No. 20-0401

In the Supreme Court of Iowa

STATE OF IOWA,
PLAINTIFF-APPELLEE

V.

HOLLIS BEAR,
DEFENDANT-APPELLANT

ON APPEAL FROM THE IOWA DISTRICT COURT FOR TAMA COUNTY

HON. PAUL D. MILLER (MOTION TO DISMISS) & FAE E. HOOVER (TRIAL & SENTENCING), JUDGES

NOS. FECR016042

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

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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 Seventy years later, in December of 2018, Congress repealed the 1948 Act and rescinded the earlier grant of criminal jurisdiction.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 Hollis Jacy Bear, an Indian, was charged by the State for crimes committed against another Indian on the Meskwaki Settlement. The Act of 1948 was then repealed in December of that year. The Appellant filed a motion to dismiss based on the repeal, which was denied. The Appellant was then convicted and sentenced following a

stipulated bench trial. The Appellant is now appealing the denial of the motion to dismiss and argues that the repeal of the Act of 1948 applies retroactively to bar his prosecution by the State for lack of jurisdiction.

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. 20-0409 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

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

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. The full text of the act 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).

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. The act in its entirety reads as follows:

> 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).

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 Appellant argues against application of the *Landgraf* test by stating that the 2018 Act is a jurisdiction-stripping statute and that there is no

presumption against retroactive application with jurisdiction–stripping statutes. *See* Appellant's Br. pp.25-28. The State correctly explains why the Appellant's argument is not persuasive and the *Landgraf* test is still relevant. *See* Appellee's Br. pp.13-15.

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 Appellant argues that the 2018 Act is a jurisdiction-stripping act and that its only affect is to change the tribunal for prosecution. *See*

Appellant's Br. pp.26-28. The Appellant quotes the Supreme Court's ruling in *Hamdan* stating 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, the Tribe, 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 of the 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 they 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.

The Appellant argues that the general savings clause should not be applied to the repeal of the 1948 Act by the 2018 Act. The Appellant argues that the general savings clause cannot be used by a court to "'justify a disregard of the will of Congress as manifested wither expressly or by necessary implication in a subsequent enaction.'" Appellant's Br. p.29 (quoting *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908)). This argument falls flat as the 2018 Act had no indication from congress, express or otherwise, that it was intended to be applied retroactively.

The Appellant's second argument against application of the general savings clause to the repeal of the 1948 Act is that the 2018 Act did only affected "remedies or procedures" and did not affect any "penalties, forfeitures, or liabilities." Appellant's Br. p.30. Therefore, the Appellant argues, the general savings clause would not apply. However, the repeal of the 1948 Act directly affects criminal liabilities and accrued penalties, and does not simply shift tribunals.

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, the Tribe, 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 1,972 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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