petitioner filed a Motion for Clarification or Rehearing of the Tribal Court of Appeals' ruling on the jurisdiction issue. ER 392. In this motion, Petitioner argued for the first time that the Tribal Court of Appeals' construction of the tribal ordinances raised a due process issue. ER 396.

The Tribal Court of Appeals ruled on the other acts evidence and the speech restriction on September 14, 2009. ER 16. Petitioner resubmitted his motion for clarification shortly after that decision. ER 402. On the date of the next motion hearing, Petitioner submitted a request for a stay to allow him to file a federal habeas petition in this Court.[6] ER 429. At the hearing, the Tribal Court of Appeals denied Petitioner's motion for clarification or rehearing. ER 20. It also verbally denied the motion for a stay because "nothing in the records show[s] that there's been a filing in federal court and that to appeal [the court's decision in this case], it would need to be that this court has completed all matters and it be a final closed case." ER 874.

Petitioner next filed a brief addressing the sufficiency of the evidence and other alleged trial errors on December 23, 2009. ER 458. He also filed a motion to remand in order to raise new issues before the trial court. ER 505. Before the Tribal Court of Appeals held oral arguments on the issues raised in Petitioner's December 23, 2009 brief, the Court learned that Petitioner had proceeded with this habeas action. *See* ER 22. The Court expressed dismay that Petitioner had done so without informing it — thereby, in the court's view, wasting its efforts in reviewing the voluminous briefing provided by Petitioner in preparation for the March 11 oral arguments. *See* ER 23. The Court of Appeals felt it had no choice but to issue a stay of further proceedings pending the outcome of this federal litigation. *See id.*

EXHAUSTION

The tribal exhaustion doctrine provides that a federal court should "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857

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[6] Petitioner framed his request for a stay in terms of a future habeas appeal (using the standard for a stay pending appeal) despite the fact that he filed his habeas petition with this Court a month before he filed the request for a stay before the Tribal Court.

(1985); *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998) ("The Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims."). While the Tribal Court of Appeals has had the opportunity to address many of Petitioner's claims, more remain to be resolved. *See, e.g.*, ER 462-63 (raising nine additional claims). Indeed, Petitioner raised new claims before the Tribal Court of Appeals even after he filed this habeas petition. *See, e.g.*, ER 506.

However, the "exhaustion of tribal court claims is not an inflexible requirement," *id.* (internal quotation marks and citations omitted), and Respondent does not urge further exhaustion here. This is so for several reasons. First, the Tribal Court of Appeals, which is clearly frustrated by Petitioner's dual-track litigation strategy, has stayed the proceedings before it in deference to this Court. ER 23. While the Court of Appeals would presumably lift that stay were this Court to remand the case back to it, if this Court were instead to resolve the issues raised in the Petition, it would not be acting in derogation of ongoing Tribal court proceedings. Second, as Petitioner notes, his jurisdictional and due process challenges have run their course in the Tribal courts – there will be no further development of those issues prior to their resolution by this Court. Third, Petitioner's challenge to the Tribe's membership-based jurisdiction raises matters of fundamental importance to Respondent and the Tribe, and the prompt resolution of those issues is accordingly in their interest. Fourth, and relatedly, given Petitioner's highly litigious nature, it could be some time before his arguments fully play out in the Tribal courts. Petitioner has elected to raise two habeas claims before this Court, and that election should operate to bar him from asserting additional claims in a subsequent habeas proceeding. *See Floyd v. Alexander*, 148 F.3d 615, 618 (6th Cir. 1998) (holding that abuse of the writ doctrine barred petitioner from seeking to raise previously unexhausted claims in a subsequent habeas

petition); *see also McCleskey v. Zant*, 499 U.S. 467, 489 (1991) ("Our recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice."). If Petitioner is required by this Court to exhaust all of his claims in tribal court before this Petition is entertained, he will undoubtedly seek to raise a host of additional issues when he returns to this Court. Thus, while exhaustion typically serves the interests of judicial efficiency, in this case it could well be more efficient for this Court to resolve Petitioner's present habeas claims now and avoid a proliferation of issues in the future.

ARGUMENT

I. Introduction and Standard of Review

Petitioner principally argues that the Tribe lacked the authority to prosecute him, even as a tribal member and an elected tribal representative, because his act of sexual assault purportedly took place not within "Indian country," as that term is defined by 18 U.S.C. § 1151, but rather at the Tribe's Community Center, which by his account is located across the road from the Tribe's historic reservation boundaries. The Tribal Court of Appeals rejected this argument in forceful terms. The Court held that, under well-accepted principles of federal law, Indian tribes retain the sovereign power to regulate their own internal affairs, including through the prosecution of their members for crimes that affect those internal relations, regardless of whether the crimes are committed within Indian country or not. The Court had little difficulty concluding that Petitioner's crime bore directly on the Tribe's internal relations and that the Tribe accordingly could exercise criminal jurisdiction over him:

> The interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a tribal employee in a public setting openly visible to other employees and Tribal members who were present. It also involves a Tribal Court finding that Defendant exercised political influence affecting the

> victim and the Tribe's welfare. It is sad that the present Defendant is a member of the Tribal Council, who in an effort to escape accountability, argues that the Tribe does not have the sovereign authority to hold him accountable to his violation of Tribal standards of behavior
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> * * *
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> It is beyond dispute that Indian tribes have the inherent authority to man[a]ge their own affairs and domestic relations. There is no federal limitation over the exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe.

ER 8, 10.

In upholding the Tribe's criminal jurisdiction over Petitioner based on his membership status and the effect of his crime on the Tribe's internal affairs, as demonstrated by the nature and location of the crime, the Tribal Court of Appeals acted in a manner fully consistent with fundamental tenets of federal Indian law. Tribes exist as unique sovereigns in our system. While their powers are in various ways more limited than those of the states, they retain significant sovereign authority over their members and their territories. A core element of a tribe's sovereign power is the ability to exert criminal jurisdiction over its members in order to regulate its internal affairs.

This membership-based criminal jurisdiction is not restricted to Indian country. The Indian country concept was originally intended to demarcate the territory within which federal and tribal, instead of state, criminal jurisdiction would apply. The concept now marks more broadly that area within which federal and tribal law operate to the general (but not complete) exclusion of state law. But just as state jurisdiction can apply under certain circumstances within Indian country, so too can tribal jurisdiction obtain outside of Indian country. And, in particular, it is well recognized that tribes can exercise *concurrent* jurisdiction with the states over their members outside of Indian country when necessary to regulate the internal affairs of the tribe.

Respondent and the Tribe have made no claim to exclusive tribal jurisdiction beyond Indian country, and hence Petitioner's parade of horribles regarding the ouster of State jurisdiction has no relevance here.

Respondent agrees that this Court should review the question of the Tribal Courts' jurisdiction de novo. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006).

II. The Tribe's Inherent Sovereign Authority Encompasses Criminal Jurisdiction Over Its Members as Necessary to Regulate Its Internal Affairs

From the time of the Founding, the United States has recognized that Indian tribes are sovereign nations. "The Indian nations ha[ve] always been considered as distinct, independent political communities. . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (Marshall, C.J.). The Constitution lists the tribes—along with foreign governments and the states—as sovereigns with which Congress has the power to regulate commerce. U.S. Const., art. I, § 8; *Cohen's Handbook of Federal Indian Law* 206-07 (2005 ed.). Furthermore, "[f]rom the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate."[7] *Worcester*, 540 U.S. at 556-57.

Tribes originally possessed all the powers of sovereign governments "with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer . . . ." *Id.* at 559. Over time, the federal government has imposed limits on tribal sovereignty based on the unique relationship between it and the tribes. "Indian tribes are, of course, no longer 'possessed of the full attributes of

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[7] The Trade and Intercourse Acts recognized that tribes had responsibility for the acts of their members outside of Indian country. *See Cohen's Handbook of Federal Indian Law* 40 (2005 ed.); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779, 793 (2006).

sovereignty.' Their incorporation within the territory of the United States . . . necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States v. Wheeler,* 435 U.S. 313, 323 (1978) (quoting *United States v. Kagama,* 118 U.S. 375, 381 (1886)).

However, the Tribes have never surrendered—and have never been stripped of—many key components of their sovereignty:

> [O]ur cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said that: "Indian tribes are unique aggregations possessing attributes of sovereignty *over both their members* and their territory . . . . [They] are a good deal more than 'private, voluntary organizations. . . ." [U]ntil Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Wheeler, 435 U.S. at 323 (quoting *United States v. Mazurie,* 419 U.S. 544, 557 (1975)) (citations omitted and emphasis added).

In two important decisions, the United States Supreme Court has made it clear that among the core sovereign powers retained by the tribes is the authority to punish their members for criminal offenses pertaining to the tribes' internal affairs. In *Wheeler*, the Court considered whether the prosecution of a Navajo member by the Navajo Nation precluded the subsequent prosecution of that individual by the United States (for the same incident) on double jeopardy grounds. The resolution of this question depended on whether the Navajo Nation had exercised its own inherent sovereignty in prosecuting its member (in which case the "dual sovereignty" doctrine would have obviated any double jeopardy issue) or whether the Nation had exercised delegated authority from the United States, in which case the subsequent prosecution would have given rise to double jeopardy problems. *Wheeler*, 435 U.S. at 316.

To answer the question, the *Wheeler* Court conducted a searching examination of the nature and scope of tribal criminal jurisdiction. In doing so, it emphasized that the tribes have retained criminal jurisdiction over their members as a necessary aspect of their power of self-government:

> *It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members*. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." *Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.*

Wheeler, 435 U.S. at 322 (citations omitted and emphases added) (quoting *Kagama*, 118 U.S. at 381-82).

The *Wheeler* Court observed that "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." *Id.* at 322-23 (citation omitted). The Court next examined Navajo-specific treaties and found that none had stripped the tribe of its authority to punish its own members. *Id.* at 324. Finally, in terms generally applicable to all Indian nations, the Court held:

> [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. *The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe*. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held, they cannot try nonmembers in tribal courts.
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> . . . But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 326 (citations omitted and emphasis added).

Just over a decade later, in *Duro v. Reina*, 495 U.S. 676, 686 (1990) *superseded by statute* Pub. L. No. 101-511, 104 Stat. 1856, 1892 (1991) (codified as amended at 25 U.S.C. § 1301), the Court reiterated the core teachings of *Wheeler,* and in doing so underscored the tribes' powers to exercise criminal jurisdiction over their members. *Duro* reaffirmed that "the retained sovereignty of the tribes is that needed to control their own internal relations," *id.* at 685, and that as such, there has occurred no divestiture of "[t]he power of a tribe to prescribe and enforce rules of conduct for its own members." *Id.* at 686. The Court noted that "[a]s full citizens, Indians share in the territorial and political sovereignty of the United States," *id.* at 693, and then declared, in terms directly applicable to this case:

> The retained sovereignty of the tribe[s] is but a recognition of certain *additional authority* the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. *A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.*

Id. (emphases added).[8]

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[8] *Duro's* recognition of the "additional authority" possessed by tribes with respect to their members, such that "[w]ith respect to . . . internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country," *id.* at 694, renders inapposite Petitioner's brief (and only partially correct) suggestion, Memorandum of Law in Support of Verified Petition for Writ of Habeas Corpus, at 28 (Nov. 5, 2009), that states cannot exercise extraterritorial jurisdiction over their citizens. *See also* Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. Legal Educ. 433, 437 (2006) ("Other criminal law systems illustrating *active* (i.e., offender-based) personality jurisdiction include those of various Native American tribes . . . .") (emphasis in original).

Duro held that the tribes' retained sovereignty does not include the authority to criminally prosecute individuals who are Indians but non-members of the prosecuting tribe. *Duro*, 495 U.S. at 688. That decision provoked a great deal of controversy, and within a year Congress had enacted the "*Duro* fix," in which Congress made clear that the tribes' inherent powers extend to the prosecution of non-member as well as member Indians. *See United States v. Lara*, 541 U.S. 193, 197, 199 (2004).

Neither *Duro* nor *Wheeler* contains any suggestion that their pronouncements regarding the continued vitality of tribal criminal jurisdiction over members are limited to Indian country. To the contrary, *Duro* spelled out the principle underpinning the continued existence of membership-based jurisdiction in terms that admit of no such geographic distinction. "Retained criminal jurisdiction over members is accepted by our precedents and *justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.*" *Id.* at 694 (emphasis added). Whereas United States citizens residing in this country have no choice but to be citizens of some state, tribal membership is voluntary.[9] And where an eligible individual chooses to accept the privileges and benefits of tribal membership, that individual must also shoulder the responsibilities that accompany such membership, including the responsibility of abiding by the tribe's code of criminal conduct or otherwise being subject to prosecution for violations that affect the tribe's internal affairs, regardless of where those violations occur.

Accordingly, both federal and state courts have relied on *Duro* and *Wheeler* in holding that tribes may exercise jurisdiction over their members for actions taking place outside of Indian country. The Ninth Circuit, which contains 411 of the country's more than five hundred federally recognized tribes, *see* National Congress of American Indians, Resolution No. SAC-06-047, at 1 (2006), *available at* https://www.ncai.org/ncai/resolutions/doc/SAC-06-047.pdf (last visited Apr. 1, 2010), has rested on those decisions in declaring that:

> *[T]ribal sovereignty is not coterminous with Indian country. Cf.* 25 C.F.R. § 83.7(b) (1989) (in order to achieve federal recognition, a group of Indians need

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[9] Not only is tribal membership voluntary, but it is also "more than mere citizenship in an Indian tribe. It is the essence of one's identity, belonging to community, connection to one's heritage . . . ." *Wabsis v. Little River Band of Ottawa Indians Enrollment Comm'n*, No. 05-141-AP, at 3 (Tribal Ct. App. May 3, 2006).

> not inhabit formal "Indian country"; inhabitation of "a specific area" or a "community viewed as American Indian" is sufficient). *Rather, tribal sovereignty is manifested primarily over the tribe's members. See Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 2060, 109 L.Ed.2d 693 (1990) ("the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order [and].... to prescribe and enforce rules of conduct for [their] own members"); *Wheeler*, 435 U.S. at 326, 98 S.Ct. at 1087 (powers such as enforcement of internal criminal laws "involve only the relations among members of a tribe [and t]hus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status"). A tribe's authority over its reservation or Indian country is incidental to its authority over its members.

Native Vill. of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 558 n.12 (9th Cir. 1991) (emphases added); *see also Kaltag Tribal Council v. Jackson*, 344 F. App'x 324, 325 (9th Cir. 2009) (unpublished), *petition for cert. filed*, 78 U.S.L.W. 3501 (U.S. Feb. 11, 2010) (No. 09-960) (same). The Tenth Circuit has likewise stated that "*the powers of tribes extend over not only their territory but also their members*; therefore "[u]nder some circumstances tribal powers can extend over members going *beyond* reservation boundaries. The determinative factor is whether the matter falls within the ambit of internal self-government." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1256 (10th Cir. 2001) (emphasis added) (internal quotation marks and citations omitted).

In *John v. Baker*, 982 P.2d 738, 754 (Alaska 1999), the Alaska Supreme Court engaged in perhaps the most searching analysis to date of the question whether tribal sovereignty transcends Indian country boundaries. While that case, like the Ninth and Tenth Circuit decisions discussed above, arose in the non-criminal context, it stands as a sweeping refutation of the arguments advanced by Petitioner here. The Alaska Supreme Court held that tribes possess "non-territorial sovereignty allowing them to resolve domestic disputes between their own members." *Id.* at 748. It rejected the notion that the elimination of the Alaska tribes' Indian country through the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.*,

had "also divested Alaska Native villages of their sovereign powers." *John*, 982 P.2d at 749. In doing so, the *John* court drew heavily from *Wheeler*, *Duro*, and other United States Supreme Court decisions in affirming the continued vitality of tribal membership-based jurisdiction:

> [F]ederal case law does provide significant support for our conclusion that federal tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy.
>
> The federal decisions discussing the relationship between Indian country and tribal sovereignty indicate that the nature of tribal sovereignty stems from two intertwined sources: tribal *membership* and tribal *land.* The United States Supreme Court has recognized the dual nature of Indian sovereignty for more than a century and a half; the Court has explained that, under federal law, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent "power of regulating their internal and social relations."

Id. at 754-55 (quoting *Mazurie,* 419 U.S. at 557) (emphases added).

As the *John* court pointed out, the situation in Alaska amply demonstrates the fallacy of arguments such as the one advanced by Petitioner here. While ANCSA eliminated almost all Indian country in Alaska, *see id.* at 748, in the Federally Recognized Tribe List Act of 1994, 25 U.S.C. § 479a *et seq.*, Congress evidenced its determination that the "Alaska Native villages are sovereign entities." *John*, 982 P.2d at 753. Acceptance of the argument that tribal sovereignty is restricted to Indian country would accordingly:

> render the Tribe List Act hollow: If tribes that do not occupy Indian country have no inherent powers of self-governance, the language in the Tribe List Act that expressly reserves to these tribes "the right . . . to exercise the same inherent and delegated authorities available to other tribes" would be virtually meaningless. We find untenable the conclusion that Congress intended for the Tribe List Act to be an empty gesture.

Id. (alteration in original); *see also* Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond The Reservation Borders*, 12 Lewis & Clark L. Rev. 1003, 1028 (2008) (stating that *John*'s conclusions should apply equally outside of Alaska).

In sum, then, under well-established tenets of federal Indian law, unless a specific treaty or statute has divested a tribe of criminal jurisdiction over its members, tribes enjoy such jurisdiction wherever a member has committed a crime bearing on internal tribal relations, and regardless of whether the crime was committed within Indian country. As the leading treatise on federal Indian law puts it: "[T]he more closely a matter is related to core tribal interests, the stronger the case is for recognition of jurisdiction based on membership in the tribe. In addition to regulation of domestic relations and probate matters, *such interests would include keeping peace among tribal members in tribal communities*." *Cohen's Handbook of Federal Indian Law* 219 (2005 ed.) (emphasis added).[10]

III. Petitioner's Crime Bore Directly on the Tribe's Internal Affairs

Application of the above principles to the case at hand leaves no doubt that the Tribe enjoyed the authority to prosecute Petitioner. Petitioner does not claim that any treaty or statute has divested the Tribe of criminal jurisdiction over its members for crimes committed outside of Indian country, and none exists. As discussed above, the Tribe's political forebears were signatories to two principal treaties—the 1836 Treaty of Washington, 7 Stat. 491, and the 1855 Treaty of Detroit, 11 Stat. 621. *See* 25 U.S.C. § 1300k(1). Neither treaty, nor any other to which the Tribe is a signatory, purports to restrict the Tribe's historic criminal jurisdiction over its members.

On the statutory front, as is also discussed above, Congress reaffirmed the Little River Band's sovereign status, and the government-to-government relationship between the United

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[10] Cohen's Handbook is widely regarded as "the leading treatise on Indian law." *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1266 (10th Cir. 2001); *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995); *see also Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the W. Dist. of Mich.*, 369 F.3d 960, 968 (6th Cir. 2004) (describing Cohen's Handbook as "a prominent treatise on federal Indian law").

States and the Tribe, in 1994. Once again, that legislation makes no effort to cabin the Tribe's traditional criminal jurisdiction over its members. To the contrary, Congress expressly stated that "[a]ll rights and privileges of [the Tribe and the] members thereof, which may have been abrogated or diminished before September 21, 1994, are hereby reaffirmed." 25 U.S.C. § 1300k-3(a).

There is no question, moreover, that Petitioner's crime bore directly on the Tribe's internal affairs. At the time of the incident, Petitioner was a member not only of the Tribe but of its nine-person Tribal Council, which constitutes the legislative branch of the Tribe's government. His crime was reprehensible in nature, and violated core Tribal norms against sexual assault and abuse of one's position. His victim, Ms. Foster, was a tribal employee engaged in tribal business (assisting elders in signing up for Medicare Part D) when Petitioner assaulted her.

Petitioner committed his crime, moreover, at the Tribe's Community Center, which by his account is located just outside of the Tribe's historic reservation boundaries. The Tribal Court of Appeals repeatedly emphasized the important role the Center played in Tribal life at the time of Petitioner's crime (and its decision), stating that it has "been the center of Tribal community activities ever since it was purchased." ER 7. "[T]he Center is a community gathering point to host varied and numerous tribal meetings, to serve community meals and to provide tribal office space for the conduct of the business of a tribal sovereign." *Id.*

Accordingly, as the Tribal Court of Appeals put it, "[t]he interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a tribal employee in a public setting openly visible to other employees and Tribal members who were present." ER 8. Acceptance of

Petitioner's arguments would strip the Tribe of the power to enforce the important social norms embodied in its criminal code against him, despite his consent to the privileges and responsibilities of membership in the Tribe. *See Duro*, 495 U.S. at 694. Petitioner has not only benefited from numerous Tribal programs but also enjoyed the privilege of serving as an elected representative of the Tribe. His efforts to now evade responsibility for actions he took against a Tribal employee run counter to fundamental notions of fairness, and to basic tenets of federal law, and the Tribal Court of Appeals was correct to reject them.

IV. Petitioner's Attacks on the Tribe's Jurisdiction Rest on Serious Misconceptions of the Law

A. The Concept of "Indian Country" Does Not Serve to Define the Exclusive Parameters of Tribal Jurisdiction

Petitioner repeatedly claims that the Tribe's jurisdiction is limited to Indian country. Not only does this claim ignore the emphasis that the courts have placed on membership as a basis for tribal jurisdiction, but it utterly misconstrues the function that the concept of Indian country serves in federal law.

"Indian country" is statutorily defined at 18 U.S.C. § 1151 to include reservation land (which has been interpreted to extend to all trust and restricted fee lands), "dependent Indian communities," and Indian allotments. The statute "by its terms relates only to federal criminal jurisdiction." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). However, the Court has applied it as well to questions of civil jurisdiction. *Id.*; *DeCoteau v. Dist. Ct.*, 420 U.S. 425, 427 n.2 (1975). Accordingly, the Indian country determination now serves to chart which sovereign has primary jurisdiction over a particular territory. "Generally speaking, primary jurisdiction *over land* that is Indian country rests with the Federal Government

and the Indian tribe inhabiting it, and not with the States." *Venetie*, 522 U.S. at 527 n.1 (emphasis added). It does not speak to membership-based jurisdiction.

Federal courts thus rely on the Indian country determination as a general reference in determining whether a sovereign may lawfully exert its authority in a particular matter. For example, crimes inside Indian country are typically punishable by the tribe or by the federal government. *Williams v. United States*, 327 U.S. 711, 714 (1946). Inside Indian country, moreover, states generally lack regulatory power over Indians, *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980), and tribes usually have the predominant taxing power. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("Indian tribes and individuals generally are exempt from state taxation within their own territory."). Outside of Indian country, Indians and Indian tribes are not infrequently subject to state taxation. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995).

These examples, however, only illustrate general principles—they do not state categorical rules. Thus, while state courts typically do not possess criminal jurisdiction in Indian country, it has long been held that they do have criminal jurisdiction over Indian country crimes where committed by a non-Indian against another non-Indian. *United States v. McBratney*, 104 U.S. 621, 624 (1881). Similarly, states have occasionally argued with success that they may exert their regulatory power inside Indian country if "state interests outside the reservation are implicated." *Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *see also Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 159 (1980). Additionally, tribes may be exempt from state taxes outside of Indian country, *Cree v. Flores*, 157 F.3d 762, 774 (9th Cir. 1998) (holding that treaty exempted tribe from taxes on travel outside of reservation).

Therefore, the concept of Indian country at best provides a general tool for determining whether a sovereign has territorial jurisdiction with respect to a particular matter. It does not conclusively determine the outer parameters of each sovereign's jurisdiction, and it does not purport to abrogate membership-based jurisdiction. *John*, 982 P.2d at 757 ("[*Venetie*] makes clear that any allocative significance that exists in the concept of Indian country pertains to a tribe's territorial power over its land, not its members."). To the contrary, membership status has played an increasingly important role in the Supreme Court's Indian law jurisprudence. *See, e.g.*, *Hicks*, 533 U.S. at 382 (Souter, J., concurring) ("It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact.").

Petitioner nonetheless links his argument irretrievably to the Indian country concept. The authorities Petitioner relies on, however, deal with non-controversial uses of that yardstick. None of Petitioner's authorities address, much less foreclose, tribal jurisdiction based upon membership.

Thus, many of the cases cited by Petitioner stand simply for the proposition that the states cannot exert criminal jurisdiction over Indians inside Indian country. *See, e.g.*, *Langley v. Ryder*, 602 F. Supp. 335, 341 (W.D. La. 1985); *State v. Rufus*, 237 N.W. 67, 71-72 (Wis. 1931); *State v. Big Sheep*, 243 P. 1067, 1071-72 (Mont. 1926) (state does not have criminal jurisdiction over Indian inside reservation unless Indian is an "emancipated Indian"); *State v. Atcitty*, 2009-NMA-86, 215 P.3d 90 (N.M. Ct. App. 2009), *cert. granted*, 2009-MCERT-8, 223 P.3d 941 (Aug. 12, 2009) (No. 31,791). Others involve unsuccessful challenges to state jurisdiction over Indians outside of Indian country. *See, e.g.*, *State v. Mathews*, 986 P.2d 323, 335 (Idaho 1999); *State v Watters, Jr.*, 156 P.3d 145, 149-50 (Or. Ct. App. 2007); *People ex rel. Kennedy v. Becker*, 109

N.E. 116, 116 (N.Y. 1915) *aff'd*, 241 U.S. 556 (1916); *Pablo v. People*, 46 P. 636, 637 (Idaho 1896) ("We think, therefore, that the Ute Indians are subject to our state laws, and amenable to the jurisdiction of our courts for offenses committed outside the limits of their reservation. This is the only question presented by this record, and all we determine."); *State v. Spotted Hawk*, 55 P. 1026, 1028 (Mont. 1899). These cases focus on state, rather than tribal, criminal jurisdiction.[11] And as will be discussed below, state criminal jurisdiction outside Indian country is not at all antithetical to concurrent tribal criminal jurisdiction over the same crime based on membership.

Petitioner also cites cases that only analyze state civil jurisdiction over Indians. *See, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983) (state attempt to enforce hunting regulations on reservation); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 75 (1962) (state properly enforced regulations against Indians where tribe had no reservation); *Oneida Tribe v. Vill. of Hobart*, 542 F. Supp. 2d 908, 926 (E.D. Wis. 2008) (tribe not immune from state jurisdiction on land owned in fee outside of Indian country); *Seneca-Cayuga Tribe of Okla. v. Town of Aurelius*, 233 F.R.D. 278, 279 (N.D.N.Y. 2006); *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005); *Roe v. Doe*, 649 N.W.2d 566, 571 (N.D. 2002) (state has concurrent jurisdiction over child custody dispute between members of two different tribes). Still other cases cited involve only state taxing authority outside of Indian

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[11] *Pablo* does suggest that Congress divested tribes of jurisdiction over the crimes listed in the Major Crimes Act inside and outside of the reservation. 46 P. at 636-37. In doing so, it relies on a repealed version of the Major Crimes Act *Id.* Congress has since amended the Act and the courts have held that the Act recognizes the tribes' concurrent jurisdiction over its enumerated crimes. *Wetsit*, 44 F.3d at 825-26. Petitioner also cites *United States v. Sa-coo-da-cot*, 27 F. Cas. 923 (CCD Neb. 1870). *Sa-coo-da-cot* stands only for the proposition that, prior to the Major Crimes Act, the federal government lacked jurisdiction over murder in Indian country. *Id.* at 926-27.

country. *See, e.g.*, *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536, 1540 (5th Cir. 1992); *Osceola v. Florida Dep't of Revenue*, 705 F. Supp. 1552, 1553 (S.D. Fla. 1989), *aff'd*, 893 F.2d 1231 (11th Cir. 1990). Finally, Petitioner relies on cases that involve tribal jurisdiction—but only over nonmembers. *See, e.g.*, *Hicks*, 533 U.S. at 357. As with Petitioner's other authorities, these cases do not discuss the extent of tribal jurisdiction over tribal members outside of Indian country. Instead, they address the extent of state civil jurisdiction over Indians, or, conversely, tribal civil jurisdiction over non-Indians.

Another set of Petitioner's authorities analyzes whether particular land falls within Indian country for purposes of state jurisdiction. *See, e.g.*, *Hagen v. Utah*, 510 U.S. 399, 401 (1994); *Solem v. Bartlett*, 465 U.S. 463, 464 (1984); *DeCoteau*, 420 U.S. at 426; *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951, 974 (8th Cir. 2009); *State v. Quintana*, 178 P.3d 820, 821-22 (N.M. 2008); *Bruguier v. Class*, 599 N.W.2d 364, 370 (S.D. 1999); *Moses v. Dep't of Corr.*, 736 N.W.2d 269, 283 (Mich. Ct. App. 2007) (per curiam); *People v. Bennett*, 491 N.W.2d 866, 867-68 (Mich. Ct. App. 1992) (per curiam); *State v. Kozlowicz*, 911 P.2d 1298, 1299-1300 (Utah Ct. App. 1996). These cases articulate the importance of the Indian country concept, but they do so only in determining whether a state has jurisdiction over a particular area. They do not suggest a limit on tribal court jurisdiction over tribal members.

Petitioners' authorities thus offer no support for the novel limitation he posits on tribal criminal jurisdiction. Instead, they almost uniformly involve non-controversial uses of the Indian country determination to assess whether states possess jurisdiction over Indians under various circumstances. As is next discussed, the Tribe's membership-based jurisdiction in this case in no way affects the State of Michigan's jurisdiction over land outside of Indian country.

B. Petitioner's Parade of Horribles Rests on a False Predicate

Petitioner spills a great deal of ink arguing that, if this Court rejects his Petition, serious jurisdictional implications will ensue for the State of Michigan. The State, he suggests, would be ousted from jurisdiction over any fee land purchased by an Indian tribe within its borders. Memorandum of Law in Support of Verified Petition for Writ of Habeas Corpus ("Memorandum"), at 33-36 (Nov. 5, 2009). This argument again demonstrates how sorely Petitioner has misconstrued the Tribal Court of Appeals' decision.

That court nowhere based its opinion on any notion that a tribe may unilaterally create exclusive tribal jurisdiction by purchasing land outside of Indian country in fee simple. *Compare* Memorandum at 33 ("To simply say that fee land outside any historic reservation is rendered sovereign by tribal repurchase, as the Court of Appeals would do, makes the trust application process meaningless."). Nor have Respondent or the Tribe ever advanced any such contention. Indeed, as Petitioner acknowledges, the "Band's [non-judicial] branches of government acknowledge local jurisdiction over this parcel as the Band's executive and legislative branches authorize the payment of property taxes to Michigan's local governments." Memorandum at 34.

The Tribal Court of Appeals instead grounded its jurisdiction in the Tribe's retained authority over its members for criminal acts bearing on the Tribe's internal relations, regardless of where those acts are committed. This membership-based jurisdiction does not detract from the territorial jurisdiction of the State of Michigan. Nor, indeed, does it detract from the State's jurisdiction over Petitioner himself.

Petitioner apparently assumes that if the Tribe can exercise criminal jurisdiction over him, the State cannot. No support exists, however, for the proposition. There exist many

circumstances in federal Indian law where two or more sovereigns enjoy concurrent jurisdiction. For example, Federal and tribal governments both possess criminal jurisdiction over the crimes enumerated in the Major Crimes Act. *Wetsit v. Stafne*, 44 F.3d 823, 825-26 (9th Cir. 1995); Cohen, *supra*, at 759-60. The Supreme Court has likewise recognized various situations where both a state and a tribe can impose their taxes on the same transactions. *See, e.g.*, *Colville*, 447 U.S. at 158-160 (holding that both state and tribe can tax non-member cigarette purchases). In these cases, the courts have evidenced the understanding that one sovereign can exercise jurisdiction without ousting another. *Id.* at 158 ("There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other.").

Indeed, the Tribe has expressly affirmed the importance of concurrent jurisdiction in its Law and Order Ordinance. Section 4.01 of that Ordinance declares that while persons committing offenses proscribed by the Tribe "may be tried and punished by the Tribal Court . . . *such jurisdiction, whether or not exercised, shall not affect the power or authority of any other courts, including those of the United States, or the State of Michigan, which may have jurisdiction.*" Law and Order Ordinance § 4.01 (emphasis added). Thus, it is simply incorrect to posit, as Petitioner does, that the exercise of jurisdiction by the Tribe can only come at the expense of the State:

> Plaintiff has framed the question incorrectly, because her question assumes that state and federal jurisdiction cannot exist simultaneously over fee-patented land within a reservation. . . . Put differently, the want of state regulatory jurisdiction over land is not a necessary condition for federal regulatory jurisdiction over the same land. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (explaining preemption law applicable to Indian reservations). In fact, the Supreme Court has suggested that tribal jurisdiction and state jurisdiction are not mutually exclusive. *See Brendale*, 492 U.S. at 440 n. 3, 109 S.Ct. 2994 ("The possibility that the county might have

> jurisdiction to prohibit certain land uses . . . does not suggest that the Tribe lacks similar authority.") (Stevens, J.) (plurality opinion).

Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1218 (9th Cir. 2001).

Indeed, after decades of conflict, states and tribes now frequently recognize that they can best advance their interests by asserting their authority in tandem with one another. *See* Tribal-State Relations, Mich. Exec. Directive No. 2004-5, at 2 (May 12, 2004), *available at* http://www.michigan.gov/gov/0,1607,7-168-36898_36900-92821--,00.html (last visited Apr. 1, 2010) ("[T]he state of Michigan and . . . federally acknowledged Indian tribes share a responsibility to provide for and protect the health, safety, and welfare of our common constituents and can benefit greatly from increased cooperation in addressing these concerns."); s*ee also Nisqually Indian Tribe v. Gregoire*, 649 F. Supp. 2d 1203, 1211 (W.D. Wash. 2009) ("The intent in authorizing the Governor to enter into [compacts with tribes] included furthering the government-to-government relationships between the State and the Indian Tribes, promoting Tribal economic development and providing needed revenues for Tribal governments, enhancing enforcement of the State's cigarette tax laws, and reducing conflict between the State and Tribes.").

This is precisely such a situation. Absent treaty provisions, there exists no bar to the exercise of state criminal jurisdiction over Indians outside of Indian country. *See Hagen*, 510 U.S. at 421-22; *John*, 982 P.2d at 759 ("[F]ederal law suggests that the only bar to state jurisdiction over Indians and Indian affairs is the presence of Indian country. Outside Indian country, all disputes arising within the State of Alaska, whether tribal or not, are within the state's general jurisdiction. Thus the state, as well as the tribe, can adjudicate such disputes in its courts."). The State hence enjoys jurisdiction to prosecute Petitioner for his Community Center crime if it so desires.

Nor would double jeopardy operate to preclude such a prosecution. As noted above, *Wheeler* makes clear that "prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *Wheeler*, 435 U.S. at 317. As states and tribes, like the federal government and tribes, are separate sovereigns, this dual sovereignty doctrine means that there exists no federal constitutional bar to the prosecution of Petitioner by both the State and the Tribe.

The Michigan Supreme Court applies the same dual sovereignty exception to the Michigan double jeopardy clause. *People v. Davis*, 695 N.W.2d 45, 51 (Mich. 2005). Accordingly, there also exists no state double jeopardy bar to the exercise of concurrent state and tribal jurisdiction over Petitioner. Petitioner's insistent claims that the failure to grant his Petition will somehow operate to the detriment of the sovereign rights of the State of Michigan are utterly without basis, and cannot serve as justification for Petitioner's attempts to radically re-write the contours of the Tribe's membership-based jurisdiction.

V. The Tribe's Prosecution of Petitioner Did Not Violate His Due Process Rights

Petitioner alleges that the Tribal Court of Appeals' opinion "unexpectedly and indefensibly fashioned a new rule regarding tribal court criminal jurisdiction." Petition ¶ 96. This claim sorely misapprehends the relevant Tribal law. Both the Tribal Constitution and various Tribal Code provisions made it amply clear at the time of Petitioner's crime that the Tribe had defined the criminal jurisdiction of its courts to extend over its members. In so holding, the Court of Appeals did not engage in any unexpected or indefensible expansion of the Tribe's criminal jurisdiction and therefore did not violate the due process principle of fair warning.

The Tribal Court of Appeals did not reach Petitioner's Due Process argument, presumably because it was not timely filed. *See* ER 876 (describing Petitioner's motion for clarification as challenging rulings that were "significantly earlier"). Therefore, this Court should make its own determination in the first instance as to whether the Tribal Court of Appeals' Opinion and Order Regarding Jurisdiction unexpectedly and indefensibly expanded the Tribe's criminal jurisdiction. *See Harries v. Bell*, 417 F.3d 631, 634-35 (6th Cir. 2005).

A. The Due Process Standard

The due process protections contained in the Indian Civil Rights Act mirror those of the Due Process Clause of the United States Constitution. *See Randall v. Yakima Nation Tribal Ct.*, 841 F.2d 897, 900 (9th Cir. 1988). It violates due process for a court to retroactively apply an "*unforeseeable* . . . construction of a criminal statute . . . to subject a person to criminal liability for past conduct." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (emphasis added); *United States v. Blaszak*, 349 F.3d 881, 886 (6th Cir. 2003). Only very specific judicial actions give rise to a *Bouie* due process violation: the Supreme Court has recently emphasized that it has "restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are '*unexpected and indefensible* by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (quoting *Bouie*, 378 U.S. at 354) (emphasis added); *see also Evans v. Ray*, 390 F.3d 1247, 1251 (10th Cir. 2004). "*Bouie* applies only to unpredictable shifts in the law," *United States v. Burnom*, 27 F.3d 283, 284 (7th Cir. 1994), or to "radical and unforeseen departure[s] from former law." *Webster v. Woodford*, 369 F.3d 1062, 1071 (9th Cir. 2004) (quoting *Hayes v. Woodford*, 301 F.3d 1054, 1088 (9th Cir. 2002)).

The *Bouie* doctrine rests "on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning." *Rogers*, 532 U.S. at 459; *United States v. Barton*, 455 F.3d 649, 654 (6th Cir. 2006) ("[W]hen addressing ex post facto-type due process concerns, questions of notice, foreseeability, and fair warning are paramount."). The doctrine is thus predicated on the "fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred.'" *Bouie*, 378 U.S. at 353 (quoting Hall, General Principles of Criminal Law 58-59 (2d ed. 1960)).

Accordingly, in determining whether a *Bouie* violation has taken place, a court looks to the state of the law at the time of the offense. *Id.* at 356. It must determine whether a defendant had "fair warning" that his conduct was criminal. *Marks v. United States*, 430 U.S. 188, 195 (1977). To do so, it can look to the sources of authority the original court relied upon in its interpretation of the law. *Rogers*, 532 U.S. at 462-63; *Bouie*, 378 U.S. at 356-60. Where those sources suggest the court's decision was foreseeable, there is no due process violation. *Rogers*, 532 U.S. at 463-64. Additionally, even if they were not relied upon by the original court, where other authorities provided notice of the illegality of the defendant's conduct, or of the severity of the punishment that could attach to that conduct, they suffice to meet the fair warning requirement. *See, e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 116 (1990) (finding "fair warning" satisfied because, in part, surrounding statutory provisions clearly indicated that the provision in question was intended to criminalize child pornography); *Bouie*, 378 U.S. at 354 (a decision is unforeseeable if it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.") (internal quotation marks omitted); *United States v. Duncan*, 400 F.3d 1297, 1307-08 (11th Cir. 2005) (finding no "fair warning" problem where the Sentencing Guidelines relied upon as mandatory by the district court in sentencing the defendant

were then deemed to be only advisory by the Supreme Court in *United States v. Booker*, 542 U.S. 220 (2005), because the statutory maximum found in the United States Code had independently provided sufficient notice of the potential punishment); *Devine v. New Mexico Dep't of Corr.*, 866 F.2d 339, 345 (10th Cir. 1989) (stating that *Bouie* "focused on whether the judicial decision was foreseeable in light of the 'law which had been expressed prior to the conduct in issue'" and rejecting, pursuant to this standard, reliance on a statute that had not been included in the official compilation of New Mexico statutes, that was flatly inconsistent with a statute that had been so codified, and to which the only official reference was an "oblique reference in the compiler's notes" noting that the codified statute had been selected over a non-codified one because it had been signed by the Governor later in time). This dovetails with the general presumption that "citizens are presumed to know the requirements of the law." *United States v. Napier*, 233 F.3d 394, 397 (6th Cir. 2000); *see also Bryan v. United States*, 524 U.S. 184, 193 (1998).[12]

B. The Tribal Court of Appeals Did Not Ordain an Unexpected or Indefensible Shift in the Law

The Tribal Court of Appeals sought to determine "whether the Tribe itself has imposed a limitation on the exercise of its inherent authority." ER 8. It examined the Tribal Constitution and various Tribal Ordinances and concluded that the Tribe had clearly defined the criminal jurisdiction of its courts to apply to Petitioner. In doing so, it did not engage in any due process violation.

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[12] In the sentencing context, the Sixth Circuit has declined to adopt the approach in *Duncan* because it is in tension with earlier Sixth Circuit precedent applying the Ex Post Facto Clause to changes in the Sentencing Guidelines. *Barton*, 455 F.3d at 657. However, *Barton* did not reject reliance on other statutes to determine whether there is fair warning under the Due Process Clause in general. *See id.*

First, Petitioner cites no support for the proposition that the *Bouie* doctrine applies at all to jurisdictional issues, and we have found none. There is no dispute in this case that, as a matter of substantive criminal law, the Tribe had clearly defined the offense of sexual assault and the potential punishment for that offense prior to Petitioner's commission of that crime, and that he accordingly had ample warning that his actions could lead to prosecution and punishment by the Tribe. Petitioner's claim instead reduces to the following proposition: while he had fair warning that he could not sexually assault a Tribal employee in a building located on Tribal trust land, he lacked fair warning that he could not assault that same Tribal employee in the Tribe's Community Center, located as it is on fee land, and it therefore violated due process for the Tribe to prosecute him for the same. Nothing in *Bouie* or its progeny supports such a conclusion. "If . . . the change in question would not have had an effect on anyone's behavior, notice concerns are minimized." *Barton*, 455 F.3d at 655. Petitioner engaged in conduct that was clearly proscribed under the Tribe's criminal code. The *Bouie* doctrine requires nothing more as a prerequisite to his prosecution. "The 'touchstone' behind all of these [due process] concerns is an examination of the statute to determine whether, either on its face or as construed, the provision in question 'made it reasonably clear at the relevant time that the *defendant's* conduct was criminal.'" *Blaszak,* 349 F.3d at 886 (quoting *United States v. Lanier*, 520 U.S. 259, 267 (1997)) (emphasis added).

Second, even if *Bouie* sweeps in jurisdictional claims, the Tribal Court of Appeals did nothing unexpected or indefensible in concluding that the Tribe had defined its own criminal jurisdiction to extend to Petitioner. In reaching this conclusion, the Court of Appeals looked first, as it of course should have, to the Tribal Constitution. Article I of the Constitution provides that:

> Section 1 – *Territory*. The territory of the Little River Band of Ottawa Indians shall encompass all lands which are now or hereinafter owned by or reserved for the Tribe.
> Section 2 – *Jurisdiction Distinguished From Territory.* The Tribe's jurisdiction *over its members and territory shall* be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.

Tribal Const. art. I, §§ 1-2 (final emphasis added).

Consistent with the federal law principles discussed above, then, Section 2 speaks of the Tribe's jurisdiction as encompassing both its members and its territory (which Section 1 defines to include fee as well as trust lands), and mandates that such jurisdiction be exercised to the fullest extent possible in keeping with the requirements of federal law and the sovereign powers of the Tribe. Pursuant to well-established federal law, as we have canvassed, the Tribe's sovereign powers include the authority to prosecute its members for crimes implicating the internal relations of the Tribe, regardless of where those crimes are committed. The Constitution plainly affirms the existence of this authority in the Tribe.

Article I's emphasis on robust membership-based as well as territorial-based jurisdiction carries over to Article VI of the Constitution. Section 8 of that Article provides as follows:

> Section 8 – *Powers of the Tribal Court*
> (a) The judicial powers of the Little River Band *shall extend* to all cases and matters in law and equity arising under this Constitution, the laws and ordinances of or applicable to the Little River Band including but not limited to:
> 1. To adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe *or to which the Tribe or an enrolled member of the Tribe is a party.*

Id. art. VI, § 8. (final emphasis added). This is mandatory language, and it plainly specifies that the powers of the Tribal courts extend to all cases in which a member of the Tribe is a party. This provision was in full force at the time that Petitioner committed his crime, and again provided ample warning that the Tribe had defined its criminal jurisdiction to include him.

And there is more. The Tribal Court Ordinance, which addresses the authority of the Tribal Courts, and which was also fully operative at the time that Petitioner committed his crime,

uses language identical to that of the Constitution in defining the criminal jurisdiction of the Tribal Courts to extend to Tribal members:

> Section 4. Jurisdiction of Tribal Court.
>
> > 4.01. *Original Jurisdiction.* The Tribal Court shall have original jurisdiction to hear and determine all civil and criminal claims and remedies arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party, except where original jurisdiction or exclusive [jurisdiction] is given by Ordinance to some other court or tribunal or where the Tribal Courts are denied jurisdiction by the Constitution.
>
> Section 5. Powers of the Tribal Courts.
>
> > 5.01. The judicial powers of the Little River Band of Ottawa Indians shall extend to all cases and matters in law and equity arising under the Tribal Constitution, the laws and ordinances of or applicable to the Little River Band of Ottawa Indians including but not limited to:
> >
> > 1. To adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party . . . .

Tribal Court Ordinance §§ 4.01, 5.01. These provisions again clearly evidence that there was nothing unexpected or indefensible about the Court of Appeals' conclusion that, at the time Petitioner committed his crime, the Tribe had plainly defined its criminal jurisdiction to extend to him. *See Duncan*, 400 F.3d at 1307 (finding fair warning in the overall universe of the law).

These provisions of the Tribal Constitution and Code are fatal to Petitioner's due process claim, and he ignores them entirely. He instead seeks to have this Court focus only on Chapter 400 of the Tribal Code, which has to do with Law and Order. But Petitioner cannot ground a due process claim in that Chapter either. It states in pertinent part as follows:

> 4.02. *Persons Under the Tribe's Criminal Jurisdiction*
>
> > a. The criminal jurisdiction of the Tribe shall extend to all Indians . . . .
>
> 4.03. *Territorial Jurisdiction.*
>
> > a. Except as provided in sub. (b), the criminal jurisdiction of the Tribe shall extend to [the Tribe's Indian country].

Law and Order Ordinance §§ 4.02-4.03. Like the Tribal Constitution and the Tribal Court Ordinance, then, this Chapter outlines the Tribe's criminal jurisdiction in terms of both persons and territory, and in defining the former category it clearly sweeps in Petitioner.

The Tribal Court of Appeals stated that the definition of the Tribe's territorial jurisdiction found in Section 4.03 is "unconstitutionally narrow" because it speaks only in terms of the Tribe's Indian country, rather than in terms of all of its lands. ER 10. Petitioner attempts to manufacture a due process violation out of that statement. But his argument fails for at least two reasons.

First, the Court of Appeals' declaration was largely unnecessary to its holding in this case. Aside from its territorial jurisdiction, the Tribe has clearly defined its criminal jurisdiction—in both Constitutional and Code provisions—to extend to its members, and federal law plainly allows for the Tribe to exercise such jurisdiction where a member's crime bears on internal Tribal relations. In the very next sentence after addressing the narrowness of Section 4.03, the Court of Appeals affirmed its core holding that "[i]t is beyond dispute that Indian tribes have the inherent authority to manage their own affairs and domestic relations." *Id.*

Second, in deeming the territorial jurisdiction found in Section 4.03 to be "unconstitutionally narrow," the Court of Appeals did not engage in any nefarious activity, but rather in the proper exercise of the judicial function. The Tribal Constitution is "the organic governing document of the Tribe" and reflects LRB members' "collective consent to be governed." ER 8-9; *compare McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-05 (1819). In ruling that the Law and Order Code must be interpreted in light of the Tribal Constitution, the Tribal Court of Appeals adhered to a fundamental precept of constitutional law: "If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the

Legislature, *the Constitution, and not such ordinary act, must govern the case to which they both apply.*" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (emphasis added). It was not unexpected or indefensible that the Tribal Court of Appeals would reconcile the provisions of the Law and Order Code with those of the Constitution (and of other sections of the Tribal Code) by making it clear that the Tribe has defined its Territory to include all lands that it owns, and not just trust lands. The Tribal Constitution empowers the tribal courts to review tribal laws to ensure they are consistent with the Constitution and to "rule void those ordinances and resolutions" that are not, Tribal Const. art. VI, § 8(a)(2), and the tribal courts have not infrequently declared their authority to do so. *Little River Band of Ottawa Indians Election Bd. v. Beccaria*, No. 05094, at 3-4 (Tribal Ct. App. Feb. 8, 2006); *Hyma-Cogswell v. Election Bd.*, No. 09-004, at 2 (Tribal Ct. Apr. 16, 2009); *Waitner v. Guenthardt*, No 98/97-1001-83-1, at 2 (Tribal Ct. Oct. 10, 1998).[13]

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[13] Petitioner briefly argues that the Court of Appeals decision runs counter to its prior decision in *People v. Champagne*, No. 06-178 (Tribal Ct. App. June 5, 2007). Memorandum at 42. Petitioner does not elaborate upon this claim at any length, and for good reasons. First, *Champagne* was decided in June of 2007, making it difficult for Petitioner to maintain that any statements in that opinion could affect the fair warning he had of the Tribe's criminal jurisdictional provisions when he committed his crime in July of 2005. Second, and in keeping with the Court of Appeals' opinion in this case, *Champagne* unequivocally indicates that the Tribe has several important articulations of jurisdictional authority that must be consulted before drawing conclusions about the scope of the Tribe's jurisdiction. *Id.* at 7-8. Third, the locus of the crime at issue in *Champagne* was within Indian country. *Id.* at 8-9. Given that fact, *Champagne* could easily observe, while addressing federal limits on tribal jurisdiction, that "[f]ederal law has long recognized the rights and authority of federally recognized Indian tribes to exercise criminal jurisdiction over American Indians for crimes committed within Indian Country," without purporting to address the parameters of tribal criminal jurisdiction outside of Indian country. *Id.* at 10. Fourth, and finally, while the Court of Appeals' focus in *Champagne* was on territorial rather than membership-based jurisdiction, the opinion contains a number of statements supporting the existence of the latter. *See, e.g.*, *id.* at 9 ("[T]he LRB Constitution authorizes the government to exercise criminal jurisdiction over its members.").

Petitioner is thus left in the odd position of arguing that the Tribal Court of Appeals retroactively expanded the Tribe's laws by forthrightly applying the definitions of the Tribe's criminal jurisdiction found in the Tribal Constitution and in various Code provisions. Petitioner simply cannot claim that it was unexpected and indefensible for the Tribal Court to enforce the jurisdictional mandate found in those positive sources of Tribal law. For this reason, and because no support exists for the argument that the "fair warning" requirement pertains to jurisdictional provisions in the first instance, Petitioner's Due Process claim must fail.

CONCLUSION

For the reasons stated above, Petitioner's habeas petition should be denied.

Respectfully Submitted,

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