NO. 14-1537

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORBERT J. KELSEY
PETITIONER-APPELLEE,

V.

MELISSA LOPEZ POPE, CHIEF JUSTICE OF THE LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL COURT OF APPEALS; MARTHA CASE, JUSTICE OF THE LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL COURT OF APPEALS; RONALD DOUGLAS, SPECIAL VISITING JUSTICE OF THE LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL COURT OF APPEALS
RESPONDENTS,

AND DANIEL T. BAILEY, CHIEF JUDGE OF THE LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL COURT
RESPONDENT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1537 Case Name: Kelsey v. Pope, et al.

Name of counsel: Alistair E. Newbern

Pursuant to 6th Cir. R. 26.1, Norbert Kelsey
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 23, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Alistair E. Newbern

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee Norbert Kelsey respectfully requests oral argument. This appeal presents an issue of first impression regarding the limits of the Little River Band of Ottawa Indians' criminal jurisdiction outside of Indian Country and a due process challenge to the Band's ex post facto expansion of its territorial jurisdiction in this case. Oral argument would aid the Court in its evaluation of the issues raised.

JURISDICTIONAL STATEMENT

Kelsey filed a petition for a writ of habeas corpus under the Indian Civil Rights Act, 25 U.S.C. § 1303. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered final judgment on March 31, 2014. (RE42, Order, PID#586.) The Band timely filed its Notice of Appeal on April 29, 2014. (RE43, Notice, PID#587.) This Court has jurisdiction over the Band's appeal from final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Tribal Court of Appeals' decision striking down the Band's territorial jurisdiction statute as "unconstitutionally narrow" and finding criminal jurisdiction to exist where it previously had not is a plain violation of *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

2. Whether the Band can assert criminal jurisdiction over its members for crimes taking place outside of its territory based only on the fact of tribal membership.

STATEMENT OF THE CASE

Tribal Court Proceedings

Appellee Norbert Kelsey is an enrolled member of the Little River Band of Ottawa Indians (the Band or Tribe), and, at the time the allegations initially were made in this case, was a member of the Band's Tribal Council. (RE01, Pet., PID#6.) On June 4, 2007, Kelsey was served with a complaint and warrant alleging violations of Section 8.06 (harassment)[1] and Section 19.01.c (sexual assault)[2] of

[1] Section 8.06 (harassment) provides in pertinent part:

a. *Offense*. A person commits the offense of harassment if:

the Band's Law and Order Code. (RE1-12, Compl., PID#113.) The complaint alleged that, two years earlier, on July 2, 2005, Kelsey had accosted tribal employee Heidi Foster during an informational meeting at the Band's Community Center. (RE10, Am. Bill, PID#959.) Kelsey was at the Community Center to participate in an Elders' Monthly Meeting, at which Foster—an Indian and an employee of the Little River Health Clinic, but not a member of the Band—was presenting to the Elders on changes in Medicare. (RE09, Mot. for Reversal, Bates#49.) The complaint alleged that Kelsey twice pulled on Foster's identification badge, which was pinned near her shoulder, and looked down her shirt. (RE10, Am. Bill, PID#959.)

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1. he knowingly pursues a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and which serves no lawful purpose; and
2. the conduct is such that it would cause a reasonable person to suffer substantial emotional distress.

b. *Sentence*. A person convicted of harassment may be sentenced to imprisonment for a period not to exceed two months, or a fine not to exceed one thousand dollars ($1,000.00), or both.

Section 8.06. (RE1-11, Law and Order Code, PID#96.)

[2] Section 19.01.c (sexual assault) provides in pertinent part:

1. *Offense*. A person commits the offense of sexual assault, if he subjects another person to any sexual contact; and
   A. he knows or reasonably should know that the sexual contact is offensive to the victim; or . . .
   D. he is in a position of authority over the victim and used this authority to coerce the victim to submit; . . .
2. *Sentence*. A person convicted of sexual assault may be sentenced to imprisonment for a period not to exceed one year, or a fine not to exceed five thousand dollars ($5,000.00), or both.

Section 19.01.c (RE1-11, Law and Order Code, PID#110.)

On January 21, 2008, following a two-day bench trial, Kelsey was found not guilty of harassment and guilty of sexual assault. (RE09, Order of J., Bates#25.) The Tribal Court judge found that "by the position of the badge on Ms. Foster . . . [Kelsey] had to touch Foster's breasts through her clothing when he pulled the badge away from her person." (*Id.*) On February 1, 2008, Kelsey filed a Motion to Vacate the judgment and dismiss the complaint for lack of subject matter jurisdiction because the alleged conduct had occurred beyond the Band's territorial jurisdiction as limited by both federal law and Section 4.03 of the Band's Criminal Offenses Ordinance. (RE11, Mot. to Vacate, PID#1291.) Section 4.03(a) provides in pertinent part: "[T]he criminal jurisdiction of the Tribe shall extend to . . . all land within the limits of the Tribe's reservations." (RE1-11, Law and Order Code, PID#91-92.) Section 4.03(b) enumerates nine offenses over which the Band's criminal jurisdiction shall extend beyond the Band's territory "wherever committed." (*Id.*) At neither the time of the alleged conduct nor the time of Kelsey's formal charging was sexual assault listed as one of these nine exceptions. (*Id.*)

The Band concedes for purposes of this litigation that the Community Center is located outside the Band's Indian country. (RE13, Answer, PID#259 n.4.)[3] The Band purchased the Community Center in fee simple in 1997. (RE01, Pet.,

[3] The Community Center address is 1762 US-31 South, Manistee, Michigan 49660. (RE01, Pet., PID#11.)

PID#11.) It is located south of Merkey Road, the southern boundary of the Band's reservation.[4] (*Id.*) The land on which the Community Center is located is not a part of either the Manistee Reservation or the Band's 1855 Treaty of Detroit allotments, nor is it held in trust for the benefit of the Band by the United States. (*Id.*) The land is freely alienable, and the Band's Tribal Council authorized the sale of the Community Center in 2008. (*Id.*) Accordingly, as the Band and Tribal Courts agreed, the Community Center is not located within Indian country for the purposes of 18 U.S.C. § 1151. (*Id.*)

On February 4, 2008, the Tribal Court judge—after refusing to hear arguments on the jurisdictional challenge because "the defendant had made the trial last two days," (RE09, Mot. for Reversal, Bates#37), and had filed "motion after motion," (RE09, Order After Hr'g, Bates#30)—sentenced Kelsey to six months in jail to be held in abeyance while he complied with probation requirements. (RE1-14, Order of Sentencing, PID#120.) Kelsey was placed on probation for one year, with the following conditions: payment of a $5,000.00 fine; performance of four hours of community service per week for one year; and a prohibition against speaking to any female employees of the Band (with the exception of blood relatives). (*Id.*) Kelsey was barred by the Tribal Ogema from "being present on tribal property at locations or public functions where females are

[4] The Band pays property taxes on the land to the State of Michigan. (RE02, Mem., PID#189.)

expected to be present" for one year, subject to criminal trespass penalties. (RE10, Order Barring, PID#1001.) Kelsey's probationary period is stayed pending resolution of this federal action. (RE09, Order for Stay, Bates#22-23.) However, he must still seek permission from the Tribal Court to leave the State of Michigan. (RE02, Mem., PID#167.)

Kelsey timely filed a Notice of Appeal to the Tribal Court of Appeals (RE11, Notice of Appeal, PID#1298), and moved for peremptory reversal of his conviction on the ground that the Tribal Court lacked criminal jurisdiction over the matter. (RE09, Mot. for Reversal, Bates#37). The Tribal Court of Appeals held that the Tribal Court had erred in summarily denying Kelsey's jurisdictional challenge and remanded the case to the trial court. (RE09, Order After Hr'g, Bates#02.)

On remand, Kelsey again argued that the Tribal Court lacked jurisdiction over the offense and moved for dismissal based on the territorial limitation contained in Section 4.03 of the Band's Law and Order Code. (RE11, Mot. to Dismiss, PID#1306.) In response, the Band argued that its jurisdiction derived from the Tribal Constitution "and any limits self imposed by the Tribe rather than by the federal courts," adding that the Community Center "is part of the de facto reservation." (RE11, Answer to Mot. to Dismiss, PID#1337.) The Tribal Court concluded as a matter of law that "jurisdiction" is an issue of tribal sovereignty, and under the Tribal Constitution the Band's jurisdictional authority extends to "all

lands which are now or at a later date owned by the Tribe." (RE09, Conclusions of Law, PID#34.) The Tribal Court held that, because Kelsey was a tribe member, the victim was an Indian, and the locus of the conduct was a facility owned in fee by the Band, "this case is clearly within the territorial and subject matter jurisdiction of this Court." (*Id.*)

Kelsey appealed for a second time, asserting the same challenge to the Band's jurisdiction. (RE09, Mot. for Reversal, Bates#182.) The Tribal Court of Appeals framed the question presented as follows:

> Does the Little River Band of Ottawa Indians Tribal Court have criminal jurisdiction in a case when the criminal act occurred in the Tribal Community Center located on land owned by the Tribe, but not within the "reservation" boundaries and not on land held by the U.S. government as "trust" land, during a tribal event and when the Defendant is both a tribal member and a tribal official?

(RE09, Jurisdiction Order, PID#36.)

The Court of Appeals began its analysis of the Band's criminal jurisdiction with the "inherent authority of tribes [to] mange [sic] their internal affairs and domestic relations." (*Id.* PID#38.) The Court determined, "[a]fter diligent research of authorities," that "[t]here 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." (*Id.* PID#38, 41.) For this reason, it concluded that the Band's

criminal law "**ought** to apply" to Kelsey's conduct despite the Community Center's location outside of the Band's territory. (*Id.*)

The Tribal Court of Appeals next addressed whether the Band itself had imposed any limitation on its inherent authority through its own tribal law. (*Id.*) The Court began—as had the Tribal Court—with the Tribal Constitution, finding in Article I, Section I, a "constitutional mandate of the people" that the Band exercise its jurisdiction over all land owned in fee. (*Id.*) The Court found further support in Section 2 of that same Article, which provides that the Band's jurisdiction be exercised "to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law." (*Id.*) The Court read the two Sections together as recognition by the Tribal Constitution drafters "that tribal jurisdiction is **larger** than territory." (*Id.*)

The Tribal Court of Appeals ultimately turned to the relevant tribal criminal statutes in the final pages of its opinion. (*Id.*) Recognizing that Section 4.03 of the Band's Law and Order Code, by specifically defining the Band's territorial and extraterritorial criminal jurisdiction, imposed a "limitation" on the exercise of its authority, the Court declared Section 4.03 "unconstitutionally narrow"—a concept without an analog in federal or state jurisprudence—and struck it down. (*Id.*) Ultimately, the Court of Appeals denied Kelsey's Motion for Peremptory Reversal and affirmed the Tribal Court's finding of territorial jurisdiction. (*Id.*)

On February 18, 2009, Kelsey moved for reconsideration, again challenging the Band's assertion of extraterritorial criminal jurisdiction as inconsistent with both federal and tribal law. (RE09, Req. for Recons., Bates#286.) The Tribal Court of Appeals, in denying Kelsey's motion, reasoned "the case before us is about tribal authority to enforce tribal standards on tribal activity **in its territory**." (RE09, Rulings on Mot. and Stay, Bates#13.) The Court added its observation that Kelsey's jurisdictional challenge "would be laughable, except it is so sad, because it completely ignores the history of the Tribe, the growth of the State around it, and that **all** of the interests in the present matters are tribal." (*Id.*)

Kelsey filed a final motion in the Tribal Court of Appeals on August 20, 2009, seeking, *inter alia*, clarification of the jurisdictional issue as well as whether the Tribal Court of Appeals violated the Due Process Clauses of the Indian Civil Rights Act and the Tribal Constitution by "reading extra into a criminal law and applying these new rules ***retroactively***" in "complete contradiction to the United States Supreme Court's holdings in *Marks v. United States*, 430 U.S. 188 (1977), [] *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and [] *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001)." (RE10, Mot. for Clarification, PID#1018, 1022.) The Court of Appeals denied the motion in a one-page order dated December 3, 2009. (RE09, Order Den. Mot., Bates#20.) The Tribal Court of Appeals then stayed its

proceedings upon receiving notice of Kelsey's federal habeas action. (RE09, Order for Stay, Bates#22.)

District Court Proceedings

Kelsey filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Michigan on November 4, 2009. (RE01, Pet., PID#2.) Kelsey made two arguments to the district court: (1) the State of Michigan, not the Band, had criminal jurisdiction over the locus of the offense, and (2) the Tribal Court of Appeals had retroactively changed the Band's criminal jurisdiction statute in violation of ICRA's Due Process Clause. (*Id.*) The Band agreed below that Kelsey had exhausted these claims before the tribal courts and waived any exhaustion defense. (RE13, Answer, PID#265.) Responding to the familiar jurisdictional challenge, the Band conceded that the Community Center is outside of the Band's Indian country, but argued for the first time that this was "wholly beside the point" because Indian tribes possess "membership-based criminal jurisdiction" that attaches "regardless of where th[e] actions [took] place." (*Id.* PID#254-55.) The Band argued further that Kelsey's due process rights had not been violated by the retroactive expansion of the Band's criminal law because the Tribal Constitution mandated striking down the statute and rendered the Tribal Court of Appeals' decision both expected and defensible. (*Id.* PID#285.)

On November 7, 2013, the Magistrate Judge issued a Report and Recommendation. (RE35, Report, PID#502.) On the issue of the Band's criminal jurisdiction, the Report rejected the Tribal Court of Appeals' view that "the Tribe's criminal jurisdiction over its members is co-extensive with any real estate the Tribe may own or decide to purchase on the open market outside Indian country." (*Id.* PID#528.) Instead, the Magistrate Judge found that "[t]he Tribe's own constitution recognizes that the Tribe exercises its jurisdiction only to the extent that it is consistent with federal law," and found such a broad question of extra-territorial criminal jurisdiction limited by federal law and the dependent nature of tribal sovereignty. (*Id.* PID#528-29.)

The Report further dismissed the Band's novel argument for membership-based jurisdiction separate from its territory, concluding that "[t]he necessary result of [tribal] dependent status was . . . that they forsook the extensive sovereignty they had enjoyed before there existed an 'Indian country.'" (*Id.* PID#530.) As a result, "the scope of their territorial sovereignty has been limited to Indian Country" and "Congress has not recognized the tribe's rights to exercise plenary criminal jurisdiction over their members or other Indians outside of Indian country, where state law and state courts already provide adequate criminal justice systems." (*Id.* PID#529.) Turning to due process, the Report found the Tribal Court of Appeals' retroactive expansion of the Band's criminal jurisdiction "by judicial

fiat after the fact" to have violated Kelsey's due process rights. (*Id.* PID#532.) The Band objected to the Report, (RE36, Objections, PID#534); Kelsey filed a reply, (RE39, Reply, PID#565.)

On March 31, 2014, the district court issued an opinion addressing each of the Band's objections and adopting the Magistrate Judge's Report. (RE41, Opinion, PID#580.) In addressing the Band's theory of membership-based jurisdiction, the district court rejected the notion that tribal membership is the sole determinative factor for criminal jurisdiction, finding instead that "tribal membership and territory are connected." (*Id.* PID#582.) The district court determined that, because "[t]ribal sovereignty has both a membership and territorial component" and "[membership] describes the limits of a tribe's authority within its territory," the Band "retain[s] sovereignty where both are present." (*Id*.) Thus, "the Tribe's exercise of jurisdiction outside of Indian country would be inconsistent with the status of tribes as dependent entities." (*Id.* PID#584.) Because the district court agreed that the Band lacked extraterritorial criminal jurisdiction, it did not reach Kelsey's due process claim. (*Id.* PID#584.)

SUMMARY OF THE ARGUMENT

At the outset, it is important to define exactly what the Band asks this Court to hold. The Band does not argue that its tribal courts properly asserted criminal

jurisdiction over Kelsey because his crime was committed within the Band's territorial jurisdiction. The Band concedes that the Tribal Community Center where the acts in question took place lies outside its Indian country. Nor does the Band argue—as the Tribal Court of Appeals found—that property owned in fee, like the Community Center, should be considered part of its territory for jurisdictional purposes. Instead, the Band argues that, by virtue of its inherent sovereignty, it enjoys criminal jurisdiction over its members completely "independent[]" from its territory and that this sweeping jurisdiction may be exercised to prosecute Band members for conduct violating tribal law wherever that conduct might occur—half a mile outside of its reservation borders or halfway around the world.[5] (Band Br. at 1.) Although the Band argues that it and all tribes have always enjoyed such broad-ranging power, it cites no example of its exercise. However, it asks this Court to find—on that basis alone—that the tribal courts appropriately tried and convicted Kelsey for acts taking place outside the Band's territory.

The Band's argument must fail. First, the theory of membership-based jurisdiction it advances in this Court is not the theory on which the tribal courts

[5] The United States advocates a more limited version of membership-based jurisdiction restricted to "extraterritorial member conduct that affects internal affairs, tribal government, or tribal property interests." (U.S. Br. at 9.) Because the assault with which Kelsey was charged had no such effects, the Band's extraterritorial prosecution of Kelsey would also fail under this standard.

found jurisdiction over Kelsey's actions. Instead, recognizing that the Tribal Community Center did not fall within the Band's territorial jurisdiction as delineated by its Law and Order Code and that sexual assault was not one of the nine offenses over which the Band claimed jurisdiction wherever committed, the Tribal Court of Appeals simply discarded its own jurisdictional statute as "unconstitutionally narrow." (RE09, Jurisdiction Order, Bates#10.) With that legislative restriction to its jurisdiction removed, the Court retroactively found *territorial* jurisdiction over Kelsey's acts and upheld his conviction. Regardless of whether the Band does possess the membership-based jurisdiction it seeks in this case, its rewriting of the law that affirmatively defined the limits of its criminal jurisdiction to its members "by judicial fiat after the fact" is a blatant due process violation. (RE35, Report, PID#532.) This Court may affirm the grant of habeas relief on that basis alone.

Second, the membership-based jurisdiction—completely divorced from territory—that the Band proposes is not consistent with tribal status as a domestic dependent sovereign. Tribal sovereignty is defined by the twin factors of membership and territory: it is strongest over members on tribal land; when either factor is absent, sovereign authority is significantly decreased. The language upon which the Band relies to support its jurisdictional theory is taken from cases in which territory was not at issue, as all relevant acts took place on tribal land. In

those cases, membership did not establish an independent basis for criminal jurisdiction; it was considered only to the extent that its absence would create a further limitation on tribal sovereignty.

Principles governing other sovereigns underscore the novel and unfounded nature of purely membership-based extraterritorial criminal jurisdiction. State criminal jurisdiction is territorially defined, and federal criminal jurisdiction is similarly presumed to apply only domestically absent an express statement of legislative intent. The states and the federal government would not enjoy extraterritorial jurisdiction under facts like those presented here. Neither does the Band.

STANDARD OF REVIEW

A tribal court's determination of tribal jurisdiction is a federal question of law. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). Thus, habeas claims arising under the Indian Civil Rights Act, 25 U.S.C. § 1303, are most analogous to habeas actions arising under 28 U.S.C. § 2241. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 890-91 (1996). This Court reviews de novo a district court's grant of habeas relief under that statute. *Rice v. White*, 660 F.3d 242, 249 (6th Cir. 2011).

Kelsey exhausted the due process and jurisdictional claims raised in his habeas petition before the tribal courts. (RE09, Request for Reconsideration, PID#286-88, 296-97; RE09, Motion for Reversal, PID#40-73, 186-213.) The Band has also waived any comity-based exhaustion defense it might raise. Because Kelsey's probationary period is suspended pending resolution of this action—and because he is prevented from traveling outside Michigan without tribal court permission at this time—he is in custody for purposes of his habeas action. *McVeigh v. Smith*, 872 F.2d 725, 727 (6th Cir. 1989).

ARGUMENT

I. THE TRIBAL COURT OF APPEALS VIOLATED THE DUE PROCESS REQUIREMENT OF FAIR NOTICE WHEN IT RETROACTIVELY EXPANDED THE GEOGRAPHIC REACH OF THE BAND'S LAW AND ORDER CODE.

Contrary to the Band's arguments on appeal, the Tribal Court of Appeals did not "rely on the Tribe's inherent membership-based jurisdiction" in affirming criminal jurisdiction over Kelsey's extraterritorial conduct. (Band Br. at 60.) Instead, believing that the Band's criminal jurisdiction "**ought** to apply to the behavior of Tribal members and other Indians in the Tribal Community Center" (RE09, Jurisdiction Order, Bates#08.), but faced with a criminal jurisdiction ordinance that, by its plain terms, did not include it, the Tribal Court of Appeals rewrote tribal law to bring Kelsey's acts within its territorial jurisdiction. The

Tribal Court of Appeals struck down the impeding jurisdictional code as "unconstitutionally narrow in that it does not provide for the exercise of the inherent criminal jurisdiction over all tribal lands." (*Id*. at Bates#10.) With this statutory limitation to territorial jurisdiction thus removed, the Tribal Court of Appeals believed itself able to affirm its "exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe" and, thereby, Kelsey's conviction.[6] (*Id.*)

By its unilateral judicial action, the Tribal Court of Appeals created criminal jurisdiction where—by the Band's own legislation—none existed before. By retroactively applying this expanded jurisdiction to Kelsey's acts, the Band increased the punishment to which Kelsey could be subjected—indeed, it increased that punishment from a baseline of zero—and denied him a complete defense to his charges. The Tribal Court of Appeals' order thus violates the Indian Civil Rights Act's guarantee of due process, 25 U.S.C. § 1302(8). The district court's grant of habeas relief may be upheld on this basis alone.

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[6] The Band apparently formally amended its Law and Order Code in 2011 to include "membership-based jurisdiction," defined as "the inherent jurisdiction of the Little River Band of Ottawa Indians shall exercise over its members with regard to any matter (regardless of the location of the actions giving rise to that matter) . . . ." *See* 2011 Tribal Law and Order Code, *available at* http://www.lrboi-nsn.gov/index.php/government/tribal-code. Regardless of whether the Band possesses the inherent sovereign authority to enact such an ordinance today, which it does not, it was not on the books at the time of Kelsey's prosecution.

This issue was raised to the tribal court in Kelsey's Motion for Clarification of the jurisdictional order and fully briefed by the parties. (RE10, Mot. for Clarification, PID#1033-35; RE10, Reply to Clarification, PID#1051-52.) The Tribal Court of Appeals dismissed that motion in a summary order. (RE10, Order, Bates#20.) It was also fully briefed in the district court and addressed in the parties' responses to the Magistrate Judge's Report and Recommendation. (RE35, Report, PID#531-32; RE36, Objections, PID#555-59; RE39, Reply, PID#573-76.) Because this Court may affirm the district court's judgment on any basis supported by the record, it may affirm the grant of habeas relief on this issue alone. *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002); *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999).

A. The Band's Criminal Jurisdiction Is Defined By Its Law And Order Code.

The Band's jurisdiction is defined broadly in its Constitution, and with specificity in its enacted ordinances. Article I, Section 2, of the Constitution of the Little River Band of Ottawa Indians provides that "[t]he 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." (RE01-6, Constitution, PID#48.) The Constitution defines "territory" to "encompass all lands which are now or hereinafter owned by or reserved for the Tribe . . . ." (*Id*.) The Constitution does not distinguish between civil and criminal jurisdiction, but the

Tribal Court of Appeals does specifically address particular instances of civil tribal authority exercised outside of Band territory, such as determinations of "tribal membership and self-regulation of tribal treaty rights within treaty ceded areas." (RE09, Jurisdiction Order, Bates#09.)

Article VI, Section 8, vests in the tribal courts the power "[t]o 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." (RE01-6, Constitution, PID#57.) But that judicial power extends only to "cases . . . arising under this Constitution [and] the laws and ordinances of or applicable to the Little River Band . . . ." (*Id*.) While the Band would have this Court focus on these more general provisions, the Law and Order Code gives specific articulation of its criminal jurisdiction.

The Law and Order Code's stated purpose is "to give fair warning of the nature of conduct declared to constitute criminal offenses." (RE01-11, Law and Order Code, PID#89.) It is the expression of the Tribal Council's legislative authority to "exercise the inherent powers of the Little River Band by establishing laws through the enactment of ordinances . . . ." (RE01-6, Constitution, PID#52.) The Code's specific and precise delineation of the Band's criminal jurisdiction does not include the locus of Kelsey's acts.

Section 4.02 defines who is subject to the Band's criminal jurisdiction: "all Indians, and all other persons other than where prohibited by Federal law," and, in cases of contempt, disobedience of a court order, or perjury in tribal court proceedings, "all persons, whether or not Indians." [7] (RE01-11, Law and Order Code, PID#91.) The Code then provides clear and specific statements of both where a Band member has "fair warning" that his conduct will be subject to tribal prosecution and which offenses fall under the Band's criminal jurisdiction "wherever committed." (*Id.* at PID#89, 91.) Neither provision includes Kelsey's charged crime.

Section 4.03(a) sets the territorial limits of the Band's criminal jurisdiction:

> 4.03. *Territorial Jurisdiction*.
>
> a. Except as provided in sub. (b), the criminal jurisdiction of the Tribe shall extend to:
>
> 1. all land within the limits of the Tribe's reservation, including trust land, fee patented land and rights of way running through the reservation; and
>
> 2. all land outside the boundaries of the Tribe's reservation held in trust by the United States for individual members of the Tribe or for the Tribe; and
>
> 3. all other land considered "Indian country" as defined by 18 U.S.C. section 1151 that is associated with the Tribe.

[7] Section 4.02 thus does not rely on tribal membership as a sufficient source of criminal jurisdiction. By extending the Band's criminal jurisdiction to "all Indians," Section 4.02 necessarily incorporates a territorial limitation, as the Band's inherent sovereignty cannot include criminal jurisdiction over all Indians, whatever their tribe, regardless of the location of their crimes.

(*Id.* at PID#91.)

The Band concedes that the Tribal Community Center does not fall within the limitation of Section 4.03(a). (Band Br. at 11-12; RE13, Answer, PID# 255, 259 n.4.) Thus, under its own law, the Band could not assert territorial jurisdiction over Kelsey's offense. While the Band urges this Court to disregard Section 4.03 as a "lone statutory provision . . . in tension with" the other more general statements of the Band's jurisdiction (Band Br. at 59), "[o]ne of the most basic canons of statutory interpretation is that a more specific provision takes precedence over a more general one." *United States v. Kumar*, 750 F.3d 563, 568-69 (6th Cir. 2014); *Evanston Y.M.C.A. Camp v. State Tax Commission*, 118 N.W.2d 818, 821 (Mich. 1962). Section 4.03(a) therefore defines and controls other broader statements of the Band's jurisdiction.

Nor could the Band assert extraterritorial jurisdiction over Kelsey under its own law. Section 4.03(b) limits the Band's extraterritorial jurisdiction to nine enumerated offenses: embezzlement, abuse of office, improper influence of a tribal official, election fraud, malicious criminal prosecution, obstruction of justice, public bribery, refusing arrest, and filing fictitious reports. (RE01-11, Law and Order Code, PID#91.) Because sexual assault is not included in this list, it is excluded from extraterritorial prosecution. *In re Robinson*, 764 F.3d 554, 562 (6th

Cir. 2014) ("[I]f a statute specifies exceptions to its general application, other exceptions not explicitly mentioned are excluded.").

Thus, the Tribal Court of Appeals had only one way to uphold Kelsey's conviction: remove Section 4.03 from the law, which it did "by judicial fiat after the fact." (RE35, Report, PID#532.) Importantly, the Court struck down Section 4.03 so that it could assert "tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe." (RE01-4, Jurisdiction Order, PID#41.) It did not assert, or even consider finding, jurisdiction over Kelsey based only on his tribal membership. While the Court found tribal interests "very strong here," it did so only to support its rationale for asserting territorial jurisdiction—that "the Tribe's standards of behavior **ought** to apply to the behavior of Tribal members and other Indians in the Tribal Community Center." (*Id*. at PID#39.) To achieve that result, the Court had to remove Section 4.03 from its law, explicitly replacing the Band's legislated preferences with its own.

B. Due Process Prohibits Retroactive Expansion of Tribal Court Criminal Jurisdiction.

The Indian Civil Rights Act protects individual Indians from "arbitrary and unjust actions of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978). It extends due process protections to any Indian tribe exercising the power of self-government, 25 U.S.C. 1302(a)(8), which courts enforce using the analogous federal standard. *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897,

900 (9th Cir. 1988). When the Tribal Court of Appeals eliminated a "narrow and precise" statutory provision to retroactively expand its criminal jurisdiction, it violated Kelsey's due process guarantee. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964).

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Id.* (internal citations omitted). Instead, "a criminal statute must give fair warning of the conduct that it makes a crime." *Id*. at 350. Just as a legislature cannot rewrite a statute to include conduct that has already taken place, "[a]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law." *Id.* at 353. Thus, "[t]he fundamental principle that the required criminal law must have existed when the conduct in issue occurred . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." *Id.* at 354 (internal citations omitted).

Specifically, a retroactive judicial construction "that makes an action done before the passing of a law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed" violates due process. *Id.* at 353 (quoting *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798)). While the due process clause does not "incorporate jot-for-jot the specific categories of *Calder*," *Rogers*, 532 U.S. at 459, it provides

similar protections. Those protections have greatest force "where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction." *Bouie*, 378 U.S. at 352; *see O'Neal v. Bagley*, 743 F.3d 1010, 1015 (6th Cir. 2013) ("This principle holds that retroactively 'applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope' is incompatible with the demands of due process.").

1. Retroactive Jurisdictional Changes Implicate Fair Notice.

It is simply not the case, as the Band now asserts, that fair notice concerns do not apply to retroactive expansions of criminal jurisdiction. (Band Br. at 54-55.) Indeed, the stated purpose of the Law and Order Code that expressly limited the Band's jurisdiction was to provide "fair warning" of its reach. (RE01-1, Law and Order Code, PID#89). Jurisdictional requirements of criminal laws are as essential to the criminality of conduct as those elements traditionally regarded as substantive. *See* Model Penal Code § 1.13(9)(e). Thus, a change in what will prove jurisdiction may eliminate what previously had been a complete defense to the crime. And, while some changes to jurisdictional statutes may "simply change[] the tribunal that is to hear the case," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994), others—like this one—will have much more severe consequences and may "effectively operate to increase the punishment for acts committed prior to

passage of the statute." *Means v. N. Cheyenne Tribal Court*, 154 F.3d 941, 947-48 (9th Cir. 1998). This is particularly true where the issue is not merely the tribunal with a single sovereign, but what multiple sovereigns may exert power.

Courts have repeatedly found retroactive expansions of jurisdiction to implicate fair notice and due process concerns. In *Means*, for example, the Ninth Circuit refused to apply retroactively the *Duro* fix legislation that recognized tribal criminal jurisdiction over non-member Indians. *Id.* at 948. The court held that doing so would be an ex post facto violation in two ways. First, because the defendant would be subject to trial in both state court and tribal court, and "each court could impose its own punishment, granting jurisdiction to the Tribal Court would effectively operate to increase the punishment for acts committed prior to the passage of the statute." *Id*. Second, allowing retroactive expansion of the tribal court's jurisdiction would "punish[] as a crime an act which was not a crime when committed, and depriv[e] a defendant of a defense which existed when the act occurred." *Id*. The *Means* court found no barrier in the fact that the defendant's acts "were crimes under the tribal code at the time they were allegedly committed." *Id*. Instead, the court reasoned, "at the time, the Tribal Court could not have tried or punished Means for those crimes, since it lacked jurisdiction over him . . . Thus while the conduct in question here might have been a crime, it was not a crime as to Means at the time it was allegedly committed." *Id*.

Similar concerns have led courts to invalidate *ex post* changes to jurisdiction even in cases not implicating separate sovereigns. For example, the Third Circuit to find a *Bouie* violation in the New Jersey Supreme Court's expansion of the statute governing juvenile court jurisdiction in that state. *Helton v. Fauver*, 930 F.2d 1040, 1044 (3d Cir. 1991). While finding "no dispute that the state supreme court has final authority to interpret the state statute," the court held the "unexpected" judicial construction of the jurisdictional statute to violate due process. *Id*. at 1044-45. The court rejected an argument that its jurisdictional ruling was merely procedural because construing the jurisdictional statute to try the defendant as an adult increased the punishment for his offense. *Id.* at 1051.

In *People v. Morante*, the California Supreme Court construed the state's criminal jurisdiction statute to give California courts jurisdiction over a conspiracy if the defendants committed at least one contributing act within the state. 975 P.2d 1071, 1081 (Cal. 1999). However, the court held that allowing retroactive application of its decision "would be analogous to expanding defendant's criminal liability under the conspiracy statute by eliminating a required element of that offense." *Id*. at 1090. Finding its jurisdictional ruling "unexpected" in light of prior decisions, the court gave its ruling only prospective effect. *Id*.

Finally, the Tenth Circuit warned against adopting a new, but ill-defined, jurisdictional test to determine what constitutes "Indian lands" for purposes of the

Safe Drinking Water Act/ The court noted that "[t]he Supreme Court has repeatedly warned us against the 'judicial expansion of narrow and precise statutory language' in the criminal context because 'a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion' of statutes." *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131, 1160 (10th Cir. 2010) (quoting *Bouie*, 378 U.S. at 352).

The Band relies on a single decision to dispute this clear line of authority: *United States v. al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011). (Band Br. at 55.) But *al Kassar* does not support its argument. That case considered offenses for which Congress had explicitly authorized extraterritorial jurisdiction. *Id*. The court considered *Bouie* only glancingly, in light of Congress's specific grant of extraterritorial jurisdiction, to support its finding of a nexus between the United States' interests and the defendants' acts. *Id*. In no way did it condone an *ex post* expansion of jurisdiction to include acts that had been explicitly excluded from an extraterritorial grant of jurisdiction.

The Band is also wrong to argue that Kelsey's subjective expectations regarding jurisdiction are relevant. (Band Br. at 60-61.) "The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis

of an ad hoc appraisal of the subjective expectations of particular defendants." *Bouie*, 378 U.S. at 355 n.5.

2. Kelsey Was Subjected To Increased Punishment And Deprived Of A Complete Defense By The Tribal Court's Retroactive Jurisdictional Ruling.

The Tribal Court's retroactive assertion of criminal jurisdiction subjected Kelsey to increased punishment. *See Means*, 154 F.3d at 948. When a tribe exercises its independent sovereign authority to punish criminal behavior, the dual sovereignty doctrine allows for separate state or federal prosecution. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 210 (2004). Here, the Band does not dispute that the State of Michigan could prosecute Kelsey for his conduct. (Band Br. at 51.) Therefore, when the Tribal Court of Appeals retroactively expanded the Band's criminal jurisdiction, it subjected Kelsey to increased punishment by adding the Band's criminal penalties to any that might be imposed by the Michigan courts. *See Means*, 154 F.3d at 948. The harm this imposed on Kelsey is not speculative. Under tribal jurisdiction, he was subject to punishment no state could impose, like being barred from speaking to women. This retroactive increase is prohibited by due process. *See Bouie*, 378 U.S. at 354-55.

Similarly, by rewriting its jurisdictional code the Tribal Court of Appeals deprived Kelsey of a complete defense to his prosecution. *See Means*, 154 F.3d at 948. Kelsey's actions were not a crime under tribal law at the time they were

committed because the Band did not have jurisdiction to prosecute him under Section 4.03. In retroactively expanding its jurisdiction, the Court stripped Kelsey of this defense and denied him due process.

3. The Tribal Court of Appeals' Ruling Was Unexpected and Indefensible Under Existing Tribal Law.

Finally, the Tribal Court of Appeals' ruling did far more than "harmonize" inconsistent statutory provisions. (Band Br. at 61.) Rather than engage in "a routine exercise of common law decisionmaking," the tribal court rewrote its law by striking down an explicit statutory provision. *Rogers*, 532 U.S. at 467. This was not "a judicial alteration of a common law doctrine of criminal law," but a quasi-legislative act. *Id*. at 462. Further, the tribal court's ruling was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id*. In *Champagne v. People of the Little River Band of Ottawa Indians*, the only relevant tribal court precedent, the Court upheld Section 4.03 as a valid legislative statement of the Band's authority, noting that "[t]he Tribal Council has adopted a criminal code and authorized a prosecutor to exercise the sovereign powers of the Band to prosecute the criminal code." (RE1-18, *Champagne v. People*, PID#142.) The court correctly interpreted the plain language of Section 4.03 to provide jurisdiction over "all crimes committed on both reservation lands and trust lands of the Little River Band," and held the Tribal Constitution to

mandate "that this Court take jurisdiction over criminal matters arising within the territory of the Band that involve tribal members." (*Id.* PID#141.) In upholding Section 4.03 and recognizing it as a limitation on the Band's ability to prosecute extraterritorial conduct, *Champagne* solidified the statutory notice of these limitations. The tribal court's decision here was an unexpected and indefensible change in the law in light of the statute's plain language and the clear precedent both limiting the Band's jurisdiction in a way that clearly excluded Kelsey's conduct. *See Rogers*, 532 U.S. at 462.

II. THE BAND'S INHERENT SOVEREIGNTY DOES NOT INCLUDE THE POWER TO ASSERT CRIMINAL JURISDICTION OVER ITS MEMBERS WITHOUT REGARD FOR TERRITORY.

The Band asserts that tribal membership alone provides a basis for asserting its criminal jurisdiction. Tribal sovereignty never has been understood to extend to members wherever they may choose to live, work, or travel, and to construe it in this manner would seriously diminish the rights of individual Indians. Sovereignty's necessary tether to territory operates to prevent such an injustice.

A. Domestic Dependent Sovereignty Is Defined By The Intersection Of Territory And Membership.

Tribes retain only those aspects of inherent sovereignty not expressly limited by Congress or treaty or implicitly divested by virtue of their domestic dependent status. *Wheeler*, 435 U.S. at 326. As domestic dependent sovereigns, tribes "are unique aggregations possessing attributes of sovereignty over both their members

and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citing *Worcester v. Georgia*, 6 Pet. 515, 557 (1832)). "This delineation of members and nonmembers, tribal land and non-Indian fee land, stem[s] from the dependent nature of tribal sovereignty." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001). Domestic dependent status required defining both *where* and *over whom* tribal authority would extend.

Territory is the foundation of authority for any sovereign. Restatement (Third) of Foreign Relations Law § 402. History and precedent show that the Court treats tribal sovereignty no differently. Cohen, 2012 HANDBOOK at 226 ("Apart from alienating tribal land and treating with foreign nationals, Indian tribes retain their original inherent sovereign authority over all persons, property, and events within Indian country unless Congress clearly and unambiguously acts to limit the exercise of that power."). Early statements of tribal sovereignty focused only on territorial limits because few non-Indians entered into tribal land. *See, e.g.*, Indian Nonintercourse Act, Act of March 1, 1793, Pub. L. No. 2-19 § 8, 1 Stat. 329 (1793). Thus, in *Cherokee Nation*, the Court affirmed the tribes' description of their status as "sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self government within that territory." *Cherokee Nation v. Georgia*, 30 U.S. 1, 4 (1831). The Court reaffirmed the territorial basis of tribal sovereignty in *Worcester v. Georgia*, holding that

subsequent treaties "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ." 31 U.S. 515, 557 (1832).

Treaties entered into at this time reflected the same territorial limits to the tribes' authority. "For example, the 1830 Treaty with the Choctaw Indian Tribe, which had one of the most sophisticated of tribal structures, guaranteed to the Tribe, 'the jurisdiction and government of all persons and property that may be within their limits.'" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978) (quoting Treaty with the Choctaw, 1830, 7 Stat. 333 (Sept. 27, 1830)). *See also* Treaty with the Cherokee, 1835, 7 Stat. 481 (securing to the Cherokee Nation the right to "carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country"). These statements were based on the underlying assumption that territorial sovereignty extended only over tribal members. *Oliphant*, 435 U.S. at 197 (noting that Choctaws expressed in the same treaty "a *wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation").

But membership served as a limitation on full territorial sovereignty, not as an independent basis for tribal authority. As the Court held in its first articulation of tribal authority, "the limitation upon [Indian] sovereignty amounts to the right of

governing every person within their limits except themselves." *Fletcher v. Peck*, 10 U.S. 87, 147 (1810). Consideration of membership heightened as non-Indians became increasingly present on tribal land and tribal courts addressed claims involving non-Indian defendants or arising on land owned by non-Indians within tribal reservation borders. Rather, tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation," and each consideration limits the other. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008)

Thus, the Court finds both factors relevant and considers both together in delineating tribal sovereignty. *See, e.g., Plains Commerce Bank*, 554 U.S. at 327 (noting "general rule restricts tribal authority over nonmember activities taking place on the reservation"); *Atkinson Trading Co.*, 532 U.S. at 647 (considering whether tribe held authority to "tax nonmember activity occurring on non-Indian fee land"); *S. Dakota v. Bourland*, 508 U.S. 679, 681-82 (1993) (considering "whether the Cheyenne River Sioux Tribe may regulate hunting and fishing by non-Indians on lands and overlying waters located within the Tribe's reservation but acquired by the United States"); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 414 (1989) (considering whether Yakima Indian Nation "has the authority to zone fee lands owned by nonmembers of the Tribe located within the boundaries of the Yakima Reservation"); *Montana v.*

United States, 450 U.S. 544, 547 (1981) (considering "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (noting distinction between "on-reservation conduct involving only Indians" and "conduct of non-Indians engaging in activity on the reservation").[8]

Specific articulation of the intersection of territory and membership in the context of criminal authority is found in the early case of *Talton v. Mayes*, 163 U.S. 376 (1896). There, the Court examined the "powers of local self-government enjoyed by the Cherokee Nation [that] existed prior to the constitution"—the tribe's inherent sovereignty. *Id*. at 384. The Court found that the tribe retained the "power to make laws defining offenses and providing for the trial and punishment

[8] Only one state court has explicitly separated territory from membership in evaluating retained tribal sovereignty. In *John v. Baker*, the Alaska Supreme Court addressed the unique circumstance of Alaska Native Villages which, pursuant to the Alaska Native Claims Settlement Act, are divested of their Indian country. *John v. Baker*, 982 P. 2d 738, 748 (Alaska 1999). The Alaska court found that "[t]he 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*." *Id*. at 754. The court held that tribes without Indian country retained the power to address child custody determinations among members as an aspect of "internal self-governance." *Id*. at 759. However, the court's holding was limited only to that unique context, in which the Indian country to which jurisdiction had historically been tied was legally recategorized, but the native village and tribal structure remained. No such idiosyncrasies are presented here. Further, as the dissent noted, "[e]ven the majority most likely would not endorse the notion of granting Alaska tribes the authority to criminally punish tribal members . . . ." *Id*. at 781.

of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the Nation." *Id*. at 380-81 (noting treaty provisions establishing Cherokee would retain the right to legislate "within their own country" and "to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the Nation by nativity or adoption shall be the only parties, or where the cause of action shall arise in the Cherokee Nation"). Emphasizing the role of territory in its analysis, the Court repeatedly described the tribe's prosecutorial authority over its members as "purely local." *Id*. at 379.

B. *Wheeler* And *Duro* Must Be Read In The Context Of This Precedent.

United States v. Wheeler, 435 U.S. 313 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990)—and their discussions of the role of membership in tribal sovereignty upon which the Band relies—thus do not exist in a vacuum. They, like tribal sovereignty, are rooted in land. These cases were decided within the Court's extensive and unvaried precedent defining tribal inherent sovereignty by membership and territory together. As the district court correctly found, *Wheeler* and *Duro* "only address tribes' authority to prosecute crimes within their territory." (RE41, Order, PID#581.) They cannot be read as endorsing the type of independent, free-floating, membership-based jurisdiction the Band now asserts. In both cases, the Court established that the conduct in question took place on tribal

land before considering membership's relevance to the particular exercise of tribal sovereignty. *See Duro*, 495 U.S. at 679 ("The events giving rise to this jurisdictional dispute occurred on the Salt River Indian Reservation."); *Wheeler*, 435 U.S. at 314 (noting that Wheeler "was arrested by a tribal police officer . . . on the Navajo Indian Reservation" and charged with disorderly conduct). Had the territorial component of jurisdiction not been established, its absence surely would have been addressed by the Court. Thus, it is "misleading" to divorce *Wheeler* and *Duro*'s language regarding a tribe's sovereignty over its members from the larger context of territory; the reach of both is "limited to 'crimes *on a reservation*.'" *Nevada v. Hicks*, 533 U.S. 353, 365 (2001). In fact, the Court's decision in *Lara* located *Wheeler* and *Duro* squarely within this precedent, holding that "the power to prosecute a tribe's own members—a power that this Court has called 'inherent' . . . –[i]n large part [ ] concerns a tribe's authority to control events that occur upon the tribe's own land." *Lara*, 541 U.S. at 204 (quoting *Wheeler*, 435 U.S. at 322-23 and noting "tribe's possession of this additional criminal jurisdiction is consistent with our traditional understanding of the tribes' status as 'domestic dependent nations').

Further, as *Talton* demonstrates, although "the 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,"

Wheeler, 435 U.S. at 326, that power is limited by the territorial boundaries inherent to domestic dependent sovereignty. *Talton*, 163 U.S. at 379 (emphasizing the "purely local" nature of criminal jurisdiction retained by Cherokee Nation). This conclusion is in keeping with *Wheeler*'s holding that implicit divestiture of sovereignty has been found in areas "involving the relations between an Indian tribe and nonmembers of the Tribe." *Wheeler*, 435 U.S. at 326. Even if the defendant to an extraterritorial prosecution is a tribal member, the fact that the alleged crime took place outside tribal territory means that it took place within another sovereign's territory. Such external assertions of sovereignty are limited by domestic dependent status.[9] *See Lara*, 541 U.S. at 205 (finding restoration of tribes' criminal jurisdiction over non-member Indians within tribal territory consistent with domestic dependent status because it "involves no interference with the power or authority of any State").

III. NO AUTHORITY RECOGNIZES TRIBAL EXERCISE OF MEMBERSHIP-BASED CRIMINAL JURISDICTION OUTSIDE OF TRIBAL TERRITORY.

[9] The terms "internal" and "external" as used by the Court to describe tribal authority similarly incorporate both territory and membership. They are not used exclusively to distinguish between tribal authority over members and nonmembers. For example, in *Duro*, the Court states that, "[i]n the area of criminal enforcement . . . tribal power does not extend beyond internal relations among members." If "internal relations" were synonymous with "members," the statement would be redundant. The better reading is that it indicates relations among members within the tribe's territory.

The Band asks this Court to assume that, for more than two hundred years, tribes have exercised membership-based criminal jurisdiction completely divorced from any territorial restriction. Not once has such an unconstrained exercise of extraterritorial jurisdiction been addressed, or even noted, even as courts and Congress have wrestled with the shifting contours of federal, state, and tribal criminal jurisdiction over Indians. Such a broad power has not simply existed *sub silento* for centuries. Rather, tribes did not, and still do not, exercise such unfettered jurisdiction because it was and is at odds with tribes' status as domestic dependent sovereigns.

A. No Authority Establishing Federal Or State Criminal Jurisdiction Over Indians And Indian Country Recognizes Tribal Jurisdiction Outside Tribal Territory.

Congress repeatedly has authorized extension of federal and state jurisdiction over crimes taking place *in* Indian country. *See* Indian Country Crimes Act, 18 U.S.C. § 1152 (extending federal criminal law to Indian country, except over crimes committed by one Indian against another, where the tribe has punished the offense under tribal law, or where exclusive jurisdiction is secured to a tribe by treaty); Major Crimes Act, 18 U.S.C. § 1153 (providing federal jurisdiction over enumerated offenses committed by an Indian against an Indian within Indian country); Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162 (providing state jurisdiction over offenses committed by or against Indians in specified Indian

country). In nearly two centuries of legislation, however, Congress has never discussed tribal criminal jurisdiction extending *outside* of Indian country.

The Band argues that the district court erred by finding this silence "instructive in determining how Congress views the issue of tribal jurisdiction." (Band Br. at 34). But these statutes—what they address and do not address—are part of "the backdrop for the intricate web of judicially made Indian law." *Oliphant*, 435 U.S. at 206. And while congressional silence may not divest tribal sovereignty (Band Br. at 34-35), the legislative landscape reflects the "common notions of the day and the assumptions of those who drafted [the statutes]—that is, that tribes did not assert criminal jurisdiction outside their territory. *Oliphant*, 435 U.S. at 206; *see also, id.* at 203 (finding significant Congress's "total failure to address criminal jurisdiction over non-Indians on other reservations" as suggesting "that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians"). The United States reflects this understanding in its brief, apparently conceding that tribal territorial jurisdiction is limited to that defined by "federal law governing the establishment of the reservation (25 U.S.C. § 1300k-4(b), (c))." (U.S. Br. at 25.) The United States also admits that "tribal law defining the Tribe's sovereign territory (as including off-reservation fee property) is in tension with federal law limiting the Tribe's territorial jurisdiction to the Tribe's reservation." (*Id*. at 27.)

The fact that lawmakers long have understood tribal authority to have an irreducibly territorial nature is further illustrated by the fact that, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (finding this principle "as relevant to a State's tax laws as it is to state criminal laws"); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962) ("It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country."). The Court has never found (or even noted) that state jurisdiction over Indians' crimes outside tribal land is concurrent with tribal authority over the same crimes. (Band Br. at 2.)

There is also the Band's own tribal court decision in *Champagne*. There, directly faced with the hurdle of potentially extraterritorial conduct, the tribal court did not consider or discuss membership-based jurisdiction as a means of overcoming the need to locate the crime within tribal territory. Considering whether it could assert criminal jurisdiction over attempted fraud arising out of an accident taking place off tribal land, the court found that it "has jurisdiction over all crimes committed on both reservation lands and trust lands of the Little River Band." (RE1-18, *Champagne* Op., PID#141.) It held that the Tribal Constitution mandates taking jurisdiction "over all criminal matters arising within the territory

of the Band that involve tribal members." (*Id*.) Finally, the Tribal Court found 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." (*Id*. at PID#143) Only after concluding that Champagne's crime had taken place within the Band's territory did it uphold its jurisdiction over his prosecution. Thus, the Band itself has refused to separate membership and territory.

Although the Band and its amicus provide a host of tribal ordinances purporting to show that tribes do exercise membership-based extraterritorial criminal jurisdiction, the cited provisions do not accomplish that goal. First, the Band points to no authority showing actual exercise of such asserted jurisdiction by any tribe. Second, only one of the included tribal codes asserts membership-based criminal jurisdiction over member conduct wherever it occurs. (Band Br. App'x C at 6) (quoting Navajo Nation Tribal Code). All others are either nonspecific jurisdictional grants or address differently limited tribal jurisdiction. Finally, that tribes include such jurisdiction in their ordinances does not mean that it is a valid exercise of inherent sovereign authority. The Supreme Court noted in *Oliphant* that thirty-three tribes purported to extend criminal jurisdiction to non-Indians through ordinances and tribal law while at the same time holding tribal sovereignty did not include such jurisdiction. *Oliphant*, 435 U.S. at 194.

B. The Few Cases To Have Considered Tribal Criminal Jurisdiction Outside of Tribal Territory Have Refused To Find It.

Cases considering a tribal court's criminal jurisdiction outside its territory are few, but they are uniform in rejecting the type of membership-based jurisdiction the Band proposes. In *Ex parte Kenyon*, the court found that the Cherokee nation could not assert tribal jurisdiction over an alleged horse theft taking place outside of the tribe's Indian country. *Ex parte Kenyon*, 5 Dill. 385, 390 (1878) The court held that "the [tribal] court which tried, convicted, and sentenced the petitioner did not have jurisdiction of the subject matter, as the place where the act was committed was beyond the territorial limits of its jurisdiction." *Id*. Although the defendant was also a non-Indian, the court found that the absence of territorial jurisdiction "alone would be conclusive of this case." *Id*. The Supreme Court cited *Kenyon* favorably in *Elk v. Wilkins*, 112 U.S. 94, 109 (1884), noting that "the court in which the prisoner had been convicted had no jurisdiction of the subject matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said 'this alone would be conclusive of the case.'"

Fife v. Moore is the only modern case to consider the Band's proposed theory of membership-based criminal jurisdiction divorced from territory. 808 F.Supp.2d 1310, 1314 (E.D. Okla. 2011). The Band discounts *Fife*, asserting that

the court admitted that "the law favors membership-based tribal criminal jurisdiction." (Band Br. at 29.) This in inaccurate. The court simply acknowledged that the authorities discussing tribal court extraterritorial jurisdiction are "quite few and quite scattered." (RE32-2, *Fife* Order, PID#493.) *Fife*'s analysis is sound and should be followed here.

The *Fife* court first rejected the argument that *Wheeler* established freestanding membership-based jurisdiction because the crimes at issue in *Wheeler* took place in Indian country. Thus, it found *Wheeler*'s discussion of tribal membership to be irrelevant to extraterritorial jurisdiction. *Id*. It then looked to the Eighth Circuit's decision in *Walker v. Rushing*, 898 F.2d 672 (8th Cir. 1990), which considered whether the Major Crimes Act applied to conduct taking place outside of Indian country. The Eighth Circuit held that "[a]n Indian tribe's power to punish members who commit crimes within Indian country is a fundamental attribute of the tribe's sovereignty." The *Fife* court refused to find that "the highlighted phrase is an excrescence." (RE32-2, *Fife* Order, PID#494.) The court also found it significant that states have jurisdiction over Indians for crimes taking place outside of Indian country. (*Id*.) It concluded that "the present state of the law has been interpreted in the same manner as by this court," and found that the tribe lacked power to assert membership-based criminal jurisdiction apart from its territory.

Courts have noted only three instances, all outside the context of criminal prosecution in which tribal sovereignty extends past the bounds of territory. *See* David M. Blurton, John v. Baker *And The Jurisdiction of Tribal Sovereigns Without Territorial Reach*, 20 Alaska L. Rev. 1, 19-22 (2003). None is based on a tribe's retained inherent sovereign authority. First, in *Settler v. Lameer*, the Ninth Circuit recognized that the Yakima Indian Nation retained arrest and seizure authority to enforce tribal fishing rights off its reservation; this power, however, was *only* by virtue of its negotiated treaty rights. *Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974). The court specified that its holding finding extraterritorial enforcement power was "a very narrow one," no broader than what the treaty specified. *Id*. at 240. The Band argues that *Settler* is invalidated by the Supreme Court's later reversal of the Ninth Circuit in *Wheeler*. (Band Br. at 30.) But *Settler* does not rely on the theory, invalidated by *Wheeler*, that tribal criminal authority is a delegated federal power. Instead, *Settler* began its analysis by considering whether extraterritorial arrest authority was part of the tribe's retained sovereignty and, finding no supporting authority on point, turned to the relevant treaty provisions. *Settler*, 507 F.2d at 238.

Second, as the Band notes, a tribe's sovereign immunity extends to off-reservation commercial activities, absent express congressional waiver. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2031 (2014). However, as this

Court correctly observed, tribal immunity is a "judicially created" doctrine "different from other jurisdictional issues in key respects"—primarily its separation from any territorial bounds. *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 414 (6th Cir. 2012). The non-territorial nature of tribal immunity illustrates why the *Bay Mills* Court was correct to "refuse[] to ascribe the magic to Indian country boundaries" in the context of assessing tribal sovereign immunity. (Band Br. at 13.) Moreover, tribal immunity does not implicate the interests of self-government on which the Band relies in arguing its theory of membership-based criminal jurisdiction. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) ("At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our independent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance.").Finally, the Indian Child Welfare Act establishes that tribal courts have jurisdiction over child custody matters involving Indian children, whether or not they are domiciled in Indian country. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989). Again, however, this extraterritorial jurisdiction is affirmatively established by statute.

C. It Is Hornbook Law That Tribal Criminal Jurisdiction Ends At Territorial Borders.

The Band's assertion that "[t]here is no dispute that tribes historically exercised, and retain today, inherent criminal authority over their members" (Band Br. at 20) is not shared by the leading authorities on tribal law. In his 1934 work, *On the Drafting of Tribal Constitutions*, authored to "assist participating tribes in organizing their political systems under the Indian Reorganization Act," Felix Cohen advised: "Offenses committed by Indians outside of the reservation are subject to the same state laws that apply to other citizens. Again, the Indian tribe is not concerned with such offenses." FELIX COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 132 (2006). Cohen restated this view in his 1942 HANDBOOK, noting that "[a]n Indian tribe may exercise a complete jurisdiction over its members and within the limits of the reservation, subordinate only to the expressed limitations of federal law . . . The jurisdiction of the Indian tribe ceases at the border of the reservation . . . ." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 148 & n.236 (1942).[10]

In its 1974 publication *Justice and the American Indian*, drafted to help Indian court judges understand the "confused and limited scope of Indian court

[10] The Band discounts Cohen's sources for this statement. (Band Br. at 31.) However, Cohen repeatedly expressed his view that tribes' inherent criminal jurisdiction is limited to exercise within territorial boundaries during this time—when, as the Band notes, "the proper scope of the tribes' sovereign authority was a foremost concern of federal policy" (Band Br. at 21).

jurisdiction," the National American Indian Court Judges Association directed its members that "[a] tribal court has jurisdiction over all offenses which violate tribal law and which are committed on the reservation . . . [*N*]*o* court has jurisdiction to enforce tribal ordinances off a reservation." NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, JUSTICE AND THE AMERICAN INDIAN 4-5 (1974). *See also* KIRKE KICKINGBIRD, ET AL., INDIAN SOVEREIGNTY (Washington: Institute for the Development of Indian Law, 1977) (reprinted in JOHN R. WUNDER, ED., NATIVE AMERICAN SOVEREIGNTY 10 (1996)) ("The power of Indian tribes to make and enforce laws also extends generally to the exercise of criminal jurisdiction over persons who commit crimes on the reservation.").

Modern treatises and textbooks share this view. *See* WILLIAM H. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (6TH ED.) 194 (2015) ("The jurisdiction of a tribe is generally confined to crimes committed within the geographical limits of its reservation and, presumably, any of its dependent Indian communities."); DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW 484 (2011) ("The first determination is whether the crime occurred in Indian country. If it did not, the inquiry is over: the state courts have jurisdiction; the federal and tribal courts have none."); HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS 39 (2008) ("Outside of Indian land areas, federal

law says that tribal courts do not have jurisdiction over tribal citizens in criminal action or civil disputes.").

Against these authorities, the Band cites only the 1939 Opinion of the Solicitor of the Interior Department. (Band Br. at 21.) But that Opinion cannot support the Band's claim. First, as the Band notes, although the Opinion makes broad pronouncements about tribal sovereignty, it does so only in the context of addressing the question of whether an Indian court may "exercise jurisdiction over acts committed by Indians on unrestricted lands *within* an Indian reservation." (Band Br. App'x B at 2.) (emphasis added). The Opinion expressly reserves the question of tribal jurisdiction over acts committed outside an Indian reservation because "the existing Law and Order Regulations and tribal codes restrict the jurisdiction of Indian courts to acts committed within an Indian reservation . . . ." (*Id*. at 17). Thus, not only does the Opinion not speak to extraterritorial jurisdiction, it shows that, at the time it was authored, no tribe believed it could prosecute crime outside its territory.[11] And, as the Band acknowledges, a 1934 Solicitor Opinion found no tribal authority outside of territory. (Band Br. at 31.)

[11] Discussion of the opinion in 1961 Congressional hearings on the Constitutional Rights of the American Indian also indicates that this document was never published and was considered a "less formal memorandum," not included in the indexed Solicitor Opinions. *Constitutional Rights of the American Indian: Hearings Before the Subcomm. On Constitutional Rights of the Comm. On the Judiciary*,87th Cong. 108 (statement of Henry E. Hyden, Associate Solicitor, Division of Indian Affairs, Office of the Solicitor, Department of the Interior).

Finally, the 1796 Indian Trade and Intercourse Act and similar treaty provisions do not show an understanding that tribes exercised criminal jurisdiction over their members for extraterritorial crimes. Rather, the Act shows only that the United States would seek restitution from a tribe for crimes committed by tribal members outside of tribal territory and, if it was not paid by the tribe, would collect from the tribe's federal allotment. 1796 Trade and Intercourse Act, 1 Stat. 469 § 14. Other treaties from the same time period demonstrate that Indians committing crimes outside of tribal territory would be subject to federal or state law. Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 952, 957 & n. 38 (1975) (citing representative treaties). The 1830 Treaty with the Choctaw Nation established that, while any Choctaw who committed a crime against a U.S. citizen "shall be delivered up to an officer of the U.S. if in the power of the Choctaw Nation, that such offender may be punished as provided in such cases, by the law of the U.S.," the tribe would not be held responsible for any crime of an offender "not within the control of the Choctaw Nation." Treaty with the Choctaw, 1830, 7 Stat. 333 § 6. This provision reflects an agreement that the Choctaw Nation would not exercise its criminal jurisdiction over members acting outside its territory.

IV. OTHER SOVEREIGNS DO NOT EXERCISE THE MEMBERSHIP-BASED JURISDICTION THAT THE BAND ADVOCATES.

Although the Band would have this Court divorce sovereign authority from territory entirely, territoriality—the exercise of power over defined blocs of space—is fundamental to both domestic and international conceptions of sovereign authority. Restatement (Third) of Foreign Relations Law of the United States § 201 ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government."). Territorial limits provide the backdrop against which the law of jurisdiction has developed and been defined. *See* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, Sup. Ct. Rev. 189 (1991). Determining jurisdiction by the territorial principle—by reference to the place where the crime was committed—is "everywhere regarded as of primary importance and of fundamental character." Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 American Journal of International Law (Supp.) 439, 445 (1935).

Sovereign states are defined under international law as territorial entities. Restatement § 201. These states exercise jurisdiction—relevant here in the form of the power to prescribe rules of law—pursuant to their authority as territorial sovereigns. *See* Restatement § 401 (describing the various forms of jurisdiction). As Chief Justice Marshall stated several decades before his seminal *Cherokee Nation* opinion, "[t]he jurisdiction of the nation within its own territory is

necessarily exclusive and absolute." *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.); Restatement § 206 cmt. b. ("'Sovereignty' . . . implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there."); Black's Law Dictionary (9th Ed. 2009) (defining "jurisdiction" as "[a] government's general power to exercise authority over all persons and things within its territory").

In turn, assertions of jurisdiction into the territory of another sovereign—particularly criminal jurisdiction—violate the sovereignty of the nation into which they intrude. *See Am. Banana*, 213 U.S. at 355-56 ("For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations."); *Schooner Exch*, 11 U.S. at 136 (explaining that any external intrusion on the exclusive jurisdiction of the nation "would imply a diminution of its sovereignty").

Set against the pervasiveness of territoriality for all sovereigns, the Band's claim that "Indian tribes, like other sovereigns, have long enjoyed criminal jurisdiction over their territory and, independently, their members" (Band Br. at 1), as well as its characterizations of the extraterritorial jurisdiction exercised by other

sovereigns are incorrect. (*Id*. at 43-44.) Recognition of independent membership-based criminal jurisdiction would go beyond the powers inherent to the states as well as the restraints placed on nations. Indeed, such recognition would amount to "special treatment relative to other sovereigns." (Band Br. at 43.)

A. State Assertions Of Criminal Jurisdiction Are Territorially Limited.

State criminal jurisdiction is rooted in "a territorial principle as the jurisdictional foundation for the reach of state laws. Under that principle, states have power to make conduct a crime only if that conduct takes place, or its results occur, within the state's territorial borders." 4 Wayne R. LaFave et al., *Criminal Procedure* §16.1(a), at 459 (2d ed. 1999); *see In re Vasquez*, 705 N.E.2d 606, 610 (1999) ("The general rule, accepted as 'axiomatic' by the courts in this country, is that a State may not prosecute an individual for a crime committed outside its boundaries."). This general principle has been expanded to include extraterritorial acts that are intended to produce and do produce detrimental effects within the state, but importantly, these acts are seen as occurring within a state's territory. *See Strassheim v. Daily*, 221 U.S. 280 (1911).

Most states have either enacted a statutory interpretation of the common law doctrine or crafted a similar statutory mechanism through which to characterize a crime as internal. Michigan, the Band's neighboring sovereign, provides a useful example. For most of its history, Michigan subscribed to the common law doctrine.

See People v. Blume, 505 N.W.2d 843 (Mich. 1993). However, in 2002 the state legislature enacted MCL 762.2, which states that a criminal offense is deemed committed within the state if "[a]n act constituting an element of the criminal offense is committed within th[e] state." MCL 762.2(2)(a). As a result, Michigan statutorily broadened the scope of its territorial jurisdiction over criminal matters by providing a territorial hook through which to view the crime as committed within the state. *See People v. Gayheart*, 776 N.W.2d 330, 336 (Mich. Ct. App. 2009).

The Band's contention that states "plainly may [exercise extraterritorial jurisdiction] 'with respect to matters in which the State has a legitimate interest'" is incomplete. (Band Br. at 44) (quoting *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941)). *Skiriotes v. Florida* in fact stands for the unremarkable proposition that in matters affecting its legitimate interests a state may regulate the conduct of its citizens *upon the high seas* where no other sovereign authority is implicated. *Skiriotes*, 313 U.S. at 77 ("There is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas."); *see State v. Jack*, 125 P.3d 311, 318-19 (Alaska 2005). *People v. Weeren*, also addressing conduct beyond a state's territorial waters, explicitly concluded that "[t]he completed violations in the case before us occurred well within the state boundaries as defined by our state Constitution and statutes." *People v. Weeren*, 607 P.2d 1279, 1287 (Cal. 1980).

These cases simply recognize a limited power of the states to enact laws governing conduct beyond the territory of the United States when it does not conflict with federal law. They are not relevant to whether one sovereign can assert its criminal jurisdiction within the territory of another.

It cannot be true that Indian tribes, as domestic dependent nations, possess criminal jurisdiction broader than that possessed by the several states as domestic sovereigns. *See Kiowa Tribe*, 523 U.S. at 765 (Ginsburg, J., dissenting) ("Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations?"). Indian tribes themselves have embraced this territorial definition of tribal sovereignty.[12]

B. Federal Law Is Presumed Not To Apply Extraterritorially Or To Citizens Without A Nexus To Territory.

Over a century ago, Justice Holmes—echoing the territorial basis of sovereignty[13]—announced a federal presumption against interpreting any statute to

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[12] This territorial definition of tribal sovereignty also explains why Indian tribes not possessing defined territory are considered to be without criminal jurisdiction. *See* Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. Rev. L. & Soc. Change 629, 657-58 (2013) ("Smaller, landless tribes, on the other hand, don't have the power to pass ordinances or enforce regulations, because they have no jurisdiction."). For example, the Mashpee Wampanoag are a landless tribe. The Mashpee Wampanoag Tribal Court "cannot presently hear criminal actions" and can only hear civil actions where members agree to the court's jurisdiction. *See* http://www.mwtribejudicial.com/Bar-%20Associations.

[13] The presumption has been tied directly to territoriality and avoiding conflict with the exclusive and absolute jurisdiction of another sovereign. *See, e.g.*, *Kiobel*

apply beyond "the territorial limits over which the lawmaker has general and legitimate power." *Am. Banana*, 213 U.S. at 357. "The general and almost universal rule," he wrote, "is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* at 356. Since that pronouncement, the Supreme Court has strengthened this presumption against extraterritoriality through broader application and stricter enforcement. *See, e.g.*, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 261 (2010) (stating that judges must "apply the presumption in all cases"); *EEOC v. Arabian Am. Oil Co.* (*Aramco*), 499 U.S. 244, 248 (1991) (reaffirming "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"). Importantly, the presumption against extraterritoriality is particularly strong in the context of crimes against private individuals like the one at issue here. *United States v. Bowman*, 260 U.S. 94, 95-96 (1922) ("Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds . . . must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed out side of the strict territorial jurisdiction, it is natural for

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v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1664 (2013); *ARC Ecology v. U.S. Dept. of Air Force*, 411 F.3d 1092, 1102-03 (9th Cir. 2005) ("[A]ccepting the appellants' broad interpretation of the statute would be the equivalent of forcing the United States to encroach on the territory and affairs of another sovereign.").

Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.").

Citizenship alone is not a sufficient basis for extraterritorial jurisdiction. Rather, internationally recognized bases of jurisdiction, like citizenship, are relevant only when explicit congressional extraterritorial intent is found and even then only to the extent that they support the exercise of extraterritorial jurisdiction as consistent with principles of due process. *See, e.g.*, *Davis*, 905 F.2d at 249 n.2 ("International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process."). The Band does not and cannot provide any example of a federal court relying on citizenship alone, without an explicitly extraterritorial statute, tethered to a territorial interest, to assert extraterritorial jurisdiction over an individual.

While the Band is correct that "[i]t is well-established that Congress may criminalize extraterritorial conduct," it omits entirely the longstanding presumption that Congress does not legislate extraterritorially and the requirement that Congress explicitly indicate its extraterritorial intent when it does.[14] (Band Br. at

[14] Without exception, every federal case cited by the Band in its brief reflects this reality. *United v. Shibin*, 722 F.3d 233, 245 (4th Cir. 2013) ("In this case, the substantive statutes on which Counts 2 through 6 rest clearly manifest Congress' intent to criminalize conduct that takes place outside the municipal jurisdiction of the United States."); *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006)

43.) The Band argues that "the United States may exercise extraterritorial jurisdiction even without regard to citizenship wherever legitimate governmental interests are implicated." (Band Br. at 44) (citing *United States v. Yousef*, 327 F.3d 56, 91 n.24, 110-11 (2d Cr. 2003)). But in *Yousef*, the Second Circuit engaged in familiar methods of statutory construction, explaining precisely why Congress intended extraterritorial application with respect to each relevant statute. Nowhere did the court discuss "legitimate governmental interests"; indeed, reliance on such a broad notion would have made redundant the very purpose of the court's analysis, *i.e.*, to find specific congressional intent for the particular statute to apply extraterritorially.

The Band and the United States—echoing the Tribal Court of Appeals below—place great emphasis on Kelsey's status as tribal elected representative. In so doing they conflate the elements of a criminal offense with the jurisdictional basis on which it can be prosecuted. (RE35, Report, PID#524-25 n.11.) Such status

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("The legal presumption that Congress ordinarily intends federal statutes to have only domestic application is easily overcome in Clark's case because the text of Section 2423(c) is explicit as to its application outside the United States.") (internal citation omitted); *Davis*, 905 F.2d at 248 ("In this case, Congress explicitly stated that it intended the Maritime Drug Law Enforcement Act to apply extraterritorially . . . [t]herefore, the only issue we must consider is whether application of the [statute] to Davis' conduct would violate due process."). In *United States v. Reeh*, the defendants did not even argue that the statutes under which they were convicted were not intended to apply extraterritorially. 780 F.2d 1541, 1543 n.2 (11th Cir. 1986).

is irrelevant to a court's ability to adjudicate legal claims regarding private conduct. *See Clinton v. Jones*, 520 U.S. 681, 695 (1997) (rejecting immunity for unofficial, private conduct "grounded purely in the identity of [the] office"); *id.* at 696 ("[A]lthough the President is placed on high, not a single privilege is annexed to his character . . . he is amenable [to suit] in his private character as a citizen, and in his public character by impeachment.") (internal quotations omitted); *United States v. Noriega*, 746 F.Supp. 1506, 1512 (S.D. Fla. 1990) ("[T]he applicable international law on extraterritorial jurisdiction . . . does not look to a foreign defendant official status but rather to the nature and effect of the conduct at issue). Kelsey's status as an elected representative " does not establish jurisdiction where it does not otherwise exist." (RE35, Report, PID#525.)

V. CONGRESS IS THE APPROPRIATE SOURCE OF THE RELIEF SOUGHT BY THE BAND.

The Band and the National Congress of American Indians argue that the solely membership-based criminal jurisdiction for which they advocate is mandated by the realities of modern tribal life. Their concerns—including shattered land bases, unreasonable delays in the trust process, and increasing numbers of members living beyond tribal territory—are significant. However, "[i]f the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs." *Duro*, 495 U.S at

698. Congress is the proper body to assess the changing needs of tribal law enforcement and, as it did in response to *Duro*, craft an appropriate response. The courts cannot "accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens." *Id*. at 698. To do so would be to encumber Indians with the extraordinary burden of carrying tribal criminal jurisdiction with them no matter where they go, and no matter what other sovereigns also may assert jurisdiction over them. This is a burden borne by no other citizen of the United States on the basis of ancestral ties and it should not be imposed on tribal members.

CONCLUSION

For these reasons, Appellant Norbert Kelsey respectfully asks this Court to affirm the district court's grant of habeas relief.

Respectfully submitted this 23rd day of January 2015,

/s/ Alistair E. Newbern
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Appointed Counsel of Record

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Sean C. Ryan
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. at 32(a)(7)(B) because:

    a. this brief contains 13,992 words, excluding the parts of the brief exempted by Fed. R. App. at 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed. R. App. at 32(a)(5) and the type style requirements of Fed. R. App. at 32(a)(6) because:

    a. this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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Dated: January 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on January 23, 2015, I will serve counsel for Appellant with one copy of the attached Brief of Appellee through issuance of a Notice of Docket Activity by the ECF electronic filing system of the United States Court of Appeals for the Sixth Circuit.

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TABLE OF RELEVANT DISTRICT COURT DOCKET ENTRIES

Docket Number	Description of Entry	Citation	Page ID # Range	Date Filed
1	Kelsey's Verified Petition for Writ of Habeas Corpus in Federal District Court (Petition)	RE01	1-27	11/05/09
1-6	Constitution of the Little River Band of Ottawa (Constitution)	RE1-6	53-71	11/05/09
1-11	The Band's Law and Order – Criminal Offenses – Ordinance (Law and Order Code)	RE1-11	88-111	11/05/09
1-12	Complaint and Warrant (Complaint)	RE1-12	112-117	11/05/09
1-14	Tribal District Court Order of Sentencing (Order of Sentencing)	RE1-14	119-121	11/05/09
1-18	*Champagne v. People of the Little River Band of Ottawa Indians* (unpublished opinion and order of the Tribal Court of Appeals, Dec. 1, 2006)	RE1-18	139-160	11/05/09
2	Memorandum of Law in Support of Verified Petition for Writ of Habeas Corpus	RE02	162-204	11/05/09

	(Memorandum)			
9	Tribal Court of Appeals Order After Hearing on Motions (Order After Hearing)	RE09[1]	Bates 000001-000003	04/02/10
9	Tribal Court of Appeals Opinion and Order Regarding Jurisdiction (Jurisdiction Order)	RE09	Bates 000005-000011	04/02/10
9	Tribal Court of Appeals Rulings on Appellant's Motion for Reconsideration and Alternative Request for Stay Pending Appeal (Rulings on Motion and Stay)	RE09	Bates 000012-000014	04/02/10
9	Tribal Court of Appeals Order Denying Motion for Clarification or Rehearing with Incorporated Memorandum of Law in Support (Order Denying Motion)	RE09	Bates 000020-000021	04/02/10
9	Tribal Court of Appeals Order to Stay Tribal Court Proceedings During	RE09	Bates 00022-00023	04/02/10

[1] The materials contained in Docket Entry 9, Rule 5 Excerpts of the Record, Volume I, are not available on PACER and were provided to appointed counsel by the Court. As provided to counsel, this docket entry is not marked with Page ID numbers. Accordingly, counsel has identified its contents using its internal Bates numbering.

	Pendency of Kelsey's Federal Habeas Corpus Action (Order for Stay)			
9	Tribal District Court Order of Judgment (Order of Judgment)	RE09	Bates 000024-000027	04/02/10
9	Tribal Court Conclusions of Law (Conclusions of Law)	RE09	Bates 000034	04/02/10
9	Kelsey's Motion for Peremptory Reversal (Motion for Reversal)	RE09	Bates 000037-000039	04/02/10
9	Kelsey's Request for Reconsideration of Opinion and Order Regarding Jurisdiction (Request for Reconsideration)	RE09	Bates 000286-000289	04/02/10
10	Amended Bill of Particulars (Amended Bill)	RE10	959-961	04/02/10
10	Tribal Ogema's Order Barring an Individual From Tribal Lands (Order Barring)	RE10	1001	04/02/10
10	Kelsey's Motion for Clarification or Rehearing with Incorporated Memorandum of Law in Support (Motion for Clarification)	RE10	1017-1027	04/02/10

10	Respondent's Reply to Motion for Clarification or for Rehearing (Reply to Clarification)	RE10	1017-1027	04/02/10
11	Kelsey's Motion to Vacate in Tribal District Court (Motion to Vacate)	RE11	1279-1293	04/02/10
11	Kelsey's Notice of Appeal to the Tribal Court of Appeals (Notice of Appeal)	RE11	1297-1305	04/02/10
11	Kelsey's Motion to Dismiss for Lack of Subject Matter Jurisdiction in Tribal Court (Motion to Dismiss)	RE11	1306-1310	04/02/10
11	Respondent's Answer to Motion to Dismiss for Lack of Subject Matter Jurisdiction in Tribal Court (Answer to Motion to Dismiss)	RE11	1337-1338	04/02/10
13	Respondent's Federal District Court Answer (Answer)	RE13	246-294	04/02/10
32-2	*Fife v. Moore* (unpublished order of the United States District Court for the Eastern District of Oklahoma, Sept. 8, 2011)	RE32-2	494-499	12/12/11
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36	Respondent's Objections to Report and Recommendation (Objections)	RE36	534-560	11/21/13
39	Kelsey's Reply to Respondent's Objections (Reply)	RE39	565-576	12/19/13
41	United States District Judge's Opinion Adopting Report and Recommendation (Opinion)	RE41	580-585	03/31/14
42	United States District Judge's Order Adopting Report and Recommendation (Order)	RE42	586	03/31/14
43	Respondent's Notice of Appeal to the Sixth Circuit (Notice)	RE43	587	04/29/14

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Case No. 14-1537

NORBERT KELSEY, Petitioner-Appellee, v. MELISSA POPE, ET AL., Respondents-Appellants,	CONSENT TO LEGAL ASSISTANCE BY LAW STUDENTS

I, Norbert Kelsey, agree to be represented on appeal in the United States Court of Appeals for the Sixth Circuit by Professor Alistair E. Newbern and eligible law students enrolled in the Vanderbilt Law School Appellate Litigation Clinic working under Professor Newbern's supervision.

I understand that any student enrolled in the Vanderbilt Appellate Litigation Clinic and appearing on my behalf has been certified by the Dean of Vanderbilt Law School or his authorized representative as being of good character and competent legal ability and has met all of the requirements of Sixth Circuit Rule 46(d). I further understand that Professor Newbern is the attorney of record in my appeal and will supervise and assume professional responsibility for all work performed by students on my behalf.

Signed this 6 day of AUGUST, 2014.

Norbert Kelsey
Petitioner-Appellee

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Case No. 14-1537

NORBERT J. KELSEY, Petitioner-Appellee, v. MELISSA LOPEZ POPE, et al., Respondent-Appellant.	CERTIFICATION OF LAW STUDENT CHARLES R. JONES PURSUANT TO SIXTH CIRCUIT RULE 46(d)

The following statements are provided pursuant to Sixth Circuit Rule 46(d) for the purpose of certifying Charles R. Jones to appear before this Court. Mr. Kelsey's consent to law student representation is also filed with this brief. Mr. Kelsey appears before this Court *in forma pauperis*.

Statement of Vanderbilt University Law School

I, Susan L. Kay, Associate Dean of Clinical Affairs, make the following certification as the authorized representative of Chris Guthrie, Dean of Vanderbilt University Law School. I hereby certify that Charles R. Jones is currently enrolled at Vanderbilt University Law School, which is approved by the American Bar Association. I further certify that Mr. Jones has completed at least four semesters of legal study and is of good character and competent legal ability.

Date: 1/23/15

Susan L. Kay / by [illegible]
Susan L. Kay
Associate Dean of Clinical Affairs
Vanderbilt University Law School

Statement of Supervising Attorney

I, Alistair E. Newbern, am the attorney of record for Appellee Norbert Kelsey in the above-captioned appeal. Charles R. Jones is currently enrolled as my student in the Vanderbilt Law School Appellate Litigation Clinic. I hereby consent to Mr. Jones's appearance on behalf of Mr. Kelsey under my direct supervision for purposes of this case.

Date: 1/23/15

Alistair E. Newbern
Vanderbilt Appellate Litigation Clinic
Vanderbilt University Law School

Statement of Law Student

I, Charles R. Jones, hereby certify that I have read and am familiar with the Tennessee Rules of Professional Conduct, which govern the jurisdiction in which my law school is located. I further state that I have not, and will not, ask for or receive compensation of any kind for my services provided in this case.

Date: 1/21/15

Charles R. Jones
Law Student

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Case No. 14-1537

NORBERT J. KELSEY, Petitioner-Appellee, v. MELISSA LOPEZ POPE, et al., Respondent-Appellant.	CERTIFICATION OF LAW STUDENT SEAN RYAN PURSUANT TO SIXTH CIRCUIT RULE 46(d)

The following statements are provided pursuant to Sixth Circuit Rule 46(d) for the purpose of certifying Sean Ryan to appear before this Court. Mr. Kelsey's consent to law student representation is also filed with this brief. Mr. Kelsey appears before this Court *in forma pauperis*.

Statement of Vanderbilt University Law School

I, Susan L. Kay, Associate Dean of Clinical Affairs, make the following certification as the authorized representative of Chris Guthrie, Dean of Vanderbilt University Law School. I hereby certify that Sean Ryan is currently enrolled at Vanderbilt University Law School, which is approved by the American Bar Association. I further certify that Mr. Ryan has completed at least four semesters of legal study and is of good character and competent legal ability.

Date: 1/23/15

Susan L. Kay / by

Susan L. Kay
Associate Dean of Clinical Affairs
Vanderbilt University Law School

Statement of Supervising Attorney

I, Alistair E. Newbern, am the attorney of record for Appellee Norbert Kelsey in the above-captioned appeal. Sean Ryan is currently enrolled as my student in the Vanderbilt Law School Appellate Litigation Clinic. I hereby consent to Mr. Ryan's appearance on behalf of Mr. Kelsey under my direct supervision for purposes of this case.

Date: 1/23/15

Alistair E. Newbern
Vanderbilt Appellate Litigation Clinic
Vanderbilt University Law School

Statement of Law Student

I, Sean Ryan, hereby certify that I have read and am familiar with the Tennessee Rules of Professional Conduct, which govern the jurisdiction in which my law school is located. I further state that I have not, and will not, ask for or receive compensation of any kind for my services provided in this case.

Date: 1/21/2015

Sean Ryan
Law Student

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Case No. 14-1537

NORBERT J. KELSEY, Petitioner-Appellee, v. MELISSA LOPEZ POPE, et al., Respondent-Appellant.	CERTIFICATION OF LAW STUDENT KRISTEN E. STONEHILL PURSUANT TO SIXTH CIRCUIT RULE 46(d)

The following statements are provided pursuant to Sixth Circuit Rule 46(d) for the purpose of certifying Kristen E. Stonehill to appear before this Court. Mr. Kelsey's consent to law student representation is also filed with this brief. Mr. Kelsey appears before this Court *in forma pauperis*.

Statement of Vanderbilt University Law School

I, Susan L. Kay, Associate Dean of Clinical Affairs, make the following certification as the authorized representative of Chris Guthrie, Dean of Vanderbilt University Law School. I hereby certify that Kristen E. Stonehill is currently enrolled at Vanderbilt University Law School, which is approved by the American Bar Association. I further certify that Ms. Stonehill has completed at least four semesters of legal study and is of good character and competent legal ability.

Date: 1/23/15

Susan L. Kay /by Leer
Susan L. Kay
Associate Dean of Clinical Affairs
Vanderbilt University Law School

Statement of Supervising Attorney

I, Alistair E. Newbern, am the attorney of record for Appellee Norbert Kelsey in the above-captioned appeal. Kristen E. Stonehill is currently enrolled as my student in the Vanderbilt Law School Appellate Litigation Clinic. I hereby consent to Ms. Stonehill's appearance on behalf of Mr. Kelsey under my direct supervision for purposes of this case.

Date: 1/23/15

Alistair E. Newbern
Vanderbilt Appellate Litigation Clinic
Vanderbilt University Law School

Statement of Law Student

I, Kristen E. Stonehill, hereby certify that I have read and am familiar with the Tennessee Rules of Professional Conduct, which govern the jurisdiction in which my law school is located. I further state that I have not, and will not, ask for or receive compensation of any kind for my services provided in this case.

Date: 01/23/15

Kristen E. Stonehill
Law Student