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 KASE, 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
The Honorable Gordon J. Quist

BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER-APPELLEE AND FAVORING AFFIRMING THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, *Amicus Curiae*, National Association of Criminal Defense Lawyers ("NACDL") makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

No. NACDL is a not-for-profit professional association. It is not a publicly held company; does not have any parent corporation; and does not issue or have any stock.

2. Is there a publicly-owned corporation, not a party to the appeal, which has a financial interest in the outcome?

No.

Dated: January 29, 2015

/s/ Ruthanne M. Deutsch
Attorney for *Amicus Curiae*

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of individuals charged with crimes and the defense attorneys who represent them to ensure a fair criminal justice system for all. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 members and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL participates in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Its mission includes "Ensur[ing] justice and due process for persons accused of crime," and "[p]romot[ing] the proper and fair administration of criminal justice."[2] In support of these goals, NACDL has filed *amicus* briefs in the United States Supreme Court and other federal courts, including this Court, and state courts.

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[1] All parties consented to this brief's filing. No party counsel authored this brief in whole or in part. No person other than *amicus*, its members, or its counsel made any monetary contribution to prepare and submit this brief. Fed. R. App. P. 29(c)(5).

[2] *See* https://www.nacdl.org/about/mission-and-values.

NACDL's long-standing institutional commitment to due process in the administration of justice and its dedication to protecting the constitutional rights of individuals underpin its involvement here, given the extraordinary implications of the post-conviction decision of the Tribal Court of Appeals of the Little River Band of Ottawa Indians ("Band" or "Tribe").

SUMMARY OF ARGUMENT

The tribal appellate court validated a prosecution and conviction that was plainly outside the Band's criminal jurisdiction when the alleged offense occurred. It did so by rewriting tribal law to remove a clear statutory limitation on the Band's criminal jurisdiction and, on that basis, affirmed.

After full briefing and argument, the Magistrate Judge concluded that the Tribal Court of Appeals violated due process when it expanded the Band's criminal jurisdiction to cover Mr. Kelsey's conduct "by judicial fiat after the fact." RE35, PID532 (Report). On review of the report and recommendation, the district court declined to reach the due process issue, granting habeas relief to Mr. Kelsey on the sole basis that the Band had no authority to assert criminal jurisdiction outside of Indian Country. RE41, PID585 (Dist. Ct. Op.).[3]

[3] NACDL does not address the ground for decision by the district court.

Whatever the limits of the Band's inherent authority to expand its extraterritorial criminal jurisdiction beyond the limits of Indian Country *prospectively*, any *retroactive* assertion of criminal jurisdiction is another matter.[4] As the Magistrate Judge concluded, even if the Band has authority to assert criminal jurisdiction over its members on fee simple lands going forward, Mr. Kelsey is nonetheless entitled to habeas relief because his due process rights, made applicable to the Band by the Indian Civil Rights Act, 25 U.S.C. § 1302 (2006), prohibit the retroactive expansion of criminal jurisdiction. *See* RE35, PID532 (Report). The decision by the Tribal Court of Appeals to void a narrow and precise statute that expressly delimits the contours of what conduct may be prosecuted where, and thereby rewrite the statutory regime to expand the scope of criminal conduct, may not be applied retroactively to allow punishment for conduct that was beyond the Band's authority to prosecute when it occurred.

NACDL urges this Court, which "can affirm a decision of the district court on any grounds supported by the record, even if different from those relied on by the district court," *see, e.g.*, *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999), to

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[4] The Band does not dispute that due process protections apply. *See* Band Br. at 52-53. The United States and the National Congress of American Indians agree that the Band can exercise extraterritorial criminal jurisdiction only "provided it affords due process." NCAI Br. at 8; *see also* U.S. Br. at 21; NCAI Br. at 10.

affirm the grant of habeas relief on the basis that the Tribal Court of Appeals' retroactive expansion of criminal jurisdiction by "judicial fiat" violated due process. This glaring due process violation should not go unaddressed, lest the Band conclude that it has the authority to repeat this constitutional transgression in other cases.

NACDL participates here to urge the Court to correct the core due process violation that the Tribal Court of Appeals committed to allow it to uphold Mr. Kelsey's conviction. Contrary to the Band's arguments, a statutory provision limiting the crimes that are prosecutable outside Indian Country is substantive statutory authority that is fully subject to due process and *ex post facto* constraints that were ignored here. The voiding of this statute subjected Mr. Kelsey to prosecution for a crime that did not exist at the time it was committed.

ARGUMENT

I. TRIBAL LAW FORECLOSED JURISDICTION OVER MR. KELSEY'S ALLEGED EXTRATERRITORIAL OFFENSE AT THE TIME IT OCCURRED.

By its terms, the critical provision here, Section 4.03 of the Tribal Law and Order – Criminal Offenses – Ordinance, #03-400-03, RE1-11, PID91-92, did not allow extraterritorial criminal jurisdiction over Mr. Kelsey's alleged sexual assault, which occurred outside of Indian Country. *See* RE41, PID580 (Dist. Ct. Op.). Neither in 2005, at the time the alleged conduct occurred, nor in 2007, when the Band charged Mr. Kelsey, was sexual assault listed among the nine offenses over

which the Tribal Council determined its criminal jurisdiction shall extend "wherever committed." § 4.03(b).

The Tribal Court of Appeals acknowledged this "limitation" that the Tribal Council had placed on the Band's "inherent authority." *See* RE1-4, PID39, 41 (Tribal Ct. App. Op.). But "[f]aced with this obstacle of the Tribe's own making," RE35, PID523 (Report), the tribal court declared it "unconstitutionally narrow," RE1-4, PID41, and refused to enforce it. In other words, the Tribal Court of Appeals had to nullify § 4.03 to uphold Mr. Kelsey's conviction.

A. Section 4.03 of the Criminal Offenses Ordinance Defines What Extraterritorial Conduct the Band Considers Criminal.

The Band's Criminal Offenses Ordinance is a substantive criminal ordinance that aims to "give fair warning of the nature of conduct declared to constitute criminal offenses," RE1-11, PID89 (Crim. Offenses Ordinance, § 1.01(a)(2)); defines what "constitute[s] forbidden criminal conduct against the Tribe," *id.* at 91 (Crim. Offenses Ordinance, § 4.01); and clarifies that persons "may be tried and punished by the Tribal Court as provided for by this Ordinance," *id.*

Section 4.03 delineates those offenses that are punishable by the Band "wherever committed." RE1-11, PID91-92. Under that provision, all defined criminal offenses may be prosecuted within Indian Country, *see* § 4.03(a), but only nine specified offenses are deemed criminal "wherever committed," *see* § 4.03(b),

and all of those directly threaten the Band's self-governance.[5] Section 4.03(b) thus expresses the Tribal Council's view of "when extraterritorial jurisdiction is needed." *See* NCAI Br. at 11. While it is an open question as to whether the Tribe has the authority to assert extraterritorial jurisdiction over even these delineated offenses, *see* RE45, PID640 (Tr. Oral Arg.), it is undisputed that at the time Mr. Kelsey's alleged offense occurred, by its terms § 4.03 provided fair warning that *only* these nine offenses were deemed criminal "wherever committed."

Section 4.02 plays a different role, elaborating which class of persons may be charged with which offenses, and clarifying that criminal jurisdiction extends to non-Indians only for three offenses: contempt, disobedience of a court order, and perjury. *See* RE1-11, PID91 (Crim. Offenses Ordinance, § 4.02). Unlike provisions from other tribes' criminal codes, however, *no* provision in the Band's Criminal Offenses Ordinance puts members on notice of the geographic reach of the Band's prosecutorial authority that is attributable to their membership status, and thereby provides "fair warning" that a person's membership or Indian status, without more, will result in certain conduct being considered criminal "wherever committed."

[5] They are: "(1) Embezzlement and theft from a tribal organization . . .; (2) Abuse of [tribal] office . . .; (3) Improper influence of a tribal official . . .; (4) [tribal] [e]lection fraud . . .; (5) Malicious [tribal] criminal prosecution . . .; (6) Obstruction of [tribal] justice . . .; (7) Public bribery [involving a tribal official, appointee, judge or employee] . . .; (8) Refusing, omitting and delaying to arrest . . .; and (9) Filing fictitious report[s] . . . ." § 4.03(b).

Such notice has been provided by other tribes.[6] But, save for the nine offenses for which jurisdiction was broadly asserted (independent of membership status), the Band provided no fair warning of any other source of extraterritorial jurisdiction.

Under the Band's "strict separation-of-powers Constitution," Band Br. at 5, it was the Tribal Council's role to set these limits on the authority of the Tribe as a sovereign. The Tribal Council "exercise[s] the inherent powers of the Little River Band by establishing laws through the enactment of ordinances," which "govern the conduct of members of the Little River Band and other persons within its jurisdiction." RE1-6, PID52 (Constitution of the Little River Band of Ottawa Indians ("Tribal Const."), art. IV, § 7(a)). Unlike other Band ordinances which "provide procedures for criminal cases in the Tribal Court," Criminal Procedures Ordinance, # 03-300-03, § 1.01, at RE12, PID779, or "establish the purposes, powers, and duties of the Tribal Courts," Tribal Court Ordinance, # 97-300-01,

[6] *E.g.*, criminal codes whose provisions "apply to all members of the Tribe and all Indian residents of the jurisdiction of the Tribe *where ever such violation may occur*, if such violation has any actual or intended effect upon the political integrity or political or economic security of the Tribe." *See*, *e.g.*, Band Br., App'x C at 1 (Absentee Shawnee Crim. Code, § 2, ch. 4), 6 (Pawnee Tribe of OK Law and Order Code, tit. VI, § 2), 7 (Sac and Fox Nation Tribal Crim. Code, tit. 10, § 2); NCAI Br., App'x at 3a (Cheyenne and Arapaho Tribes Law & Order Crim. Code, subpt. D, § 2(a)), 8a (Oglala Sioux Tribe Crim. Code § 2(a)) (all emphases added); *see also* § 203 of Navajo Nation Law and Order Code (Nation's courts "shall have jurisdiction over . . . any member of the . . . Nation who commits an offense against any other member of the . . . Nation *wherever the conduct which constitutes the offense occurs*.") Band Br., App'x C at 6 (emphasis added).

§ 1.01, at RE12, PID774, the Criminal Offenses Ordinance defines criminal conduct and speaks directly and explicitly to jurisdiction and resulting authority to prosecute and punish criminal conduct occurring outside of Indian Country. The Criminal Offenses Ordinance, including § 4.03, thus expresses the Tribal Council's determination, enacted into law after consultation with the other branches of tribal government, of the Band's authority (both when and where) over the conduct of its members. *See* RE1-18, PID142 (*People v. Champagne* Op.).[7]

When Mr. Kelsey's alleged sexual assault occurred outside of Indian Country, § 4.03 plainly excluded that offense from the specified list of extraterritorial offenses over which the Band chose to assert criminal jurisdiction.[8] The Magistrate Judge so

[7] *See also* RE16, PID318 (Pet'r's Habeas Reply Br.) (meeting minutes when Law and Order Code was passed show that "after two work sessions with [a prosecutor], the . . . Council recommend[ed] this ordinance for approval . . . "; and a member stated "that in previous meetings between Council, the Tribal Court, and the Tribal Prosecutor," suggestions were made to update and amend the Ordinance, and "there were certain actions and criminal offenses that were not covered").

[8] Basic rules of statutory construction, applied in Michigan courts and which the Tribe has incorporated by reference in Tribal Court Ordinance § 8.02, *see* RE12, PID776, support this conclusion. Section 4.03 is the only provision to specifically address which offenses are subject to extraterritorial criminal jurisdiction, and where a law "contains a general provision and a specific provision, the specific provision controls." *Gebhardt v. O'Rourke*, 510 N.W.2d 900, 903 (Mich. 1994). Under the maxim *expressio unius est exclusio alterius*, moreover, "the expression of one thing is the exclusion of another." *Miller v. Allstate Ins. Co.*, 751 N.W.2d 463, 469 (Mich. 2008) (quoting *Miller v. Chapman Contracting*, 730 N.W.2d 462, 465 n. 1 (Mich. 2007)). The Tribal Council's specification of only nine offenses over which

recognized. RE35, PID531-32 (Report). He also concluded that none of the other tribal law provisions put Mr. Kelsey "legally on notice that the [T]ribe considered him to be subject to the criminal jurisdiction of the [T]ribe when he was on the grounds of the Community Center." *Id.* at 532. To the contrary, he was plainly on notice that jurisdiction for this crime did not exist on the grounds of the Community Center.

B. The Tribal Court of Appeals' Ruling Confirms That § 4.03 Foreclosed Tribal Jurisdiction Over Mr. Kelsey's Alleged Extraterritorial Offense.

The Tribal Court of Appeals' own analysis confirms that § 4.03 posed a binding limitation on the exercise of criminal jurisdiction over Mr. Kelsey's alleged offense, one that had to be invalidated before Mr. Kelsey's conviction could be affirmed. That body "was only able to provide a uniform definition of the Tribe's jurisdiction which could be made applicable to [Mr. Kelsey's] prosecution after the conviction occurred, and then only after it ruled that [§ 4.03] . . . was unconstitutionally narrow, and expanded it." RE35, PID532 (Report). Even assuming deference is due to the Band's construction of tribal law, *see* Band Br. at 15; U.S. Br. at 24; *but see* Kelsey Br. at 15, one thing is clear: as long as § 4.03 remained on the books as written, the Band could not assert criminal jurisdiction

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extraterritorial jurisdiction is allowed excludes all others, and that is what the law provided when the operative events occurred here.

over Mr. Kelsey's alleged offense.

From the outset, the Tribal Court of Appeals plainly wanted to subject Mr. Kelsey to criminal prosecution, finding it "clear . . . that the Tribe's standards of behavior **ought** to apply to the behavior of Tribal members and other Indians in the Tribal Community Center." RE1-4, PID39 (emphasis in original). The court also noted a constitutional command to extend jurisdiction to the outer limits of the Tribe's territory, defined under their constitution as including not only Indian Country, but also "all lands which are now or hereinafter owned by or reserved for the Tribe." *Id.* at 39-40 (citing Tribal Const., art. 1, § 1).

The Tribal Court of Appeals recognized, however, that the Band's constitutional charge to exercise "jurisdiction over its members and territory . . . to the fullest extent," was subject to three limitations: the Band's "Constitution, the sovereign powers of the Tribe, and federal law." *See id.* at 40 (quoting Tribal Const., art. I, § 2); *see also* RE1-18, PID141 (*Champagne* Op.) ("The Constitution provides that the Band must exercise jurisdiction over the Band's territory, subject to three limitations.").

Assessing these potential limitations, the Tribal Court of Appeals first held that federal law imposed no "limitation over the exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe." RE1-4, PID38. It likewise concluded that the Band's Constitution posed no barrier. *Id.*

at 40. It was only when considering ordinances enacted by the Tribal Council "that apply to the instant matter" to determine "whether the Tribe itself had imposed a limitation on the exercise of its inherent authority," *id.* at 39-40, that the court hit a roadblock—namely, § 4.03.

The court's analysis was succinct. It first recited the elements of § 4.03(a) that confine the Band's criminal jurisdiction to Indian Country, but did not mention the nine excepted extraterritorial offenses set forth in § 4.03(b). *Id.* at 40. It then quoted § 8.08 of the Criminal Procedures Ordinance, which provides that the "Tribal court shall have jurisdiction over any action by any Indian as defined by this Ordinance, that is made a criminal offense under applicable Tribal Code and that occurred within the territorial jurisdiction of the Tribe as defined in the Constitution." *Id.* at 41. It then concluded that the "Tribal Council is obligated by the Tribal Constitution, as this Court is, to assert jurisdiction over the Tribe's territory." *Id.*

But before the Tribal Court of Appeals could so assert jurisdiction, it had to remove § 4.03, an "obstacle of the Tribe's own making." RE35, PID523 (Report). Indeed, in *People v. Champagne*, the Tribal Court of Appeals itself recognized § 4.03 as a binding limitation on the "sovereign powers of the Band to prosecute the criminal code." RE1-18, PID142. To uphold Mr. Kelsey's conviction, therefore, the Tribal Court of Appeals first had to declare § 4.03 "unconstitutionally narrow in

that it does not provide for the exercise of the inherent criminal jurisdiction over all tribal lands." RE1-4, PID41.

Such power to invalidate a law on constitutional grounds as unduly narrow seemingly has no parallel in the federal system, where the United States Constitution delineates and thereby limits the powers of the federal government, rather than dictating that such powers must be exercised to their "fullest extent." *See Marbury v. Madison*, 5 U.S. 137, 176 (1803) (the United States Constitution "establish[es] certain limits not to be transcended" by the political branches).[9] Yet the Band's interpretation of its own Constitution can be respected without foreclosing habeas relief to Mr. Kelsey. Whatever its sovereign authority to assert jurisdiction, the Band is constrained to exercise such authority without violating the due process rights of its members.

Critically, for due process purposes, it is only *after* the Tribal Court of Appeals struck down a narrow and precise law defining which crimes the Band could prosecute beyond the reservation, that it was able to uphold Mr. Kelsey's conviction for sexual assault that took place outside of Indian Country. *See* RE1-4, PID40-41.

[9] The Magistrate Judge so recognized, noting at the oral argument that "[w]ell, normally when we think of things as being unconstitutional, we think of them as exceeding what the Constitution permits. But here the opinion seems to read that the Law and Order Ordinance passed by the council is unconstitutional because it didn't do enough. It didn't exert powers that it otherwise could have." RE45, PID636-37.

Akin to a legislative repeal, the Court invalidated § 4.03, and did so by "judicial fiat after the fact." RE35, PID 532 (Report). Although the Band argues that "it was not unexpected that the Court would harmonize" different tribal law provisions, Band Br. at 61, this is not a case where two different legislative provisions were "reconciled." Rather, the Court jettisoned completely § 4.03, recognizing that it posed an otherwise insurmountable obstacle to criminal prosecution of Mr. Kelsey for sexual assault outside of Indian Country.

If in fact the Tribal Court of Appeals has such extraordinary authority to void and rewrite statutes to extend the Band's prosecutorial authority as broadly as possible, it can only exercise that power giving full accord to *ex post facto* and due process protections enshrined not only in the Indian Civil Rights Act, 25 U.S.C. § 1302, but also in the Band's Constitution, RE1-6, PID49 (Tribal Const., art. III, § 1(h)). Such protections ensure that the Band's members, and others the Band seeks to punish, receive fair notice of the reach of the Band's capacity to criminalize and punish conduct and they fully apply here. Notice was provided in the now-voided § 4.03, and the statutes listed in the appendices to the briefs of Appellant and NCAI. Notice was not provided, however, when the Tribal Court of Appeals invalidated § 4.03 to affirm Mr. Kelsey's conviction. That failure to give notice was the type of arbitrary exercise of sovereign power that due progress guards against.

II. DUE PROCESS PROHIBITS RETROACTIVE EXPANSION OF CRIMINAL JURISDICTION.

There is no dispute that the Indian Civil Rights Act requires due process and prevents the enactment of *ex post facto* laws. *See* 25 U.S.C. §§ 1302(a) (8)-(9). Enacted to protect Indians from "arbitrary and unjust actions of tribal governments," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967)), the Indian Civil Rights Act incorporates most of the protections of the Bill of Rights. *See* 25 U.S.C. § 1302. Section 1303 provides for federal habeas review, entitling defendants like Mr. Kelsey to review of their convictions and sentences by an Article III court for constitutional violations under settled constitutional norms. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 890 (2d Cir. 1996) (courts "conduct the same inquiry under [25 U.S.C.] § 1303 as required by other habeas statutes"); *see also* Kelsey Br. at 15.

Application of these norms readily establishes that Mr. Kelsey was deprived of due process by the Tribal Court of Appeals' retroactive expansion of the Band's criminal jurisdiction to cover conduct that was not within its purview before Mr. Kelsey's conviction. By repudiating the Band's self-imposed limits on the exercise of its criminal jurisdiction to affirm Mr. Kelsey's conviction, the court acted in derogation of well-established due process rights that it was obliged to respect. Mr. Kelsey was denied due process because the court's actions subjected him to

increased punishment after his conduct occurred and deprived him of an affirmative jurisdictional defense.[10]

A. Where the Legislature Cannot Enact An *Ex Post Facto* Law, Courts Cannot Rewrite Or Void A Statute To Have the Same Effect.

"The 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." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (internal citations omitted). *Ex post facto* laws are "contrary to the first principles of the social compact," *The Federalist* No. 44 (James Madison), and are "among the favorite and most formidable instruments of tyranny." *The Federalist* No. 84 (Alexander Hamilton). The fundamental unfairness of an *ex post facto* violation is no less present when it is the product of a judge giving retroactive effect to the criminal law than when it derives from legislative action. So while the *ex post facto* clauses themselves apply only to the federal and state legislatures, due process protects against the same evils being visited by judicial interpretation. *See Bouie*, 378 U.S. at 353-54.

Accordingly, judges cannot retroactively expand "narrow and precise" criminal statutory language. *See Bouie*, 378 U.S. at 352. Clear statutes duly enacted

[10] As discussed *infra*, at Part II.C, due process and *ex post facto* rights are implicated even by jurisdictional provisions that affect a criminal defendant's substantive rights, as Mr. Kelsey's were here, when a retroactive change in jurisdiction exposed him to increased punishment and deprived him of a defense.

by the legislature serve the critical function of providing fair notice to those who are subject to punishment, as "[t]he underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 350-51 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). And citizens rely on the language of statutes to structure their conduct, lest the legality of their actions become "a *post hoc* guessing game." *See Hydro Resources, Inc. v. United States EPA*, 608 F.3d 1131, 1161 (10th Cir. 2010).

Bouie illustrates the dangers of courts retroactively expanding criminal law. There, civil rights demonstrators were deprived of due process when the South Carolina Supreme Court retroactively expanded a narrow criminal statute. *Bouie*, 378 U.S. at 350. When demonstrators conducting a sit-in at a drugstore refused to leave, they were arrested and convicted under a state trespass statute prohibiting "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry . . . ." *Id.* at 348-49. The South Carolina Supreme Court construed this statute—that by its terms covered only the act of entry—to also include the act of remaining on the premises after receiving notice to leave. *Id.* at 350. That construction, the United States Supreme Court held, deprived the demonstrators of due process because it operated precisely like an *ex post facto* law to criminalize conduct that was not deemed criminal by the legislature at the time it occurred. *See id.* at 353. If the state legislature could not retroactively prohibit the demonstrators'

conduct, neither could the state supreme court by judicial construction. *Id.* at 353-54. Such unforeseeable judicial expansions of the criminal law deprive defendants of due process. *Id.* at 362.[11]

The Tribal Court of Appeals here committed the same type of error, though far more extreme. It expanded the reach of the Band's criminal jurisdiction, retroactively authorizing the Band's prosecution of sexual assaults committed outside of Indian Country, notwithstanding narrow and precise statutory language to the contrary. The result was to declare Mr. Kelsey's conduct a criminal offense against the Band, even though his conduct was not subject to tribal punishment at the time it occurred, thereby depriving Mr. Kelsey of due process.

B. Voiding A Narrow and Precise Statute Is Not Common Law Decision-Making.

Appellant's reliance on common law cases to defang the due process inquiry is unavailing. Band Br. at 56-61 (arguing that fair notice principles of due process were not violated because tribal court's harmonization of tribal law was not unforeseeable). Jettisoning a narrow and precise statute by "judicial fiat after the fact," RE35, PID532 (Report), is a far more aggressive act than "judicial alteration

[11] Appellant's argument (Br. at 60) that subjective notice is required is simply wrong. "The determination whether a criminal statute provides fair warning . . . must be made on the basis of the statute itself . . . 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.

of a common law doctrine of criminal law," U.S. Br. at 29 n.10 (quoting *Metrish v. Lancaster*, 133 S. Ct. 1781, 1788 (2013)).

The court's role in determining the force of statutory language therefore distinguishes this case (and *Bouie*) from cases relied upon by Appellant where a court is tasked with shaping an ever-evolving common law. In *Rogers v. Tennessee*, for example, there was no *ex post facto* violation when the Tennessee Supreme Court retroactively applied a decision abolishing the common law "year-and-a-day" rule, 532 U.S. 451, 455-56 (2001)—a rule that was "widely viewed as an outdated relic of the common law," *id.* at 462, and had "never once served as a ground of decision" in Tennessee—to affirm a murder conviction for conduct that occurred before the rule was abolished, *id.* at 464.

Although the court's decision deprived Rogers of a defense, the United States Supreme Court declined to rigidly apply *ex post facto* prohibitions to such common law judicial decision-making, so as not to unduly constrain judges who must regularly confront and resolve ambiguity in the law. *Id.* at 461; *accord Metrish*, 133 S. Ct. at 1791 (no due process violation occurred when the Michigan Supreme Court considered, as a question of first impression, the viability of a common law defense and retroactively abolished it).

Underpinning the ruling in *Rogers* was an understanding that judges undoubtedly need flexibility when they are tasked "not [with] the interpretation of a

statute but an act of common law judging," so as to resolve uncertainties without "unacceptable restraint[s]." *Rogers*, 532 U.S. at 461. But where, as here, the task is enforcing (or not) precise statutory language that by its very terms places the citizenry on notice of the limited scope of sovereign authority, and which has been judicially recognized as a binding limitation, courts have no such flexibility.

Moreover, the Tribal Court of Appeals acted at the nadir of its power to retroactively expand the law when it *voided* a clear statute. A primary purpose of the *ex post facto* prohibition is to allow citizens to rely on statutes until they are explicitly changed. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). Citizens are wholly unable to rely on criminal statutes if their clear language could simply be voided based on a judicial view that the statutes were unduly lenient, and the results applied retroactively. In such a situation, the court is acting legislatively, rather than judicially and it is doing so unlawfully in any system that recognizes the right to due process. *See United States v. Salisbury*, 983 F.2d 1369, 1380 (6th Cir. 1993) (declining "to become legislators by attempting to retroactively expand" categories of conduct proscribed by statute).

Here, the Tribal Court of Appeals undeniably acted legislatively by rewriting statutory law to repeal statutory language circumscribing the Band's announced authority to prosecute and punish criminal conduct that was, in its view, "unconstitutionally narrow." RE1-4, PID41. Wielding a power foreign to an Article

III judge, the Tribal Court of Appeals effectively repealed a criminal statute because it did not cover conduct the court thought "ought" to be covered. RE1-4, PID39. Whether viewed as a legislative or judicial act, the tribal court violated the *ex post facto* or due process restrictions to which the Tribe is bound. *See* RE1-6, PID 49 (Tribal Const., art. III, § 1(h), (i)).

C. Retroactively Expanding the Band's Criminal Jurisdiction Deprived Mr. Kelsey of Due Process by Retroactively Subjecting Him to Increased Punishment and Depriving Him of A Defense.

Retroactively expanding the Band's criminal jurisdiction implicates two categories of *ex post facto* laws. *See Calder v. Bull*, 3 U.S. 386, 390 (1798) (detailing four types of laws prohibited by the *Ex Post Facto* clause).[12] First, Mr. Kelsey was subjected to a retroactive increase in punishment, *id.*, because at the time of the conduct, the Band had no authority to punish him. Allowing the Band to exercise criminal jurisdiction after the fact increased the potential quantum of punishment for his actions. Relatedly, Mr. Kelsey was denied the affirmative defense that the Band lacked jurisdiction to prosecute him, implicating a second *Calder* category. *Id.* These two sides of the same expanding-criminal-jurisdiction coin deprived Mr. Kelsey of due process.

[12] The *Calder* categories of *ex post facto* laws are: (1) laws that criminalize and punish actions done before the passing of the law; (2) laws that aggravate crimes beyond what they were when committed; (3) laws that inflict greater punishment than was attached to the crime when committed; and (4) laws that alter the legal rules of evidence to lessen the burden of prosecution.

When any sovereign, including an Indian tribe, retroactively exercises criminal jurisdiction, the dual sovereignty principle subjects the defendant to increased punishment for his actions. *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 948 (9th Cir. 1998), *overruled on other grounds*, *United States v. Enas*, 255 F.3d 662, 675 n.8 (9th Cir. 2001) (preserving *Means*' *ex post facto* holding that retroactively expanding tribal jurisdiction impermissibly subjects defendants to increased punishment and deprives them of a defense). Because Indian tribes operate as independent sovereigns, double jeopardy protections do not guard against punishment by the tribe and a separate sovereign (i.e. a state) for the same action. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that double jeopardy did not bar federal prosecution for assault after Indian tribe's prosecution and punishment for the same action).

Thus, with no double jeopardy protection in play, punishment is always increased when a sovereign retroactively expands criminal jurisdiction, either from no punishment to some punishment, or from some punishment to more punishment. But although double jeopardy protections might not exist, due process protections remain as a limitation on sovereign authority. Indeed, the heightened exposure to punishment from multiple sovereigns makes due process protections all the more important and prohibits judicial constructions of jurisdictional statutes that *retroactively* increase punishment.

1. Retroactively Expanding Criminal Jurisdiction Manifestly Violates Due Process.

Perhaps unsurprisingly, retroactive expansions of criminal jurisdiction are rare, because the risk of increased punishment is an obvious and fundamental *ex post facto* or due process violation.

Thus, in *Means*, the Ninth Circuit found a due process violation after a tribal court applied the Indian Civil Rights Act retroactively to reach criminal conduct by a non-member Indian. *Means*, 154 F.3d at 943. Before the 1990 amendments to the Indian Civil Rights Act, tribal courts lacked jurisdiction to prosecute non-member Indians. *Id.* at 945. Because Means' crimes occurred before the 1990 amendments, the tribal court's exercise of jurisdiction violated the *ex post facto* prohibition because it both subjected Means to increased punishment as a result of dual sovereignty and deprived him of an affirmative defense (that the tribal court lacked jurisdiction). *Id.* at 948.

Similarly in *Helton*, the New Jersey Supreme Court reinterpreted the statute governing juvenile court jurisdiction to permit the juvenile court to waive jurisdiction, after a sixteen-year-old defendant was charged as a juvenile per the statute's terms. *Helton v. Fauver*, 930 F.2d 1040, 1044 (3d Cir. 1991). Consequently, the defendant was convicted in superior court and faced more severe punishment than he would have if tried in juvenile court. *Id.* at 1052. The defendant was also deprived of a defense that the superior court lacked jurisdiction to convict

him. *Id.* at 1048. Because of the increased punishment and deprivation of a defense, the New Jersey Supreme Court's reinterpretation of the juvenile court jurisdiction statute violated due process. *Id.*

People v. Morante, too, confirms that criminal jurisdiction cannot be expanded retroactively without violating due process. 20 Cal. 4th 403, 432 (1999). There, the California Supreme Court abandoned its previous interpretations of the criminal conspiracy statute, eliminating an existing requirement that defendants must attempt to commit the object offense in California. *Id.* at 409. This preexisting geographical constraint had deprived the state of jurisdiction to prosecute defendants like Morante, whose attempt-related conduct was not within California. *Id.* at 431. Tellingly, the California Supreme Court declined to apply its decision retroactively because to do so would deprive the defendants of due process by increasing the punishment attached to their actions and depriving them of a lack of jurisdiction defense. *Id.* at 432.

This case presents the same problems as *Means*, *Helton*, and *Morante*. By retroactively exercising jurisdiction over Mr. Kelsey, the Tribal Court of Appeals increased his potential punishment after the fact and violated due process. *See Bouie*, 378 U.S. at 362; *Means*, 154 F.3d at 948; *Helton*, 930 F.2d at 1052; *Morante*, 20 Cal. 4th at 432. Due process was also violated because Mr. Kelsey was deprived of a defense. If the court had enforced the limitations on its jurisdiction set forth in

§ 4.03, instead of voiding the provision "by judicial fiat after the fact," RE35, PID532 (Report), lack of jurisdiction would have provided a complete defense to Mr. Kelsey's prosecution. *See Bouie*, 378 U.S. at 362; *Means*, 154 F.3d at 948; *Helton*, 930 F.2d at 1048.

2. Due Process Follows Substantive Rights, Not Jurisdictional Labels.

The Band is thus incorrect in its assertion that no due process concerns are presented simply because the Tribal Court of Appeals' decision was jurisdictional and left unchanged the elements of the underlying crime. *See* Band Br. at 54-56. Contrary to Appellant's assertion, this "jurisdictional decision" very much *did* "'attach[] criminal penalties to what previously had been innocent conduct,'" *id.* at 56 (quoting *Rogers*, 532 U.S. at 459), by voiding the Band's own statute meant to provide "fair warning" of what conduct was deemed criminal and where. *See supra*, Part I.

That Mr. Kelsey's substantive rights were affected through a jurisdictional change arguably makes the due process violation stronger. Clear, bright-line rules are always essential with respect to jurisdiction, and even in the civil context, due process requires jurisdictional rules that "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Such notice concerns are heightened with criminal jurisdiction, as the Tenth Circuit stressed in *Hydro Resources*. There, the court declined to retroactively expand the reach of the federal criminal jurisdiction statute at issue, 18 U.S.C. § 1151 (2012), because doing so would violate the basic due process principle that criminal statutes must clearly proscribe punishable conduct. *Hydro Resources*, 608 F.3d at 1160. If courts could retroactively interpret statutory language to reach conduct that was not punishable when committed, people would be left to guess whether their actions would subject them to sanction. "Such extra-statutory guesswork is hardly the stuff on which criminal determinations should turn." *Id.* at 1161-62.

Critically, "it is the effect, not the form, of the law that determines whether it is *ex post facto*." *Weaver*, 450 U.S. at 31. The inquiry thus turns on whether the challenged action has increased the punishment to which a criminal defendant is subject or deprived him of a defense. *See id.*; *Calder*, 3 U.S. at 390. Here, the Tribal Court of Appeals' expansion of criminal jurisdiction violates due process on both counts.

To be sure, "no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" *Weaver*, 450 U.S. at 29 n.12 (quoting *Hopt v. Utah*, 110 U.S. 574, 590 (1884)); *accord Beazell v. Ohio*, 269

U.S. 167, 171 (1925) (holding that retroactive application of a statute providing for joint trials did not implicate substantive rights and therefore did not violate the *ex post facto* prohibition). Thus, if a retroactive change to criminal jurisdiction served only to switch the tribunal that heard the case, no due process or *ex post facto* concerns would arise. *See Al Bahlul v. United States*, 767 F.3d 1, 19 (D.C. Cir. 2014) (finding no *ex post facto* violation where criminal jurisdiction was transferred from an Article III court to a military commission because the transfer did not affect the crime's definition, any defenses, or the punishment).

But where substantive rights are implicated such that a defendant's liability is increased through an increase in potential punishment or loss of an affirmative defense, *see Calder*, 3 U.S. at 390, *ex post facto* protections are triggered, even by jurisdictional changes. As the cases discussed above illustrate, retroactively expanding criminal jurisdiction statutes, although leaving untouched the elements of the offenses, will nearly always implicate substantive rights. *See Means*, 154 F.3d at 948; *Helton*, 930 F.2d at 1052; *People v. Morante*, 20 Cal. 4th at 432.

Weaver provides another example where an *ex post facto* violation occurred even though the elements of the underlying offense remained unchanged. 450 U.S. at 33-34. There, Florida altered the statutory formula for calculating "good time credits," making it harder for prisoners to earn this reduction of prison time for good behavior. *Id.* at 26. Retroactive application of this change amounted to an

unconstitutional *ex post facto* law because, although leaving unchanged the statutory definition of the conduct of the underlying crime, it lengthened the period that a prisoner would spend in prison, thereby increasing his punishment. *Id.* at 33.

Adhikari v. Daoud & Partners, 994 F. Supp. 2d 831 (S.D. Tex. 2014) is also instructive. There, a court declined to retroactively apply amendments to the Trafficking Victims Protection Reauthorization Act (TVPRA), 18 U.S.C.A. § 1596 (2014), that authorized expanded extraterritorial jurisdiction, because applying this jurisdictional change retroactively would have expanded the defendants' liability for past conduct. *Adhikari*, 994 F. Supp. 2d at 839. The court readily concluded that the jurisdictional amendment was substantive because it *created*, rather than transferred jurisdiction. *Id.* at 838. Because this post-hoc creation of jurisdiction implicated the substantive rights–liability–of the defendants, the court declined to retroactively apply the amendments, so as to avoid an impermissible *ex post facto* violation. *Id.* at 839.

The Tribal Court of Appeals, too, *created* jurisdiction by exercising legislative authority to repeal the jurisdictional limitation contained in § 4.03. In so doing, the Band infringed upon Mr. Kelsey's substantive rights, making him criminally liable for his actions only after they occurred. The Tribal Court of Appeals' decision therefore violated due process even though it did not change the underlying elements of the crime.

* * *

Ultimately, whether an Indian tribe can prospectively exercise criminal jurisdiction over a member Indian on land owned by the tribe in fee simple is an extremely complicated question of first impression, the resolution of which here appears to turn upon a theory advanced by the appellant that was not relied on by the sovereign tribal court. Whatever the limits of the Band's criminal jurisdiction, however, it plainly may not be expanded retroactively. Deep-rooted due process values prevent courts, including tribal courts, from rewriting criminal laws post-conviction to allow punishment for conduct that the sovereign declined jurisdiction over at the time it occurred.

CONCLUSION

For the forgoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(c)-(d) and 32(a)(7)(B)(i). This brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count including footnotes and headings is 6,866.

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CERTIFICATE OF SERVICE

It is hereby certified that on January 29, 2015, the foregoing brief was electronically filed with the Clerk of the Court using the ECF system. Counsel for the appellants and appellees are registered ECF users and will be served by the ECF system.

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