No. 20-0409

In the Supreme Court of Iowa

STATE OF IOWA,
PLAINTIFF-APPELLEE

V.

CHRISTOPHER LEE CUNGTION, JR.,
DEFENDANT-APPELLANT

ON APPEAL FROM THE IOWA DISTRICT COURT
FOR TAMA COUNTY

HON. MITCHELL TURNER (MOTION TO DISMISS) &
FAE E. HOOVER (ADJUDICATION OF GUILT & SENTENCING), JUDGES

NOS. FECR016068

BRIEF FOR THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Sac and Fox Tribe of the Mississippi in Iowa (Tribe) is a federally recognized Indian tribe located on the Meskwaki Settlement in Tama County Iowa. The Tribe purchased the first portion of the Meskwaki Settlement in 1857 and has continued to expand its land base since. The majority of the Meskwaki Settlement is held in trust by the United States for the benefit of the Tribe. In 1948, Congress passed an act to give the State of Iowa criminal jurisdiction over crimes with an Indian perpetrator or victim on the Meskwaki Settlement. Act of June 30, 1948, ch. 759, 62 Stat. 1161 (1948) (1948 Act). Until the 1948 Act, criminal jurisdiction over crimes committed on the Meskwaki Settlement by an Indian was held concurrently by the Tribe and the United States, with the State of Iowa having jurisdiction over crimes committed by Non-Indians. Seventy years later, in December of 2018, Congress repealed the 1948 Act and rescinded the earlier grant of criminal jurisdiction. Pub. L. No. 115-301, 132 Stat. 4395 (2018) (2018 Act).

In November of 2018 the Appellant Christopher Lee Cungtion, Jr., a non-Indian, was charged by the State for crimes committed against an Indian at the Meskwaki Bingo Casino Hotel on the Meskwaki Settlement. The Appellant pled guilty to some of the crimes for which he was charged and was granted a deferred judgement, with five years' probation and a suspended civil

penalty. The Act of 1948 was then repealed in December of that year through the 2018 Act. In July of 2019 the State asked the district court to revoke the deferred judgement. The Appellant filed a motion to dismiss the State's application in September of 2019, arguing that the repeal of the 1948 Act by Congress deprived the State of jurisdiction over the crimes that occurred on the Meskwaki Settlement because the victim was an Indian. The district court denied the motion and the Appellant has appealed to this Court based on the same argument.

The Tribe has a strong interest in the present case. This interest stems from the Tribe's inherent interest in jurisdictional certainty over crimes committed on the Meskwaki Settlement. Any confusion regarding prospective jurisdiction after the repeal of the 1948 Act should have been cleared by the Stanton case in 2019. *State v. Stanton*, 933 N.W. 2d 244 (Iowa 2019). It is the Tribe's hope that with the resolution of this case and case No. 20-0401 all remaining jurisdictional questions will be resolved.

STATEMENT OF AUTHORSHIP

The Tribe certifies pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d) that no party or their counsel authored this brief in whole or in part, nor did they contribute funding to its preparation or submission.

STATEMENT OF ISSUE

Whether the repeal of the Act of June 30, 1948 operates retroactively to remove criminal jurisdiction from the state over crimes which were committed on the Meskwaki Settlement and for which prosecution was pending at the time of the repeal.

ARGUMENT

THE RETROCESSION PROCESS PRESENT IN P.L. 280 IS WHOLLY INAPPLICABLE TO THE REPEAL OF THE 1948 ACT AND STATE JURISDICTION WAS ENDED THROUGH THE 2018 ACT.

As a starting point, states lack jurisdiction over crimes involving Indians that take place in Indian Country. *United States v. John*, 437 U.S. 634, 651 (1978). However, Congress may grant states jurisdiction. Congress chose to grant the State of Iowa criminal jurisdiction over crimes committed by Indians and crimes where the victim is Indian which occur on the Meskwaki Settlement in 1948. Congress did so through an act which reads as follows:

> 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 (1948).

The 1948 Act was not the only jurisdiction granting act that Congress passed in that era. Congress granted the state of North Dakota criminal jurisdiction over the Devils Lake Indian Reservation, using almost the exact language that would later be used in the 1948 Act. Act of May 31, 1946, ch. 279, 60 Stat. 229. Congress enacted the current grant of jurisdiction for the state of Kansas which is also similar to the language of the 1948 Act in June of 1948. Act of June 25, 1948, ch. 645, 62 Stat. 827. In July of 1948 Congress granted the state of New York criminal jurisdiction over tribes within the state using similar language to the 1948 Act. Act of July 2, 1948, ch. 809, 62 Stat. 1224. Congress acted again in 1949 granting the state of California jurisdiction over the Agua Caliente Indian Reservation. Act of October 5, 1949, ch. 604, 63 Stat. 705. These Acts and the 1948 Act share similar language. They also share a distinct lack of any mechanism for retrocession by the states being granted jurisdiction.

The first instance of retrocession of jurisdiction was the enactment of 25 U.S.C. 1323 in 1968. This statute provides for the ability of the Federal Government to accept criminal or civil jurisdiction which had been granted to

states pursuant to P.L. 280 which was passed in 1953. The statute specifically states its application to the mandatory assumption of criminal jurisdiction by certain states found in 18 U.S.C. 1162, the mandatory assumption of civil jurisdiction by those same states in 28 U.S.C. 1360, and the permissive assumption of civil and criminal jurisdiction which was allowed for in Section 7 of P.L. 280. Pub. L. No. 83-280, 67 Stat. 588. Section 7 was repealed with the adoption of 25 U.S.C. 1323. These are the only instances to which retrocession is applicable, and the 1948 Act is not one of those instances.

Appellee and Appellant both make reference to the P.L. 280 allowance for retrocession throughout their arguments. However, to argue that the 1948 Act required retrocession to end State jurisdiction or even allowed for retrocession has no basis in fact or law. Such an argument also brings unnecessary complexity to a straight forward repeal of a previous act by Congress.

The passage of Iowa Code § 1.15A acted as a signal to Congress that the State no longer desired the 1948 grant of criminal jurisdiction and nothing more. Because there is no mechanism like retrocession built into the 1948 Act, the passage of Iowa Code § 1.15A was not necessary for repeal of the 1948 Act. The passage of the 2018 Act was the effective end of that grant and all that was necessary to end the grant. The 2018 Act states:

> 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.

Pub. L. No. 115-301, 132 Stat. 4395 (2018). There is no mention of acceptance of retrocession or of the passage of Iowa Code §1.15A. The repeal of the 1948 Act by Congress was the only act necessary to end the State's criminal jurisdiction over the Meskwaki Settlement.

The 1948 Act also differs from P.L. 280 in the grant of criminal jurisdiction. Mandatory P.L. 280 states were given criminal jurisdiction over Indian Country in their state to the exclusion of the Federal Government. The 1948 Act contains a specific retention of criminal jurisdiction by the Federal Government.

There is no need to read the retrocession process into the 1948 Act where it has never existed. It is accurate to the law to state that Congress granted the State criminal jurisdiction over the Meskwaki Settlement in 1948 and then repealed the grant in 2018. To tack the retrocession process onto the 1948 Act would be inappropriate and do harm to the actual language of the 1948 Act.

I. THE REPEAL OF THE ACT OF 1948 DOES NOT APPLY RETROACTIVELY AND THE STATE MAY COMPLETE PROSECTUIONS PENDING AT THE TIME OF REPEAL OF STATE JURISDICTION

Both the Appellant and the State incorrectly base their arguments on the mistaken and unsupported position that it is not the 2018 Act which controls if the repeal of the State's jurisdiction was retroactive. The State makes this mistake in their first argument, and the Appellant makes the mistake in their brief and reply-brief. They both argue based on the idea that retrocession is an applicable and integral part of the repeal of the 1948 Act. The State's second argument does address the correct law, but continues to use the term retrocession instead of repeal. The State's argument in *State v. Bear*, No. 20-0401 is more accurate as to the law concerning retroactive application of the repeal of the 1948 Act.

Jurisdiction over offenses committed by or against Indians was granted to the State through the 1948 Act. The effect of the act was a grant by the Federal government of the right for Iowa to impose its laws and to proceed with prosecution for violations of those laws when there was an Indian perpetrator or victim. In 2018 the Federal Government chose to repeal the 1948 Act. This was accomplished by a similarly brief piece of legislation. There is no mention of retroactive or prospective application in the 2018 Act.

The repeal of the 1948 Act by the 2018 Act led to much confusion by the Tama County magistrate over what jurisdiction if any was still afforded to the State on the Meskwaki Settlement. This Court cleared the confusion and ruled that the State still had jurisdiction on the Meskwaki Settlement over crimes not committed by or against Indians, and over victimless crimes. *State v. Stanton*, 933 N.W.2d 244 (Iowa 2019).

This case turns on the application of the 2018 Act to the 1948 Act. If the repeal of the 1948 Act is applied retroactively then State jurisdiction over the Appellant would have dissipated while prosecution was still pending and conviction and sentencing should be vacated for lack of jurisdiction. The United States Supreme Court noted that there is a default presumption against retroactive application of a statute and provided a two-part test for determining the appropriateness of retroactive application of a statute in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

The first step of the *Landgraf* test requires a court "to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S., at 280. This step simply asks a court to look at the statute and see if there is language stating it should be applied retroactively or prospectively. In the case of the 2018 Act there is no language regarding

application. The Act simply states that it is repealing the 1948 Act. Since the 2018 Act did not expressly prescribe its proper reach the second step of the *Landgraf* test is necessary.

The second step of the *Landgraf* test requires a court to determine if the retroactive application of the statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. If retroactive application of the statute would do any of these things then the statute should not be applied retroactively.

The Supreme Court's ruling in *Hamdan* states that "unlike other intervening changes in the law, jurisdiction-conferring or jurisdiction-stripping statute usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006)(quoting *Hallowell v. Commons*, 511 U.S. 244, 274 (1916)). If all the 2018 Act does is change the tribunal for prosecution, then the second step of the *Landgraf* test would allow for retroactive application.

The 2018 Act does affect the rights and obligations of the parties. Before the repeal of the 1948 Act there were three separate sovereigns with criminal jurisdiction over criminal acts committed by Indians on the Meskwaki Settlement, and two with criminal jurisdiction over crimes

committed against Indians. Each of the sovereigns could have prosecuted the Appellant in their own court under their own laws under the dual-sovereignty doctrine. See, Gamble v. United States, 139 S. Ct. 1960, 204 L. Ed. 2d 322 (2019). In this case the Appellant could have potentially been charged by the State and the Federal Government for the same events. The 2018 Act does not simply change which tribunal may hear a prosecution, it eliminates the ability of all tribunals of one of the sovereigns to hear the case.

Further, retroactive application of the 2018 Act will affect the right that Iowa had at the time criminal action, which had been granted by the 1948 Act. It would also affect the obligations of those who committed crimes on the Meskwaki Settlement for which prosecution was pending on enactment of the 2018 Act. At the time the criminal act occurred everyone on the settlement was subject to the criminal laws of the State, Federal Government, and if there are an Indian the Tribe. In many cases there is no longer an obligation to follow State laws on the Settlement, however retroactive application of the 2018 Act will affect obligations of the parties that would be in effect if not for retroactive application. Because retroactive application affects the rights and obligations of the parties the *Landgraf* test dictates that the repeal of the 1948 Act should not be applied retroactively.

The present case is disguisable from *Hallowell* which was quoted in *Hamdan* to provide the jurisdiction-stripping exemption. *Hallowell* concerned the enactment of a law taking probate of allotment land held in trust by the Federal Government away from the Federal Courts and granting exclusive right of determination of heirs. The Supreme Court ruled that the act only changed the tribunal and affected no substantial rights. *Hallowell v. Commons*, 239 U.S. 506, 508 (1916). This case is distinguishable because in *Hallowell* congress did truly just change which tribunal on the Federal level would hear a case. In this case the 2018 Act does not change which tribunal may hear the case, it instead revokes jurisdiction of a sovereign who previously had jurisdiction.

Additionally, the general savings clause would support the repeal of the 1948 Act being applied prospectively only. 1 U.S.C. § 109. The general savings clause provides for application of law in effect at the time a crime was committed in the prosecution of that crime unless the act repealing the law that was in effect states that the repeal is retroactive. *Id*. Since Congress did not include any language in the 2018 Act stating that it should be applied retroactively the law as it was when the Appellant committed the crimes for which he was convicted and sentenced should be and were correctly applied to his prosecution.

As stated above, before the repeal of the 1948 Act there were three separate sovereigns with criminal jurisdiction over criminal acts committed by Indians on the Meskwaki Settlement, and two with criminal jurisdiction over crimes committed against Indians. Because, the Appellant could have been charged by the State and the Federal Government for the same events. The repeal of the 1948 Act affects "penalties, forfeitures, and liabilities" because retroactive application would remove the ability of one of the sovereigns to prosecute and convict the Appellant. Therefore, the general savings clause should apply to the repeal of the 1948 Act.

CONCLUSION

This Court should affirm the Appellant's conviction and sentence for the above mentioned reasons.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,590 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced, 14-point Times New Roman typeface using Microsoft Word.

Dated: July 20, 2021

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CERTIFICATE OF SERVICE

I certify that, on the 20th day of July 2021, I served this document on all parties to this case by electronically filing the forgoing with the EDMS system on this same date.

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