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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2021AP1378-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS LYLE HOUSE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. WALSH, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF- RESPONDENT

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ISSUE PRESENTED

Was House, a proclaimed registered member of the Oneida Nation, properly convicted in state court for committing second-degree sexual assault on Oneida land, when federal law gives the State of Wisconsin "jurisdiction over offenses committed by or against Indians in the areas of Indian country"? 18 U.S.C. § 1162(a).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not warranted. The issue should be decided on the basis of controlling precedent, and no reason appears for questioning or qualifying this precedent. Wis. Stat. § 809.23(1)(b)3.

STATEMENT OF THE CASE

CSM, who was sixteen at the time, went with her friend[1] to her friend's grandfather's (House's) residence. (R. 66:81–83.) Several other juveniles were at the residence. (R. 66:83–84.) When CSM and her friend arrived, House left to get a bottle of alcohol, came back, poured shots, and asked everyone there to take several shots.[2] (R. 66:85, 109.) CSM drank one shot, drank half of a second, and told House she did not want any more. (R. 66:86.) The group then went to a park, returned, and continued drinking. (R. 66:87–88.)

[1] CSM's friend is also her half-sister. (R. 66:75, 79–80.)

[2] One trial witness testified that the juveniles found the bottle of alcohol "in the trash," that someone else rather than House poured shots and facilitated the drinking game, and further testified that House was not present when the juveniles were drinking. (R. 66:120–21, 124, 133.)

Later that night, CSM fell asleep in the living room. (R. 66:89.) CSM said she woke up to House holding her hands and leading her somewhere. (R. 66:91.) CSM was not fully awake at the time. (R. 66:91.) She woke up laying on House's bed and found House touching her breast and kissing her arm. (R. 66:91–92.) House was touching her over her clothing. (R. 66:69, 98.) CSM said House was trying to touch "down there" but was unsuccessful. (R. 66:93.) CSM jumped up, found the light, and ran out of the room. (R. 66:93–94.) She told her friend what happened, and they went into a room and locked the door. (R. 66:95.) CSM felt "[s]ad, angry, [and] emotional" as she told her friend what happened. (R. 66:95.) CSM could hear House walking back and forth and telling her friend not to believe her, that she was dreaming and hallucinating. (R. 66:96.) CSM and her friend left the residence when they perceived that House had gone to his room or stopped guarding the door. (R. 66:96.) CSM told her dad what happened, and her dad called the police. (R. 66:97–98.)

The State charged House with second degree sexual assault of an unconscious victim, repeater. (R. 1:1; 15.) He pleaded not guilty. (R. 24:1.) A trial was held, in which the jury found House guilty as charged in the information. (R. 50; 66:182.)

House filed a postconviction motion, asking the court to vacate his conviction because the State of Wisconsin lacked jurisdiction to prosecute and convict him in state court. (R. 98.) House claimed that the federal statute granting Wisconsin jurisdiction over crimes committed by or against Indians in Indian country was not constitutionally enacted.

(R. 98:8.) The circuit court denied the motion. (R. 100.)[3] This appeal followed.

STANDARD OF REVIEW

House challenges the constitutionality of one or more federal statutes and the state's jurisdiction over his criminal law case. The issue in this case concerns questions of law, which this Court reviews de novo. *State ex rel. Myers v. Swenson*, 2004 WI App 224, ¶ 6, 277 Wis. 2d 749, 691 N.W.2d 357. This Court "will uphold the constitutionality of a statute unless the party challenging it demonstrates its unconstitutionality beyond a reasonable doubt." *Id.*

ARGUMENT

House was properly prosecuted and convicted for second degree sexual assault. Federal law gives the State of Wisconsin jurisdiction over offenses committed by or against Indians in the areas of Indian country. 18 U.S.C. § 1162(a) (hereafter, Public Law 280). The crime took place on Oneida land. House claims he and the victim are registered members of the Oneida Nation. He was properly prosecuted and convicted in Wisconsin state court.

On appeal, House does not dispute that he committed the crime. Nor does he dispute that federal law gives Wisconsin jurisdiction over the crime. House's sole argument is that Congress lacked authority to delegate criminal law jurisdiction to the states. But the United States Supreme Court has never struck Public Law 280 down, and lower courts in other jurisdictions have consistently upheld its constitutionality. House's arguments therefore lack merit. The circuit court's order should be affirmed.

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[3] The circuit court's postconviction decision is included in a supplemental appendix filed with the State's brief.

A. House was properly prosecuted and convicted for second degree sexual assault on Oneida land.

1. Public Law 280 provides Wisconsin with criminal jurisdiction over offenses committed by or against Indians within Indian country.

In general, a person is subject to prosecution and punishment under Wisconsin law if the person commits a crime in Wisconsin. Wis. Stat. § 939.03(1)(a); *State v. Anderson*, 2005 WI 54, ¶ 28, 280 Wis. 2d 104, 695 N.W.2d 731.

However, "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *In re Commitment of Burgess*, 2003 WI 71, ¶ 12, 262 Wis. 2d 354, 665 N.W.2d 124 (quoting *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170–71 (1973)). Congress did exactly that with the passage of Public Law 280 in 1953. *Id.*

Public Law 280 "expressly" grants certain states, including Wisconsin, "jurisdiction over criminal offenses and certain civil causes of action arising in 'Indian country.'"[4] *Id.* The relevant statute provides:

> Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country … to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or

[4] "Indian Country" includes "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 18 U.S.C. § 1151 (.

> Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

18 U.S.C. § 1162(a). The State of Wisconsin is listed in the table and has criminal jurisdiction over "[a]ll Indian country within the State." *Id.* The grant of criminal jurisdiction "broadly covers criminal offenses committed by or against Indians within Indian country." *In re Commitment of Burgess*, 262 Wis. 2d 354, ¶ 12. Since Wisconsin is a mandatory Public Law 280 state, all Indian country in Wisconsin is subject to Public Law 280, "except for the Menominee Tribe, which is specifically exempt." *Id.* & n.3.

2. House was properly prosecuted and convicted in Wisconsin court for second degree sexual assault on the Oneida reservation.

House sexually assaulted a young woman in the Village of Hobart, Wisconsin. (R. 15; 50.) Given the location of the assault, (R. 1:1; 66:59), as well as public mapping, this Court may take judicial notice that the crime appears to have taken place on the Oneida Reservation.[5] Wis. Stat. § 902.01(2)(b). In apparent support of his claim that he and the victim are "Indians" under the federal statute, House claims that both he and the victim are registered members of the Oneida Nation. (R. 98:8; House Br. 10.) He cites no evidence in the record or publicly available documents to support that contention.

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[5] *See* https://oneida-nsn.gov/business/development-division/geographic-land-information-systems/#GIS-Maps; *see also* https://www.google.com/maps/place/Oneida+(WI)+Reservation,+WI/@44.488656,-88.2794862,12z/data=!3m1!4b1!4m5!3m4!1s0x880256f875fa269d:0xaad778d68a69c3ff!8m2!3d44.4913114!4d-88.1971966

If neither he nor the victim qualify as Indians, then Public Law 280 would not apply, and the State of Wisconsin has jurisdiction over the crime, just as it does over any other crime committed in the state.[6] Assuming, *arguendo* that either House or the victim are Indian and the crime took place on the reservation, then Public Law 280 indisputably gives the State of Wisconsin jurisdiction over the crime. Either way, House was properly convicted in Wisconsin state court for the crime.[7]

B. House's constitutional challenge lacks merit.

On appeal, House does not dispute that he committed the crime. Nor does he dispute that the Public Law 280 gives Wisconsin jurisdiction over the crime. Instead, House argues that Public Law 280 is unconstitutional because Congress lacked authority to regulate criminal jurisdiction over the tribes and delegate that jurisdiction to the states. (House Br. 22.) But the United States Supreme Court has held otherwise, and lower courts in other jurisdictions have consistently

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[6] Likewise, unless he or the victim are Indians, House cannot demonstrate he was injured by Public Law 280, and he therefore lacks standing to challenge Public Law 280. *State v. Barbeau*, 2016 WI App 51, ¶ 24, 370 Wis. 2d 736, 883 N.W.2d 520 (defendant lacked standing to categorically challenge constitutionality of statute permitting life imprisonment with no extended supervision; defendant was not injured by statute, since he was not found ineligible for release to extended supervision).

[7] For the purpose of this brief, the State assumes that House and the victim are registered members of the Oneida Nation, therefore triggering Public Law 280. As explained in this brief, this Court should not hold that Public Law 280 is unconstitutional. But if this Court were inclined to nullify House's conviction on the theory that Public Law 280 is unconstitutional, the State requests this Court to order House to supplement the record with adequate documentation (1) confirming that the crime took place in Indian country, as defined under 18 U.S.C. § 1151, and (2) showing that either he or the victim are Indians under 18 U.S.C. § 1162(a).

upheld Public Law 280's constitutionality. House's arguments therefore lack merit.[8]

1. Courts have consistently affirmed Congress' authority to regulate Indian affairs, as well as Public Law 280's validity.

The United States Supreme Court has affirmed Congress's power to regulate Indian affairs, and such regulation extends to the delegation of criminal law jurisdiction to the states. In the numerous times the high court has examined Public Law 280, it has never struck the law down as unconstitutional. And courts in other jurisdictions have held that Congress had authority to enact Public Law 280.

The United States Supreme Court recognizes that, in the field of Indian affairs, Congress has plenary authority to legislate regarding health and safety within Indian country, including the area of criminal law. *United States v. Lara*, 541 U.S. 193, 200 (2004) ("the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive'").

[8] House claimed he was making a facial challenge to Public Law 280 in his postconviction motion, and the circuit court treated his motion as such. (R. 98:8; 100:1.) On appeal, he argues that he is challenging Public Law 280's constitutionality (as well as 25 U.S.C. § 71's constitutionality) as it applies to the Oneida Nation. (House Br. 14.) His arguments, however, suggest that he is trying to make both a facial and as-applied challenge to Public Law 280. Regardless of how the challenge is framed, it fails based on settled United States Supreme Court precedent, as explained in this brief.

"The Constitution both defines and limits national powers, and as interpreted by the Supreme Court, provides ample support for the national regulation of Indian affairs." Cohen's Handbook of Federal Indian Law § 5.01[1], at 383 (Nell Jessup Newton ed., 2019). Federal power to regulate Indian affairs comes from the text and structure of the United States Constitution. Cohen, § 5.01[1], at 383–84 (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)); *see also Lara*, 541 U.S. at 200.

While the existence of Congress' authority is not in doubt, the precise source of Congress's authority has been a matter of some historical debate. "The Indian commerce clause[9] and the treaty clause[10] are most often cited as the constitutional bases for legislation regarding Indian tribes." Cohen, § 5.01[1], at 384 (*citing, e.g., Lara*, 541 U.S. at 200; *McClanahan*, 411 U.S. at 172 n.7. The primary function of the Indian Commerce Clause "is to provide Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 200 (citation omitted). Such power is "broad," and is not limited strictly to regulating commerce. *Id*. In *Lara*, for example, the United States Supreme Court held that Congress had authority (deriving in part from the Indian Commerce Clause) to relax restrictions on tribes' power to prosecute members of other tribes. *Id*. at 200–02.

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[9] Article I, § 8, cl. 3 gives Congress power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

[10] Article II, § 2, cl. 2 provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

While the treaty power is a presidential power under Article II of the Constitution, "treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" *Lara*, 541 U.S. at 201 (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

As the Seventh Circuit Court of Appeals has observed, "'[c]ourts have attributed Congress's plenary powers over Indian relations to the Indian Commerce Clause, which grants Congress the power to 'regulate Commerce ... with the Indian Tribes.'" *United States v. Long*, 324 F.3d 475, 479 (7th Cir. 2003) (citing*, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)). Courts have also attributed Congress's plenary powers "to Congress's protectorate or trust relationship with the Indian tribes." *Id*. (*citing United States v. Kagama*, 118 U.S. 375, 383–84 (1886)). Other sources of Congress's power to regulate Indian affairs have been identified as well. *Id*.

Despite the variation in the precise source of authority, "it is clear that Indian tribes retain the powers of a sovereign nation in the limited realm of internal affairs, subject to Congress's power completely to divest the tribes of such sovereignty." *Id*. at 479–80 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987)). Public Law 280 is an example of Congress exercising its lawful authority to legislate in the field of Indian affairs.

Regarding Public Law 280 itself, the United States Supreme Court has analyzed the law without expressing concern that Congress lacked authority to enact it. The court describes Public Law 280's history and purpose as follows:

> Public Law 280 ... was enacted by Congress in 1953 in part to deal with the 'problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement' … The basic terms of [Public Law

> 280] … are well known. To five States it effected an immediate cession of criminal and civil jurisdiction over Indian country … [t]o the remaining States it gave an option to assume jurisdiction over criminal offenses and civil causes of action in Indian country without consulting with or securing the consent of the tribes that would be affected.

Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 471–74 (1979).

The Supreme Court has recognized Public Law 280's delegation of jurisdiction over criminal law matters without expressing disapproval. In *Bryan v. Itasca County*, the court held that Public Law 280 did not confer on the states any new taxing jurisdiction over Indian country. *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 390 (1976). The court contrasted the debated taxing jurisdiction with the statute's express grant of criminal jurisdiction to named states. *Id.* at 379–81. "[P]rovision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of [Public Law 280]." *Id.* at 380. The court has recognized Public Law 280 in other opinions without expressing concern over its constitutionality. *See, e.g., Cabazon Band of Mission Indians*, 480 U.S. at 207 ("In [Public Law 280], Congress expressly granted six States…jurisdiction over specified areas of Indian country within the States") (superseded by statute on other grounds).

That said, the Supreme Court has never squarely addressed whether Public Law 280 is constitutional. However, lower courts in other jurisdictions have repeatedly upheld the statute as a lawful delegation of Congress's authority. *See State v. Fanning*, 114 Idaho 646, 647, 759 P.2d 937 (Ct. App. 1988) (collecting cases). In *Fanning*, the criminal defendant argued that Congress's delegation was unlawful because "Congress could only have been acting

pursuant to the Commerce Clause of the United States Constitution, and she was not engaging in an act of commerce." *Id*. at 648.

Rejecting that argument, the *Fanning* court noted that the United States Supreme Court "has recognized Congress's authority to manage Indian affairs not only pursuant to the Commerce Clause, but also pursuant to the Treaty Clause and a variety of other provisions." *Id*. at 648 (citations omitted). The court reasoned that the federal-tribal relationship is premised on "broad, albeit not unlimited," plenary federal constitutional power over Indian affairs. *Id*. Further, "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Id*. (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)). In light of the "complex relationship between the federal government and the tribes," the court was not inclined to adopt the defendant's simplistic constitutional interpretation, especially when she had not provided any theory of constitutional law that would deny Congress the power to regulate the operation of motor vehicles by Indians while in Indian country, or to pass such regulatory power to the states. *Id*. at 648–49.

This Court should make the same conclusion that the *Fanning* court did, especially in light of guidance from the United States Supreme Court and the Seventh Circuit in this area. *Lara*, 541 U.S. at 200 ("the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"); *Long*, 324 F.3d at 479 ("Indian tribes retain the powers of a sovereign nation in the limited realm of internal affairs, subject to Congress's power completely to divest the tribes of such sovereignty"). Public Law 280 is a lawful expression of Congress's power to regulate Indian affairs. While there is an academic dispute over the precise source of authority underpinning Public Law 280,

there is ample authority to show that it is a valid exercise of constitutional authority. The law has been repeatedly examined and applied by both state and federal courts, including the Wisconsin Supreme Court, with no suggestion that it is invalid. *See In re Commitment of Burgess*, 262 Wis. 2d 354, ¶ 12. This Court should follow this long line of authority.

2. House's arguments ignore settled United States Supreme Court precedent.

House's primary argument appears to be that the Oneida Nation is a sovereign nation, and neither the United States Constitution nor any other source of law gives Congress authority to regulate its criminal affairs or delegate that authority to Wisconsin. His arguments are foreclosed by federal law and United States Supreme Court precedent, which binds this Court. Persuasive authority also shows that his arguments lack merit.

House argues that the Oneida Nation's sovereignty "predates Wisconsin's statehood," as well as the United States Constitution, the Articles of Confederation, and the Declaration of Independence. (House Br. 11.) Because the Oneida engaged in treaties with other nations, including the United States, "[t]hese treaties confirm [the Oneida's] sovereign status was never lost by treaty." (House Br. 15.) House summarizes a number of treaties without clear citation and argues that "[a]bsent from these treaties is any delegation of the Oneida's sovereign status." (House Br. 16.) He appears to contend that the Oneida Nation's sovereign status, as generally or implicitly expressed in these treaties, means that Congress lacks authority to regulate it. (House Br. 16.)

House is wrong, for two primary reasons. First, House relies only on general principles of tribal sovereignty, but this reliance is misplaced. In general, tribes at one time "may have had the status of independent nations," but they lost their full independence—a loss that was later ratified by treaties. *Long*, 324 F.3d at 479 (citing *Cherokee Nation*, 30 U.S. at 17). Indian tribes are now viewed as quasi-independent or domestic dependent nations within the United States. *Id*. They "retain the powers of a sovereign nation in the limited realm of internal affairs, subject to Congress's power completely to divest the tribes of such sovereignty." *Id*.

In 1871, Congress prohibited the further recognition of Indian tribes as independent nations by passing 25 U.S.C. § 71. That statute provides that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." 25 U.S.C. § 71.

House contends that "as applied to the sovereign Oneida Nation, 25 U.S.C. § 71 is unconstitutional, and as such, Public Law 280 must also be unconstitutional." (House Br. 14.) It is not clear why he believes 25 U.S.C. § 71 is unconstitutional, and Supreme Court precedent points the other direction. *See Lara*, 541 U.S. at 201 ("[w]e recognize that in 1871 Congress ended the practice of entering into treaties with the Indian tribes").

House cites *Worcester v. Georgia*, a United States Supreme Court case from 1832, to argue that at the time the Constitution was ratified, tribal nations were considered sovereign. (House Br. 20–21) (citing 31 U.S. 515, 559–61 (1832)). That case predates the enactment of 25 U.S.C. § 71 and modern Supreme Court cases affirming Congress's authority to regulate Indian criminal law affairs. Further, while *Worcester* recognized that tribal nations were sovereign before the Constitution was ratified, the court also recognized that, after the Constitution was in effect, Congress had power to legislate in the field of Indian affairs. *Worcester*, 31 U.S. at 559 ("[o]ur existing constitution … confers on congress the powers of war and peace; of making treaties, and of regulating commerce. . . *with the Indian tribes.* These powers comprehend all that is required for the regulation of our intercourse with the Indians"). Under *Worcester*, tribal sovereignty may have limited the power of the *states* to legislate in that field but did not similarly limit the legislative power of *Congress*. *Id.* at 558–61.[11] *Worcester* is unhelpful to House's argument.

House's reliance on general principles of tribal sovereignty misses the mark.

Second, Congress' plenary power includes the power to override Indians' treaty rights. *See South Dakota v. Bourland*, 508 U.S. 679, 687 (1993). Where a treaty expressly provides a tribe with a specific right, Congress must clearly express its intent to abrogate that right. *Id.* House cites no treaty language that shows Congress lacks authority to regulate the

[11] *See Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001) (recognizing the court's abandonment of *Worcester*'s view that state laws lack force on Indian reservations).

tribe in areas of health and safety via Public Law 280.[12] House instead relies only on general principles of tribal sovereignty purportedly recognized in the treaties he cites. He has not pointed to any provision in any Oneida treaty that Congress must specifically abrogate in order to make Public Law 280 applicable to the Oneida Nation. House's reliance on Oneida treaty language therefore fails.

House claims that the United States Constitution, by evidence of its plain text, does not grant Congress power to regulate tribes. (House Br. 17–18.) He argues that *United States v. Kagama* was wrongly decided because its reasoning was not grounded in the text of the Constitution. (House Br. 17–18.) But *Kagama* is United States Supreme Court precedent, which this Court is not at liberty to disregard. *State v. Webster*, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474 (1983) (state courts are bound by decisions of the United States Supreme Court interpreting federal law).

Even setting *Kagama* aside, more recent cases have held that the Indian commerce clause and the treaty clause, coupled with the supremacy of federal law, provide "ample support for the federal regulation of Indian affairs." Cohen, § 5.01[1], at 384. Such regulation is not restricted to commerce and has been interpreted to include criminal law matters. *Lara*, 541 U.S. at 200; s*ee also Fanning*, 114 Idaho at 649.

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[12] House points to the 1789 Treaty of Fort Harmar, which allegedly authorizes prosecution of Oneida members in state court for certain specific crimes, including murder and horse theft. (House Br. 22.) He cites no authority to explain why this language nullifies Congress's authority to regulate other criminal acts committed by or against Indians while in Indian country, or to delegate that authority to the states.

House also claims that historical events surrounding the adoption of the constitution show that Congress lacks authority to enact Public Law 280. (House Br. 19–20.) This argument ignores the United Supreme Court precedent discussed above, which forecloses his argument.

The Supreme Court has consistently affirmed that the power to regulate Indian affairs is plenary and derives from the structure and text of the Constitution. *Lara*, 541 U.S. at 200.[13] To adopt House's arguments would require this Court to undermine United States Supreme Court precedent, which it cannot do. *Webster*, 114 Wis. 2d at 426 n.4.

Federal law, as interpreted by the United States Supreme Court and other courts, gives Wisconsin jurisdiction over criminal acts committed by or against Indians in Indian Country. 18 U.S.C. § 1162(a). House's arguments to the contrary are without merit.

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The relationship between the federal government and the tribes is unique and complex, and the United States Supreme Court has consistently held that Congress has constitutional power to regulate Indian affairs. The Supreme Court has never held that Congress's delegation of power to the states in Public Law 280 is unconstitutional, and other courts have affirmed the statute's validity. House has provided no compelling reason to completely undermine federal law.

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[13] House notes that Justice Clarence Thomas has expressed some reservations regarding the constitutional analysis; but Thomas's discussion appears in concurrences and is not binding. *See Lara*, 541 U.S. 193 at 214–26 (Thomas, J. concurring); *United States v. Bryant*, 579 U.S. 140, 157–62 (2016) (Thomas, J. concurring)).

CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the circuit court's judgment of conviction and denial of postconviction relief.

Dated: January 18, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4356 words.

Electronically signed by:

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JENNIFER L. VANDERMEUSE
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of January 2022.

Electronically signed by:

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