IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0409

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER LEE CUNGTION, JR.,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR TAMA COUNTY
THE HONORABLE MITCHELL TURNER, DISTRICT JUDGE, &
THE HONORABLE FAE HOOVER GRINDLE, DISTRICT JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

AARON ROGERS
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
aaron.rogers@ag.iowa.gov

BRENT HEERAN
Tama County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Regulations/Statutes

State Rules/Statutes

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did Iowa's retrocession of its jurisdiction over crimes committed against Indians on the Meskwaki Settlement apply only prospectively and not abate pending cases?

Authorities

Duro v. Reina, 495 U.S. 676 (1990)
Hamdan v. Rumsfeld, 548 U.S. 557 (2006)
Landgraf v. USI Film Prods., 511 U.S. 244 (1994)
Lindh v. Murphy, 521 U.S. 320 (1997)
Negonsott v. Samuels, 507 U.S. 99 (1993)
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)
Sac & Fox Tribe of Miss. in Iowa v. Licklider, 576 F.2d 145 (8th Cir.)
Tyndall v. Gunter, 840 F.2d 617 (8th Cir. 1988)
United States v. Lara, 541 U.S. 193 (2004)
United States v. Lawrence, 595 F.2d 1149 (9th Cir. 1979)
United States v. Schumann, 861 F.2d 1234 (11th Cir. 1988)
Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979)
Youngbear v. Brewer, 549 F.2d 74 (8th Cir. 1977)
Brewer v. Iowa Dist. Ct., 395 N.W.2d 841 (Iowa 1986)
First Nat'l Bank in Lenox v. Heimke, 407 N.W.2d 344 (Iowa 1987)
Hannan v. State, 732 N.W.2d 45 (Iowa 2007)
In re Daniel H., 678 A.2d 462 (Conn. 1996)
Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, 763 N.W.2d 250 (Iowa 2009)
Mun. Fire & Police Ret. Sys. of Iowa v. City of W. Des Moines, 587 N.W.2d 227 (Iowa 1998)
Schwarzkopf v. Sac Cnty. Bd. of Supervisors, 341 N.W.2d 1 (Iowa 1983)
State v. Goham, 216 N.W.2d 869 (Neb. 1974)
State v. Hoffman, 804 P.2d 577 (1991)
State v. Lasley, 705 N.W.2d 481 (Iowa 2005)
State v. Macke, 933 N.W.2d 226 (Iowa 2019)

State v. Stanton, 933 N.W.2d 244 (Iowa 2019)
State v. Thompson, ___ N.W.2d ___, No. 19–1259, slip op. 21 (Iowa Feb. 5, 2021)
Act of June 30, 1948, ch. 759, 62 Stat. 1161 (1948)
Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395 (2018)
2016 Iowa Acts pp. 94-95, ch. 1050 (86th Gen. Assembly)
1 U.S.C. § 109
18 U.S.C. § 1152
25 U.S.C. § 1323
25 U.S.C. § 1323(a)
Iowa Code § 1.15A
Iowa Code § 4.13(1)(a)
Iowa Code § 4.13(1)(b)
Iowa Code § 4.13(1)(c)
Iowa Code § 4.13(1)(d)
Iowa Code § 4.4
Iowa Code § 4.5
Iowa Code § 907.3(1)(a) (2018)
Iowa Code § 907.3(1)(b)
163 Cong. Rec. H8323-02, (Nov. 1, 2017), 2017 WL 4968728
H.R. Rep. 115-279 (2017), 2017 WL 3741411

ROUTING STATEMENT

The State requests that the Iowa Supreme Court retain this case because it presents a "fundamental and urgent issue[] of broad public importance requiring prompt [and] ultimate determination by the supreme court." Iowa R. App. P. 1101(2)(d). It presents an issue closely related to the already-retained case, *State v. Bear*, 20-0401, set for non-oral submission before the Iowa Supreme Court on March 23, 2021.

Retention would allow the Court to speak more thoroughly to whether the State of Iowa's retrocession of jurisdiction over crimes by or against Indians on the Meskwaki Settlement is prospective only. *Bear* involves a crime by an Indian and a prosecution that spanned the retrocession, while this case involves a crime against an Indian and a post-retrocession probation revocation and judgment entry after deferred judgment.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from judgment and sentence after Defendant Christopher Lee Cungtion, Jr., was given a deferred judgment and violated his probation. He contends that the court could not enter judgment due to a retrocession of Iowa's criminal jurisdiction over

crimes committed against Indians on the Meskwaki Settlement. The district court correctly held that the retrocession was prospective only and did not abate Cungtion's pending case. The district court's judgment and sentence should be affirmed.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Cungtion committed crimes against Indian victims on the Meskwaki Settlement on July 30, 2017. Order Def.'s Mot. Dismiss p. 1 (10/10/2019); App. 25. He was charged with multiple crimes, including attempted murder. Plea & Sen. (11/30/2018) Tr. 2:15–3:3. He entered an *Alford* plea to a trial information, which by agreement did not include an attempted-murder charge. Plea & Sen. (11/30/2018) Tr. 2:15–3:3. His pleas were to Count 1—intimidation with dangerous weapon, a class D felony, in violation of Iowa Code section 708.6; Count 2—willful injury resulting in bodily injury, a class D felony, in violation of Iowa Code section 708.4(2); Count 3—assault with dangerous weapon, an aggravated misdemeanor, in violation of Iowa Code sections 708.1(2)(c) and 708.2(3); and Count 4—driving while barred, an aggravated misdemeanor, in violation of

Iowa Code Section 321.561. Plea/Deferred (11/30/2018); Plea/Sentence (11/30/2018); App. 8–9, 12–13. Cungtion received deferred judgments on Counts 1 and 2. Plea/Deferred (11/30/2018); App. 8–9. For Counts 3 and 4, Cungtion received concurrent, suspended two-year prison sentences with concurrent two-year terms of supervised probation. Plea/Sentence (11/30/2018); App. 12–13.

Cungtion violated his probation by beating his girlfriend, quitting his job, and smoking marijuana. Report Violation (07/22/2019) p. 2; Order (02/28/2020) p. 1; App. 16, 32. The Tama County Attorney filed a report of probation violation on July 22, 2019. Report Violation (07/22/2019); App. 15–17. Cungtion moved to dismiss for lack of jurisdiction, arguing that Iowa no longer had criminal jurisdiction over the counts for which he received deferred judgments because it retroceded jurisdiction to the United States on December 11, 2018, and that the court could not revoke his probation or enter judgment on the deferred counts. Mot. Dismiss (09/30/2019); App. 20–21. The State resisted. Resistance Mot. Dismiss (10/02/2019); App. 22–23.

The district court concluded that Iowa retroceded its criminal jurisdiction for crimes committed by or against Indians only for acts

committed after December 11, 2018. Order Def.'s Mot. Dismiss (10/10/2019); App. 26–27. For acts committed before that date, however, the district court concluded that Iowa retained jurisdiction. *Id.* Because Cungtion committed his crimes and was prosecuted before December 11, 2018, the court concluded Iowa's criminal jurisdiction continued over the pending case. *Id.*

The parties filed a joint motion to enlarge the district court's ruling. Joint Mot. Enlarge (10/11/2019); App. 29. The two issues for clarification were: 1) "The implication, if any, of the State of Iowa Statute 1.15A becoming effective by the signature of President Trump repealing the 1948 Act of Congress and the Iowa Code language decreeing that all criminal jurisdiction 'shall cease' "; and 2) "The impact, if any, that while the underlying criminal acts took place prior to the December 11, 2018 federal repeal, the acts leading to the filing of the current probation revocation took place after December 11, 2018. Further, the court has not imposed judgment on the felony offenses." Order Joint Mot. Enlarge (10/24/2019); App. 30.

Addressing these two issues for enlargement, the district court first decided that the term "shall cease" in Iowa Code section 1.15A did not retrocede Iowa's jurisdiction over pending cases because the

federal statute did not say retrocession was retroactive. *Id.* The district court next reasoned that, though the acts leading to the probation violation report occurred after December 11, 2018, there was no jurisdictional problem. *Id.* The district court thus concluded there was jurisdiction for entering judgment on the deferred felony counts, as well for revoking probation, because Cungtion committed the underlying criminal acts before December 11, 2018. *Id.*

Cungtion admitted he violated his probation terms and conditions. Order (02/28/2020); App. 32. By agreement of the parties, the district court amended his probation terms and conditions on Count 1. *Id.* at 1–3; App. 32–34. Also by agreement, the court revoked the deferred judgment on Count 2; found Cungtion guilty of willful injury resulting in bodily injury, a Class D felony, in violation of Iowa Code section 708.4(2); imposed an indeterminate five-year prison term, which it suspended; and placed him on probation for five years. *Id.* For Counts 3 and 4, the parties agreed to the court extending the probation terms to November 30, 2021. The court ran sentences on Counts 2, 3, and 4 consecutively, also pursuant to the parties' joint recommendation. *Id.*

Cungtion appeals. Notice Appeal.

Facts

Cungtion committed crimes against Indians on the Meskwaki Settlement.

Cungtion and a male accomplice offered services of two female companions to three men in the parking lot of the Meskwaki Bingo Casino and Hotel. Mot. Dismiss Ex. 1 pp. 1–2; Conf. App. 4–5. The three men were Natives,[1] and the incident occurred on the Meskwaki Settlement. Mot. Hearing Tr. 3:14–21 (10/03/2019). The Native men declined. Mot. Dismiss Ex. 1 p. 2; Conf. App. 5.

Cungtion and his male associate then made rude comments to the Native men and retrieved liquor bottles from Cungtion's girlfriend's car. *Id.* Cungtion hit one of the Native men in the face with a bottle. *Id.* He next threw the bottle at the Native man's car. *Id.*

Not yet through, Cungtion got into his girlfriend's car. *Id.* He tore around the parking lot and drove at the Native man he had struck with the bottle. *Id.* Cungtion narrowly missed hitting the still-dazed man with the car, sideswiping the man's vehicle instead. *Id.*

[1] For purposes of this appeal, because it was not challenged in district court, the Court can assume Cungtion's victims were Indians.

Iowa retroceded jurisdiction over crimes by or against Indians on the Meskwaki Settlement.

After Cungtion entered his *Alford* plea leading to deferred judgments on two counts, Iowa retroceded criminal jurisdiction on the Meskwaki Settlement over crimes committed by or against Indians.

The Meskwaki[2] Tribe, also known as the Sac & Fox of the Mississippi in Iowa, is federally recognized. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed.Reg. 34,863, 34,866 (July 23, 2018). The Meskwaki Settlement—officially identified as the Sac & Fox Indian Reservation—in Tama County, Iowa, is held in trust by the federal government for the benefit of the tribe. *Sac & Fox Tribe of Miss. in Iowa v. Licklider*, 576 F.2d 145, 148 (8th Cir.), *cert. denied*, 439 U.S. 955 (1978). The Meskwaki Settlement is thus "Indian

[2] Per the Meskwaki Nation website, "Meskwaki" has always been the name of the tribe that the French called "Renards" (translates to the Fox). The federal government adopted "Fox," but the tribe called itself, and calls itself, Meskwaki, including after its beneficial association with the Sauk Tribe that led to the federal government lumping the tribes into the "Sac and Fox." Meskwaki Nation, *History* https://meskwaki.org/about-us/history/ (last visited March 26, 2019).

country" as defined by 18 U.S.C. § 1151. *State v. Youngbear*, 229 N.W.2d 728, 732 (Iowa), *cert. denied,* 423 U.S. 1018 (1975).

Before December 11, 2018, Iowa had jurisdiction over all crimes committed on the Meskwaki Settlement. *State v. Stanton*, 933 N.W.2d 244, 249 (Iowa 2019). On July 1, 2016, Iowa tendered its jurisdiction over crimes on the settlement, committed by or against Indians, to the United States, thus beginning the process of retrocession. Iowa Code § 1.15A. The retrocession was subject to the federal government's acceptance. *Id.* The State's tender did not include language addressing pending cases. *Id.*

On December 11, 2018, Congress accepted the State's tender of jurisdiction by revoking the Act of June 30, 1948, ch. 759, 62 Stat. 1161 (1948) (1948 Act), which had confirmed Iowa's jurisdiction over crimes committed by or against Indians. Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395 (2018) (2018 Act). The federal acceptance of the State's retrocession of jurisdiction did not expressly revoke the State's jurisdiction over pending cases. 2018 Act, 132 Stat. 4395.

Cungtion violated his probation.

Following Iowa's retrocession of jurisdiction, Cungtion quit his job, smoked marijuana, and beat his ex-girlfriend. Report Violation p.

2 (07/22/2019); Order p. 1 (02/28/2020) (noting Cungtion admits these acts); App. 16, 32. All were all probation violations. Report Violation p. 2 (07/22/2019); Order p. 1 (02/28/2020); App. 16, 32.

ARGUMENT

I. The State's retrocession of jurisdiction over crimes against Indians on the Meskwaki Settlement was prospective only; thus, pending cases were not abated.

Preservation of Error

The State does not dispute that error was preserved by Cungtion filing a motion to dismiss for lack of jurisdiction and joining in a motion to enlarge. Mot. Dismiss (09/30/2019); Joint Mot. Enlarge (10/11/2019); App. 20–21, 29. Yet, Cungtion did not present the argument below that he presents here—the district court entering judgment after a probation violation on a deferred judgment is a prospective, not retroactive, application of the retrocession of jurisdiction. Below, he simply argued that the state retroceded all jurisdiction over pending cases. A question of a court's subject matter jurisdiction, however, may be raised at any time by any party or even by an appellate court on its own motion. *State v. Lasley*, 705 N.W.2d 481, 486 (Iowa 2005). If subject matter jurisdiction were lacking for a reason not preserved below, a court would nevertheless have to address the unpreserved argument.

Standard of Review

Issues of jurisdiction and statutory interpretation are reviewed at law. *State v. Stanton*, 933 N.W.2d 244, 247 (Iowa 2019).

Merits

A. The retrocession did not abate pending cases because the Iowa General Assembly did not expressly make its tender of jurisdiction retroactive.

The district court correctly concluded that retrocession of jurisdiction over crimes committed by or against Indians was not retroactive and did not abate Cungtion's pending action. Cungtion contends that the State had not "exhausted" its jurisdiction by entering judgment, so it could not enter judgment. Cungtion's circular position is not supported by statute or case law, and the Court should affirm the district court judgment and sentence.

Crimes committed in Indian country are governed by a complicated patchwork of statutes, case law, and treaties stitching together federal, state, and tribal law. *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (citing *Duro v. Reina,* 495 U.S. 676, 680 n. 1 (1990)). This patchwork assigns jurisdiction depending on the crime committed, who committed it, who was the victim, and where it was committed. *Id.* The federal government may grant to the states the

authority to regulate matters involving Indians, including criminal offenses. *Tyndall v. Gunter*, 840 F.2d 617, 619 (8th Cir. 1988) (citing *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)).

Retrocession of jurisdiction is the term used for a state returning criminal jurisdiction ceded to it by the federal government. 25 U.S.C. § 1323. The United States had ceded Iowa jurisdiction over crimes committed by or against Indians on the Meskwaki Settlement in 1948, and Iowa retroceded that jurisdiction to the federal government effective in 2018. To determine whether the retrocession here was retroactive—and thus abated Cungtion's pending case—statutory interpretation is necessary. *State v. Macke*, 933 N.W.2d 226, 231 (Iowa 2019).

1. None of the legislation effecting the retrocession addresses retroactivity.

The court should start with the text of the legislative acts executing the retrocession. *See Tyndall*, 840 F.2d at 617 (concluding that Congress validly accepted less jurisdiction than Nebraska tendered but could not accept more). Two statutes effected the retrocession here, one state and one federal. Iowa began the process:

> Notwithstanding any other provision of law to the contrary, the state of Iowa tenders to the United States any and all criminal jurisdiction which the state of Iowa has over criminal offenses committed by or against Indians on the Sac and Fox Indian settlement in Tama, Iowa, and that as soon as the United States accepts and assumes such criminal jurisdiction previously conferred to the state of Iowa or reserved by the state of Iowa, all criminal jurisdiction on the part of the state of Iowa over criminal offenses committed by or against Indians on the Sac and Fox Indian settlement in Tama, Iowa, shall cease.

2016 Iowa Acts pp. 94-95, ch. 1050 (86th Gen. Assembly) (codified at Iowa Code § 1.15A). The federal government followed suit by repealing the law conferring jurisdiction on Iowa:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of June 30, 1948, entitled "An Act to confer jurisdiction on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation" (62 Stat. 1161, chapter 759) is repealed.

2018 Act, 132 Stat. 4395. Evaluating the 2018 Act's effect thus requires reviewing the repealed 1948 Act, which says in its entirety:

> Jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any

> Indian reservation: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Act of June 30, 1948, ch. 759, 62 Stat. 1161 (hereinafter 1948 Act); *see Lasley*, 705 N.W.2d at 487.

Congress thus confirmed in 1948 that Iowa's jurisdiction extended to those criminal acts committed by or against Indians on the settlement. *Licklider*, 576 F.2d at 148 (citing 1948 Act) (emphasis added). Congress's 2018 Act only did one thing—it repealed the 1948 Act. 2018 Act, 132 Stat. 4395. The 2018 Act thus retrocedes Iowa's jurisdiction over crimes on the settlement by or against Indians. None of the legislative text addresses retroactivity.

2. Iowa's tender controls the extent of jurisdiction retroceded.

The content of the retrocession, including whether or not it is retroactive, is governed by the extent of jurisdiction Iowa tendered to the United States. *Tyndall*, 840 F.2d at 618. For retrocessions of jurisdiction granted to states in Indian country under Public Law 280 and other specified statutes, Congress provides an explicit procedure. 25 U.S.C. § 1323. Under § 1323:

> The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

25 U.S.C. § 1323(a). Iowa was not a Public Law 280 state, and the Act giving Iowa jurisdiction is not identified by § 1323(a), so the provision does not strictly apply to the retrocession of criminal jurisdiction on the Meskwaki Settlement. Yet, for Iowa's 2018 retrocession, the state and federal government essentially followed the procedure outlined in § 1323(a). "Even though Iowa was not one of those States, for years it has been treated as if it were a Public Law 280 State." 163 Cong. Rec. H8323-02, (Nov. 1, 2017) (statement of Rep. Blum, bill sponsor of the 2018 Act), 2017 WL 4968728. Cases that address a § 1323(a) retrocession's effect on pending cases are thus instructive if not binding. And these cases hold that a state's tender governs the content of the retrocession.

A Nebraska retrocession did not apply to pending cases even though judgment had not yet been entered. *Tyndall*, 840 F.2d at 618. Nebraska retroceded criminal jurisdiction over the Omaha Indian

Tribe Reservation, and the effective date was one day before a Nebraska court sentenced a defendant for crimes including first-degree murder. *Id.* Nebraska's retrocession—according to the Nebraska Supreme Court's interpretation of the state statute tendering jurisdiction—did not include the state's jurisdiction over pending cases. *State v. Goham*, 216 N.W.2d 869 (Neb. 1974). The content of the retrocession was an issue of state law conclusively determined by Nebraska's *Goham* decision. *Tyndall*, 840 F.2d at 618. Only the overall validity of the retrocession was an issue of federal law. *Id.*; *see also United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979) (concluding validity of Washington's retrocession was a matter of federal law).

The content of Iowa's tender thus governs whether it retroceded jurisdiction over pending cases. *Tyndall*, 840 F.2d at 618.

3. Iowa did not tender its jurisdiction over pending cases.

Iowa presumes prospective application of statutes: "A statute is presumed to be prospective in its operation unless expressly made retrospective." Iowa Code § 4.5; *see also Macke*, 933 N.W.2d at 232 ("Generally, a newly enacted statute is presumed to apply prospectively, unless expressly made retrospective." (quoting *Iowa*

Beta Chapter of Phi Delta Theta Fraternity v. State, 763 N.W.2d 250, 266 (Iowa 2009)). The General Assembly, in fact, cannot "arbitrarily decree that courts are without subject matter jurisdiction in a certain class of cases then pending in the courts." *State v. Thompson*, 954 N.W.2d 402, 415 (Iowa 2021) (quoting *Schwarzkopf v. Sac Cnty. Bd. of Supervisors*, 341 N.W.2d 1, 6 (Iowa 1983)). Neither Iowa nor the United States would have any interest in abating pending cases by retroactively retroceding jurisdiction; thus, without explanation, retroceding jurisdiction over pending cases would be arbitrary and invalid. *Schwarzkopf*, 341 N.W.2d at 6.

The presumption of prospective application controls the Iowa General Assembly's tender of jurisdiction because there is no language rebutting the presumption, *i.e.*, expressly making the retrocession retroactive. *Macke*, 933 N.W.2d at 232. If the legislature had meant to retrocede jurisdiction over pending cases, it would have "expressly made [section 1.15A] retrospective." Iowa Code § 4.5.

Cungtion notes that the text of section 1.15A says "all criminal jurisdiction . . . shall cease," but the presumption of prospective application requires reading that language as meaning that all jurisdiction shall cease prospectively. In other words, if the General

Assembly does not include specific terms like "pending cases" or "retroactively," the term "all criminal jurisdiction" means all prospective criminal jurisdiction.

Without its express legislative rebuttal, the prospective presumption controls the interpretation. *Macke*, 933 N.W.2d at 232. "If the legislature wanted the [retrocession] to apply retroactively, it had to say so expressly." *Id.* at 233; *see also Brewer v. Iowa Dist. Ct.*, 395 N.W.2d 841, 843 (Iowa 1986) (reasoning that the legislature would have clearly expressed its intention to abate pending proceedings if it had intended to do so). As in *Macke*, the court here should "decline to change the rules after the game is played." 933 N.W.2d at 233.

4. Effectively a repeal, section 1.15A does not have retroactive effect.

Yet another Iowa statutory construction provision, Iowa Code section 4.13(1), informs the meaning of section 1.15A to the extent that it can be considered a repeal. When the United States accepted the section 1.15A tender by passing the 2018 Act repealing the 1948 Act, section 1.15A effectively repealed all Iowa criminal statutes with respect to their operation regarding crimes by or against Indians on the settlement. So, interpreting section 1.15A as a repeal makes sense.

Prior operations of, or actions taken pursuant to, a statute are not affected by a repeal. Iowa Code § 4.13(1)(a). Nor does a repeal affect violations, penalties, or punishments incurred regarding a repealed statute. Iowa Code § 4.13(1)(c). A repeal also does not affect a "proceeding or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed . . . ." Iowa Code § 4.13(1)(d).

Applying these interpretive provisions, section 1.15A does not have the retroactive effect of abating Cungtion's pending case. Cungtion's plea was accepted, his deferred judgment was entered, and his probation was imposed by a prior operation of, and actions taken pursuant to, functionally repealed statutes governing pleas, deferred judgments, and probation. *Id*. These were also punishments incurred pursuant to those functionally repealed statutes. Iowa Code § 4.13(1)(b). And, Cungtion's probation in his criminal case was effectively an ongoing proceeding with privileges, obligations, liabilities, penalties, forfeitures, and punishments springing from

those repealed statutes. Iowa Code § 4.13(1)(d). A repeal does not interfere with any of these matters. *Id.*

Section 4.13(1) clearly requires that Cungtion's case continues. According to that provision, the district court retains every power under the repealed statutes. This includes the power to revoke probation and enter judgment.

5. Retrocession is a substantive, not procedural, change; thus, the lack of a provision making it retroactive means it is prospective only.

Cungtion asserts that a three-part test for evaluating statutory retroactivity applies here. *See Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007) (citing *Mun. Fire & Police Ret. Sys. of Iowa v. City of W. Des Moines,* 587 N.W.2d 227, 231 (Iowa 1998)). Yet this test only applies when a statute is procedural, not when it is substantive. *Id.* Substantive changes apply only prospectively. *See Macke*, 933 N.W.2d at 232 (citing *In re Daniel H.*, 678 A.2d 462, 466–68 (Conn. 1996)). The retrocession is substantive, and the test described in *Hannan* does not apply.

Whether a given sovereign has the power to enforce its criminal law is about as substantive as legal changes get. "Substantive law creates, defines, and regulates rights, while procedural law governs

the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Mun. Fire & Police Ret. Sys. of Iowa*, 587 N.W.2d at 231 (citing *First Nat'l Bank in Lenox v. Heimke*, 407 N.W.2d 344, 346 (Iowa 1987)). The retrocession had only to do with creation, definition, and regulation of rights on the settlement. When criminal jurisdiction is retroceded, there are no practices, methods, procedures, or legal machinery left to change. So, a retrocession is not remotely procedural. In *Hannan*, the court only applied the three-part retroactivity test because the change was procedural. 732 N.W.2d at 51. Like other substantive changes, retrocession applies prospectively.

Even if the test from *Hannan* was appropriate to apply here, applying it would not show that the retrocession was retroactive.

The first step of the test in *Hannan* is to evaluate the statutory language. As analyzed above, the language of section 1.15A provides no express basis to apply it retroactively. *Hannan*, however, applied a postconviction procedural change retroactively despite nothing supporting retroactivity in the language of the statute. *Id.* So, a statute failing the first question is not controlling.

The second step is to identify the problem to be remedied. Without supporting authority, Cungtion infers that the targeted problem is the State of Iowa's interference with Meskwaki tribal sovereignty and self-government. Cungtion contends further that abating a pending case, like his, for a crime against an Indian somehow aids the Meskwaki Tribe in self-government. Even accepting Cungtion's inferred reason for retrocession, his analysis is flawed.

Abating Cungtion's pending case in no way aids the Meskwaki Nation in self-government. Indian tribes have no jurisdiction over non-Indians. *Oliphant v. Suqamish Indian Tribe*, 435 U.S. 191, 195–96 (1978), *superseded by statute on other grounds* as *recognized by, United States v. Lara*, 541 U.S. 193, 200 (2004). Crimes by non-Indians against Indians are thus matters outside the Meskwaki Nation's powers of self-government. To hold a non-Indian like Cungtion responsible for a crime committed in Indian country, either the state or federal government must prosecute. *Oliphant*, 435 U.S. at 195–96. For acts prior to the retrocession, it is the State of Iowa that prosecutes; for acts subsequent, it is the United States. Abating

Cungtion's pending case, or any other, would not affect the Meskwaki Nation's ability to govern itself.

One possible reason cited in federal legislative history for the retrocession was indeed aiding the Meskwaki Nation in self-government. Yet the potential aid was in the form of federal dollars to support tribal courts, law enforcement, and a detention center. H.R. Rep. 115-279, at 2 (2017), 2017 WL 3741411. The Bureau of Indian Affairs could not authorize funds to support those pursuits until state jurisdiction over crimes by or against Indians was retroceded. *Id*. The report also noted, however, that the Meskwaki Nation already established those institutions and did not intend to apply for any significant amounts between 2018 and 2022. *Id*. Even if additional funding was the goal, nothing in the legislative history suggests that a retrocession must be retroactive to allow those funds to go to the Meskwaki. If that were a requirement, surely it would have come up in the report or floor debate, or perhaps even the text of the legislation.

A second cited reason for the federal acceptance of retrocession was that, before the retrocession, Native individuals on the Meskwaki Settlement were subject to prosecution by the Tribe as well as the

State. 163 Cong. Rec. H8323-02, H8325 (Nov. 1, 2017) (statement of Rep. Torres), 2017 WL 4968728. Retroceding the State's jurisdiction was intended to put Native people on a more level playing field, no longer subjecting them to a potential prosecution by both the State and the Tribe for the same act. *Id.* Abating Cungtion's pending case is not consistent with, and does not further, this purpose.

The third step of the test is to determine whether the statute is a remedy to an existing law. Again, the retrocession does not lean toward retroactivity because there is no existing law that section 1.15A remedies. The closest analogue is an existing federal law criminalizing certain acts in Indian country. *See* 18 U.S.C. § 1152 (providing that general federal criminal laws apply on Indian country). The United States retained this jurisdiction when it granted jurisdiction to the State of Iowa. 1948 Act, 62 Stat. 1161 ("[N]othing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."); *see Youngbear v. Brewer*, 549 F.2d 74, 76 (8th Cir. 1977), *abrogated on other grounds by*, *Negonsott*, 507 U.S. at 99 (holding federal jurisdiction reserved by 1948 Act was exclusive for crimes in Major Crimes Act, 18 U.S.C.

§ 1153, and otherwise concurrent with state crimes). The State of Iowa cannot, of course, remedy federal law. Plus, at any time before or after the retrocession, the United States could have applied its general laws in Indian country under § 1152 to a non-Indian perpetrator like Cungtion who committed a crime against an Indian, so it wasn't much of a remedy anyway. Effectively, however, before the retrocession, crimes on the settlement were the State's purview. There is thus no existing law that section 1.15A sought to remedy.

All three prongs of the test in *Hannan* weigh against retroactivity. There is no language rebutting the prospectivity presumption. Abating pending criminal cases does not further the purpose of Section 1.15A. And the retrocession was not a remedy to any law. Section 1.15A is not retroactive under the test in *Hannan*.

6. Abating Cungtion's pending case, and cases like it, is not a reasonable or just application of section 1.15A.

Cungtion's case was pending. *See Tyndall,* 840 F.2d at 618 (concluding that a case was pending and jurisdiction continued after a retrocession though sentencing and entry of judgment had not occurred). Cungtion's criminal case did not begin with the acts constituting probation violations but with his criminal acts before the

December 11, 2018 retrocession. Yet, Cungtion argues that the court does not have jurisdiction because the acts leading to the probation violation occurred after December 11, 2018. He contends that the district court had not "exhausted its jurisdiction" by entering judgment, so it lost the jurisdiction it retained over Cungtion by putting him on probation.

Jurisdiction over pending cases, however, continues whether retrocession occurs before or after judgment. *Tyndall,* 840 F.2d at 618. Commencement of the prosecution trumps entry of judgment. *See State v. Hoffman*, 804 P.2d 577, 588 (1991) (concluding retrocession did not affect pending prosecution; yet, the Washington legislature explicitly addressed the issue). Otherwise, the defendant sentenced for first-degree murder the day following the Nebraska retrocession should have gone free. *Tyndall,* 840 F.2d at 618. There is nothing magical about entry of judgment with respect to Cungtion's deferred judgment and pending probation.

Cungtion's probation, imposed on account of his deferred judgment, reflected the pending nature of his case and the state's continuing jurisdiction. "With the consent of the defendant, the court may defer judgment and may place the defendant on probation upon

conditions as it may require." Iowa Code § 907.3(1)(a) (2018). Basically, Cungtion agreed to comply with probation terms to avoid a judgment being entered. The jurisdiction to enter judgment after the probation violations was thus based not only on Cungtion's crimes committed on the Meskwaki Settlement before retrocession but also on his consent to be held accountable for those crimes, with potential revocation and judgment entry as a disincentive to violate his probation.

Other provisions demonstrate that Cungtion's case was pending. Iowa Code section 907.3(1)(b) provides: "Upon a showing that the defendant is not cooperating with the program of probation or is not responding to it, the court may withdraw the defendant from the program, pronounce judgment, and impose any sentence authorized by law." It also provides: "Upon violation of the conditions of probation, the court may proceed as provided in chapter 908." Iowa Code § 907.3(1)(b). Cungtion's consent to deferred judgment and probation means that his case was pending because the court could revoke probation for violations. The State of Iowa retained jurisdiction.

If the State were not able to revoke probation for probationers' violative acts after a retrocession, then upon retrocession, probation for crimes committed on the settlement would have effectively ceased. Also, if the State could not revoke probation, there would be no reason that the State could correct an illegal sentence imposed on an offender convicted of a crime before the retrocession. Entry of judgment is an important event in a criminal case. Yet, for purposes of criminal jurisdiction, more important is commission of the criminal act. *Tyndall,* 840 F.2d at 618; *Hoffman*, 804 P.2d at 588.

Abatement here—and for crimes committed on the settlement before retrocession—is not a just or reasonable result. The Iowa Code instructs: "In enacting a statute, it is presumed that . . . [a] just and reasonable result is intended." Iowa Code § 4.4. Cungtion does not offer a principled reason that his individual case should be subject to retroactive application of the retrocession and abate. He also does not offer any reason that adoption of his argument would not require abatement of every criminal case the State of Iowa ever prosecuted on the settlement—at least those in which the State still has the offender on probation or parole, or in prison.

The State of Iowa did not tender jurisdiction over pending cases. Congress's acceptance of the State's tender did not, therefore, retrocede jurisdiction over pending cases. It is not just or reasonable to interpret the retrocession to have abated all criminal cases arising from criminal acts on the settlement prior to December 11, 2018.

B. Even if federal law controls the content of the retrocession, Congress did not retrocede Iowa's jurisdiction over pending cases.

Even if the federal 2018 Act, and not section 1.15A, governs retroactivity, for many of the same reasons expressed above, the retrocession is not retroactive. When Congress repeals a statute, the repeal does not have retroactive effect unless the revoking statute explicitly so provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. Section 109 is a general savings clause embodying the federal policy against abatement—in other words, those who commit federal offenses are not granted an undeserved reprieve when the

statute they violated is repealed ahead of their conviction or sentence. *United States v. Schumann*, 861 F.2d 1234, 1239 (11th Cir. 1988). This federal general savings clause parallels a general presumption against retroactivity when interpreting federal statutes. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006). The 2018 Act has no express language making the retrocession retroactive, so the federal savings clause and presumption of prospective application control. 2018 Act, 132 Stat. 4395.

There is also no legislative history to the contrary—floor debate did not address retroactivity. 163 Cong. Rec. H8323-02, (Nov. 1, 2017) (statements of Reps. Cook, Torres, and Blum), 2017 WL 4968728. The House Committee Report likewise has no support for retroactive application. H.R. Rep. 115-279, at 2 (2017), 2017 WL 3741411. There is no basis in legislative history to apply the retrocession to pending cases. *Id.* at 1-6.

Some straightforward jurisdiction-stripping or jurisdiction-conferring statutes are applied to pending cases. Yet this common law retroactivity rule applies only when the United States simply changes the forum for bringing a case without affecting rights or entitlement to relief. *See Hamdan*, 548 U.S. at 576 n.7 (distinguishing cases).

When substantive rights would be affected, the United States, like Iowa, requires explicit language in legislation for there to be retroactive effect. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

Based on *Hamdan* and *Lindh*, as well as the savings clause, Congress must speak clearly to revoke or retrocede jurisdiction and have it apply retroactively to pending cases. *Id.*; *Hamdan*, 548 U.S. at 576–77; 1 U.S.C. § 109. Any justification for retroactivity of a same-sovereign forum change that affects no substantive rights does not apply when jurisdiction effectively shifts to a different sovereign; and especially not when retroactive application would frustrate the original sovereign's vested interest in continuing in the case.

Here, the forum for criminal prosecutions effectively changed from state court to federal court. Again, this is not merely a forum change but a sovereign change. And the change affects rights and substance—the federal government will not charge violations of state law going forward, so the state criminal law no longer applies to crimes against Indians on the settlement. If rights, liabilities, or duties would change due to retroactive application, the presumption is that a statute is prospective "absent clear congressional intent otherwise." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

Generally, the change from a state to a federal criminal paradigm changes rights, liabilities, and duties. Specifically, abatement of Cungtion's probation terms and conditions would change his rights, liabilities, and duties.

For the retrocession to be retroactive, Congress would have had to expressly provide that it was retroactive. *Hamdan*, 548 U.S. at 576. When substantive rights would be affected, the United States, like Iowa, requires explicit language in legislation for there to be retroactive effect. *Lindh*, 521 U.S. at 326. Congress did not express its intent that the retrocession apply retroactively, and, under the alternative federal analysis, the retrocession is not retroactive. *Landgraf*, 511 U.S. at 280; 1 U.S.C. § 109.

CONCLUSION

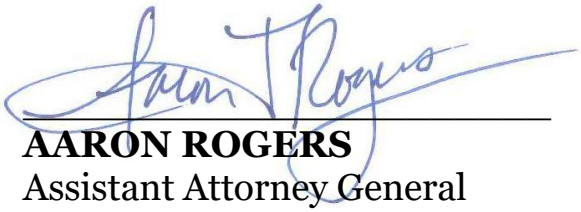
For the reasons stated above, the retrocession of state criminal jurisdiction over crimes by or against Indians on the Meskwaki Settlement is not retroactive. Iowa thus retained jurisdiction over Cungtion's pending case. This Court should affirm the judgment and sentence of the district court.

REQUEST FOR NONORAL SUBMISSION

Indian Law issues and retroactivity analysis are both complicated areas. The Court could perhaps benefit from oral argument. Yet, the Court has set a related case for nonoral submission. *State v. Bear*, No. 20-0401. The State thus defers to the Court's view of the issue and requests nonoral submission.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



AARON ROGERS
Assistant Attorney General
Hoover State Office Bldg.
Second Floor
Des Moines, Iowa 50319
(515) 281-5976
aaron.rogers@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **6,164** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

Dated: March 19, 2021

AARON ROGERS
Assistant Attorney General
Hoover State Office Bldg.
Second Floor
Des Moines, Iowa 50319
(515) 281-5976
aaron.rogers@ag.iowa.gov