IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0177

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JESSICA RAE STANTON,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR TAMA COUNTY
THE HONORABLE RICHARD VANDER MEY, MAGISTRATE

APPELLANT'S BRIEF

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ROUTING STATEMENT

The State has a pending request for early submission pursuant to Iowa R. App. P. 6.1102(2). If the issue is not submitted early, 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). The State requested discretionary review, and this Court granted it, because the issue is important to the judiciary and profession. Iowa Code § 814.5(2)(d); Iowa R. App. P. 6.106(1).

STATEMENT OF THE CASE

Nature of the Case

This is a discretionary review of dismissal of criminal charges for lack of subject matter jurisdiction by Judicial Magistrate Richard Vander Mey of the Sixth Judicial District of Iowa in and for Tama County.

The State of Iowa has criminal jurisdiction over crimes committed on the Meskwaki Settlement in Tama County, Iowa, if not committed by or against a tribe member. Yet, the magistrate improperly dismissed for lack of subject matter jurisdiction three

complaints under two case numbers against Defendant Jessica Rea Stanton. Dismissal was improper because the State has jurisdiction over these victimless criminal acts committed on the settlement by a nonmember of the Meskwaki Tribe. This Court should thus reverse the order and direct reinstatement of the complaints.

Course of Proceedings

On January 1, 2019, an officer of the Meskwaki Nation Police Department filed three simple misdemeanor complaints against Defendant Jessica Rea Stanton, not a member of the Meskwaki Tribe, in the Iowa District Court for Tama County. Complaint: Trespass, Case No. STA0021728; App. 9; Citation & Complaint: Drug Paraphernalia, Case No. SMSM013023; App. 5; Citation & Complaint: No Contact Violation, Case No. SMSM013023; App. 7. One complaint alleges trespass first offense in violation of Iowa Code section 716.8(1), the second alleges possession of drug paraphernalia in violation of Iowa Code section 124.414, and the third alleges violation of a no contact order in violation of Iowa Code section 664A.2. The same day the tribal police filed the complaints, Judicial Magistrate Richard Vander Mey dismissed the three charges sua sponte. Order

Dismiss (01/01/2019), Case No. STA0021728 & SMSM013023; App. 10.

The State filed an application for discretionary review on January 30, 2019. The magistrate filed a resistance on February 15, 2019, and requested appointment of counsel. Stanton did not resist discretionary review.

The Iowa Supreme Court granted discretionary review on March 8, 2019. The Court struck the resistance of the magistrate because he is not a party and denied as moot the magistrate's application for appointment of counsel. In its order, the Court gave Stanton twenty-one days to state whether she would retain, or seek appointment of, counsel. Stanton appeared through counsel on March 29, 2019.

Due to the urgent, important issue involved, the State asked the Iowa Supreme Court to expedite this appeal's briefing, submission, and decision. Mot. Expedited Rev. (03/11/2019). That motion remains pending.

Facts

The Meskwaki[1] 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 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).

On January 1, 2019, an officer with the Meskwaki Tribal Police filed complaints alleging that Defendant Jessica Rea Stanton trespassed, possessed drug paraphernalia, and violated a no contact order while on the Meskwaki Settlement. App. 5, 7, 9. Meskwaki police officers are law enforcement officers trained, and recognized, by the State of Iowa. Iowa Code §§ 80B.3, 80B.18, 80D.6A. The

[1] According to 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 government lumping the tribes into the "Sac and Fox." Meskwaki Nation, *History* https://meskwaki.org/about-us/history/ (last visited March 26, 2019).

district court[2] immediately dismissed sua sponte the complaints for lack of jurisdiction. Order Dismiss; App. 10.

The district court concluded that 2018 federal legislation removed state criminal jurisdiction over all crimes committed on the settlement. *Id.* The court also said that neither tribal police nor state peace officers may bring state charges for conduct on the settlement "regardless of the race or ethnic background of any potential Defendant." *Id.* The court reasoned: "Any charges for conduct upon the Meskwaki Settlement can be pursued in tribal court or federal court." *Id.* Costs of the action were taxed to the tribe. *Id.*

The court also told the Tama County Sheriff to consult the Tama County Attorney to determine whether the sheriff can accept detainees charged with crimes on the settlement. *Id.* Additionally, the court told tribal authorities to instruct tribal police not to charge state criminal violations because doing so would clog the courts and

[2] Magistrates exercising the power of the district court are sometimes referred to as "magistrate court," yet "there is no such thing as a separate 'magistrate court' in Iowa. Rather, the code provides that a magistrate is one of the judicial officers of our unified trial court system." *Wenck v. State*, 320 N.W.2d 567, 569 (Iowa 1982); *cf.* Iowa Code §§ 602.6101, .6104.

impose costs on the tribe as cases would be dismissed and court costs imposed against the tribe. *Id.*

The State sought this discretionary review of the district court's order, asserting it "rais[es] a question of law important to the judiciary and the profession. Iowa Code § 814.5(2)(d). The Iowa Supreme Court granted review. Order (03/08/2019).

ARGUMENT

I. The State of Iowa has Jurisdiction Over Victimless Crimes Committed on the Meskwaki Settlement by Nonmembers of the Tribe.

Preservation of Error

A question of a court's subject matter jurisdiction may be raised at any time by any party or even sua sponte by an appellate court. *State v. Lasley*, 705 N.W.2d 481, 486 (Iowa 2005). The district court did not offer the State the opportunity to address the issue below, dismissing sua sponte for lack of jurisdiction the same day charges were filed. Order Dismiss; App. 10. The court has granted discretionary review on the issue, which is an appropriate vehicle to address questions of subject matter jurisdiction. *Lasley*, 705 N.W.2d at 486.

Standard of Review

Matters of subject matter jurisdiction are reviewed at law. *Id.* at 485. Evaluating subject matter jurisdiction requires statutory interpretation, also reviewed at law. *Id.*

Merits

A. The State of Iowa has Jurisdiction to Investigate and Prosecute Crimes Committed on the Meskwaki Settlement If Not Committed By or Against a Tribe Member.

The district court's order dismissing charges based on a lack of subject matter jurisdiction was incorrect. The Meskwaki Settlement is "Indian 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). Crimes committed on such tribal land 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 statute that the district court apparently relied on to dismiss the charges does not govern the crimes alleged against Defendant Jessica Stanton.

"Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001). The State's power to regulate must accommodate the tribe's interest in making its own laws and being governed by them. *Id.* But a tribe's authority no longer extends to nonmembers who come onto tribal lands. *See Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 935-36 (8th Cir. 2010) (describing the historical divestiture of aspects of tribal sovereignty by the federal government).

When addressing crimes committed on tribal lands, the important distinction to make at the outset is between two broad categories of crimes: 1) crimes committed by or against tribe members, and 2) other crimes. *See United States v. Antelope*, 430 U.S. 641 (1977) (concluding that assigning criminal jurisdiction based on tribe membership status does not violate due process or equal protection). States have criminal jurisdiction over crimes committed on tribal lands if not committed by or against a tribe member. *New York ex rel. Ray v. Martin*, 326 U.S. 496, 497 (1946). The State of Iowa has had this jurisdiction since the grant of statehood. *United States v. McBratney*, 104 U.S. 621, 623, 624 (1881).

For criminal acts by nonmembers of tribes on tribal lands not committed against tribe members, states in fact have exclusive jurisdiction. *See Lasley*, 705 N.W.2d at 490 (noting State of Iowa would have jurisdiction if the defendant was not a tribe member) (citing *United States v. John*, 587 F.2d 683, 686 (5th Cir. 1979)); *e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984); *Hilderbrand v. United States*, 261 F.2d 354, 356 (9th Cir. 1958); *State v. Kurtz*, 249 P.3d 1271, 1275–76 (Or. 2011); *State v. Harrison*, 238 P.3d 869, 874 (N.M. 2010); *State v. Wabashaw*, 740 N.W.2d 583, 591 (Neb. 2007); *State v. Reber*, 171 P.3d 406, 408 (Utah 2007); *State v. Sebastian*, 701 A.2d 13, 22 (Conn. 1997); *State v. Vandermay*, 478 N.W.2d 289, 290 (S.D. 1991); *State v. Snyder*, 807 P.2d 55, 56 (Idaho 1991); *State v. Thomas*, 760 P.2d 96, 98 (Mont. 1988); *Vialpando v. State*, 640 P.2d 77 (Wyo. 1982); *State v. Jones*, 546 P.2d 235, 235 (Nev. 1976); *State v. Griswold*, 422 P.2d 693, 694 (Ariz. 1967); *State v. Holthusen*, 113 N.W.2d 180, 187-88 (Minn. 1962); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *People v. Collins*, 826 N.W.2d 175, 179 (Mich. Ct. App. 2012); *Goforth v. State*, 644 P.2d 114, 116-17 (Okla. Ct. Crim. App. 1982).

To prove the State does not have jurisdiction over a crime not against a tribe member, a defendant would have the burden to prove tribal membership. *Young v. State*, No. 13-1656, 2015 WL 567012, at *2 (Iowa Ct. App. Feb. 11, 2015) (citing *State v. Verdugo*, 901 P.2d 1165, 1168 (Ariz. 1995)). Here, no hearing was held below, so Stanton did not establish tribal membership. *See United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) (noting imprecise definition of who is an "Indian," according to federal law, and setting forth two considerations: 1) some amount of Indian blood, and 2) recognition as an Indian by a tribe or the federal government) (applying test proposed by *United States v. Rogers*, 45 U.S. (4 How.) 567, 572–73 (1846)). For purposes of this appeal, Stanton is thus a nonmember of the Meskwaki Tribe or any other.

The district court here, despite all authority being to the contrary, concluded that the State of Iowa has no criminal jurisdiction over any acts on the Meskwaki Settlement. Order Dismiss; App. 10. The court also extended its reasoning to conclude that the county sheriff could not accept prisoners for crimes allegedly committed on the settlement. *Id.* And it suggested that tribal authorities should train tribal police not to charge state crimes for

conduct on the settlement, no matter the race of the offender. *Id*. If the district court extends its misreading, it may refuse to issue search warrants for crimes on the settlement or subpoenas for tribe member witnesses.

When the State of Iowa tendered to the federal government lands in Tama County, which were held at the time by Iowa's governor in trust for the Meskwaki, the State included this restriction in the transferring legislation:

> Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state . . . .

1896 Iowa Acts p. 114, ch. 110 (26th Regular General Assembly). The federal government accepted the tender subject to the State's expressed limitations:

> That the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama County, in the State of Iowa, and of their lands in said State, as tendered to the United States by the act of the legislature of said State passed on the sixteenth day of January, eighteen hundred and ninety-six,

> subject to the limitations therein contained . . . .

Sac & Fox Tribe of Miss. in Iowa v. Licklider, 576 F.2d 145, 147-49 (8th Cir. 1978) (quoting Act of June 10, 1896, ch. 398, 29 Stat. 321, 331 (1897)). The transfer of lands retained state criminal jurisdiction over all crimes on the lands transferred into trust. History hasn't changed anything in respect to nonmembers of the Meskwaki, which will be discussed in detail in section C below. The transfer legislation, approved by the federal government, also shows that law enforcement officers had, and have, the power to serve any judicial process on the Meskwaki Settlement when exercising the criminal jurisdiction of the state courts. 1896 Iowa Acts p. 114, ch. 110.

Even ignoring the State of Iowa's specific reservation of powers on the settlement, case law governing state jurisdiction on tribal lands is not to the contrary. State criminal jurisdiction includes crimes committed by nonmembers on the settlement not against members. *McBratney*, 104 U.S. 621 at 624; *State v. Warner*, 379 P.2d 66 (N.M. 1963); *Kuntz*, 66 N.W.2d at 532; *State ex rel. Olson v. Shoemaker*, 39 N.W.2d 524, 529 (S.D. 1949); *State v. Roedl*, 155 P.2d 741, 744 (Utah 1945). Other states addressing state power on tribal land have held that state law enforcement officers also have the authority to stop

vehicles for traffic offenses on tribal lands. *See Harrison*, 238 P.3d at 875 (noting that if the officer learns the offender is a tribe member, however, the State does not have authority to prosecute). Officers have been recognized to have power to execute search warrants on tribal land. *Kaul v. Stephan*, 83 F.3d 1208, 1216-18 (10th Cir. 1996). Tribal sovereignty has not been a barrier to states issuing and executing search warrants at an enrolled member's residence. *State v. Clark*, 308 P.3d 590, 593-95 (Wash. 2013); *but see Francisco v. State*, 556 P.2d 1, 5 (Ariz. 1976) (concluding Arizona had no power to serve process on tribe member on tribal land). The power to conduct law-enforcement-related activities, including execution of search warrants and subpoenas, has been allowed to extend as well to crimes committed off tribal lands. *Hicks*, 533 U.S. at 386. A state's authority to serve warrants on tribal land within their borders has been recognized as necessary to prevent reservations from becoming places of asylum for fugitives. *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885). A state may also enforce its non-criminal regulatory interests on a reservation, for example, requiring a tribal entity to collect state cigarette taxes. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980). Even before

statehood, territories were recognized to have power to serve process on a reservation if a territorial court had jurisdiction over the controversy. *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 31 (1885).

When the state has jurisdiction over a criminal act, barring a limiting treaty provision, the state's law enforcement powers on tribal land are not limited by tribal sovereignty. Stanton, as a nonmember of a tribe until proved otherwise, is subject to state court jurisdiction for her alleged victimless crimes committed on the Meskwaki Settlement.

B. Public Law 301, Congress's 2018 Legislation Addressing Crimes Committed By or Against Tribe Members, Does Not Apply to Stanton.

The district court here relied on recent legislation addressing crimes committed by or against tribe members to dismiss the charges against Stanton. Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395 (2018) (hereinafter "Public Law 301"). Failure to distinguish between two categories of crimes—those committed by or against a tribe member versus all other crimes—is the root of the district court's error. Evaluating Public Law 301 shows that it only addresses crimes committed by or against tribe members. Stanton's alleged crimes are not in this category.

The district court noted as its reason to dismiss:

> Federal legislation was recently enacted which removed state jurisdiction for crimes committed on the Settlement. The understanding of the undersigned is that this lack of state jurisdiction prohibits tribal police officers, as well as Iowa peace officers, from initiating state criminal charges for conduct on the Settlement regardless of the race or ethnic background of any potential Defendant."

Order Dismiss; App. 10. The district court was apparently referring to Public Law 301, which was enacted on December 18, 2018. 132 Stat. 4395. If the district court meant to point to different "federal legislation," it did not cite it. The district court's understanding that Public Law 301 addresses victimless crimes committed by nonmembers is mistaken.

Congress confirmed in 1948 that the State of Iowa's criminal jurisdiction extended to those acts committed by or against tribe members on the settlement by passing Public Law 846. *Licklider*, 576 F.2d at 148 (citing Act of June 30, 1948, ch. 759, 62 Stat. 1161) (hereinafter Public Law 846) (emphasis added). Congress enacted Public Law 301 in 2018, and that law did one thing—it repealed Public Law 846. 132 Stat. 4395. Public Law 846 likewise did one thing—it confirmed State of Iowa jurisdiction over crimes on the

Meskwaki settlement by or against tribe members. 62 Stat. 1161. Because Public Law 301 only repeals Public Law 846, and Public Law 846 only confirmed the State of Iowa's criminal jurisdiction over crimes on the settlement by or against tribe members, Public Law 301 only addresses the State of Iowa's jurisdiction over crimes on the settlement by or against tribe members.

The proof that the laws only affect crimes on the settlement by or against tribe members is clear from the texts. Public Law 301 says in its entirety:

> 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.

132 Stat. 4395 (emphasis added). Evaluating Public Law 301's effect thus requires reviewing the repealed Public Law 846, 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.

62 Stat. 1161 (emphasis added); *see Lasley*, 705 N.W.2d at 487.

Due to the words of limitation "by or against Indians on the Sac and Fox Indian Reservation," Public Law 846 addresses only jurisdiction over crimes by or against tribe members on the settlement. 62 Stat. 1161; *see Negonsott*, 507 U.S. at 105 (interpreting a similar grant of criminal jurisdiction to Kansas). And Public Law 301 does nothing but repeal Public Law 846. 132 Stat. 4395. Public Law 301 thus addresses only crimes by or against tribe members. *Id.*

Also, the title of Public Law 301 is "An Act To repeal the Act 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.' " *Id.* (emphasis added). In other words, even the title of Public Law 301 tells us that it singularly repeals Public Law 846 and includes that "by or against Indians" limitation in its title.

There is no legislative history to the contrary—floor debate only addressed crimes by or against tribe members. 163 Cong. Rec. H8323-02, (Nov. 1, 2017) (statements of Reps. Cook, Torres, and

Blum), available at 2017 WL 4968728. The House Committee Report notes: "Crimes committed in Indian Country in which the offender and victim are non-Indian are under state jurisdiction." H.R. Rep. 115-279, at 2 (2017), available at 2017 WL 3741411. There is no basis in the report for the district court's reading of Public Law 301 as extending to crimes other than those committed by or against tribe members. *Id.* at 1-6.

Prior to Congress enacting Public Law 301, Iowa took preparatory steps in 2016, including passing the following:

> 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) (emphasis added) (codified at Iowa Code § 1.15A). The state law tendering jurisdiction, like the accordant federal law, limits its provisions to crimes by or against tribe members. *Id.* In respect to the 1896

reservation of state jurisdiction over crimes on the settlement and state courts' power to serve process on the settlement, 1896 Iowa Acts p. 114, ch. 110, the 2016 tender only speaks to crimes by or against Meskwaki members in Tama County. 2016 Iowa Acts pp. 94-95, ch. 1050. The remaining provisions are unaffected.

Because Public Law 301 also simply addresses that first category—crimes committed by or against tribe members—the crimes alleged against Stanton are not affected by Public Law 301 because the crimes alleged against her are in the second category. Neither Public Law 301 nor Public Law 864 says anything about criminal jurisdiction over crimes committed on the settlement by nonmembers. This distinction between categories of crimes on the settlement makes all the difference. Yet the district court incorrectly extended the provisions of Public Law 301 from one category of offenses to another, effectively depriving the State of all criminal jurisdiction over acts on the Meskwaki Settlement. This was error.

The district court's decision should be reversed.

C. Nothing in the History of the Meskwaki Settlement Divested the State of Iowa of Its Criminal Jurisdiction Over Crimes Committed By Nonmembers of the Meskwaki Tribe.

The State of Iowa has since statehood had criminal jurisdiction over nonmembers' crimes—victimless or between nonmembers—committed on tribal land. *See McBratney*, 104 U.S. at 623, 624 (concluding a grant of statehood, without reserving exclusive federal jurisdiction, grants criminal jurisdiction over crimes by nonmembers of tribes on tribal lands); 41 Am. Jur. 2d § 182 ("[S]tate jurisdiction extends over the territorial limits of an Indian reservation so as to apply to all crimes committed thereon by persons not members of the tribe against other nonmembers of the tribe.") To understand the law governing tribes, history cannot be ignored. *United States v. Erickson*, 478 F.2d 684, 686 (8th Cir. 1973). Reviewing Iowa's criminal jurisdiction since the grant of statehood reveals no limitation preventing a state criminal charge against Stanton, a nonmember of the tribe, for her acts on tribal land not against any member of the tribe.

The United States Constitution gives Congress the exclusive, plenary power to legislate with respect to the indigenous tribes present when settlers arrived in what is now the United States. *United*

States v. Lara, 541 U.S. 193, 200 (2004); U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause); U.S. Const. art. II, § 2, cl. 2 (Treaty Clause). Now "dependent domestic nations," the tribes retain some aspects of sovereignty over members and territory, yet this sovereignty depends on, and is subordinate to, the Federal Government. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014).

For some states admitted after the original thirteen, like Iowa, jurisdiction can be limited by prior grants of exclusive federal criminal jurisdiction over acts by nonmembers. *McBratney*, 104 U.S. at 623. When statehood is granted, however, on footing equal to the other states, and Congress does not include an exception extending that exclusive federal jurisdiction, the grant of powers implicit in statehood includes criminal jurisdiction over acts by nonmembers on tribal lands not victimizing tribe members. *Id.*

For example, the Act of March 3, 1875, admitting Colorado as a state, explicitly put Colorado on equal footing as the original states in all respects. *Id.* That expressed equal footing included criminal jurisdiction over acts committed within the state's borders by nonmembers, even on tribal land previously subject to exclusive

federal criminal jurisdiction. *Id.* at 624. The rule from *McBratney* is: unless the federal government has reserved itself exclusive jurisdiction, a state placed on equal footing as the original states has exclusive criminal jurisdiction over acts on tribal lands by nonmembers not victimizing tribe members. *New York ex rel. Ray v. Martin*, 326 U.S. 496, 497 (1946); *Sebastian*, 701 A.2d at 22; *see also United States v. Sutton*, 215 U.S. 291 (1909) (concluding Congress had power to prohibit introduction of intoxicating liquors on tribal land by both tribe members and nonmembers); *Draper v. United* States, 164 U.S. 240, 247 (1896) (interpreting federal Indian Country Crimes Act, now codified at 18 U.S.C. § 1152, to prohibit murder of a tribe member by nonmember).

Turning to Iowa's history with the tribe, the Sac Tribe and the Fox Tribe were previously separate, independent tribes of central Wisconsin; they began relying on one another in the late eighteenth century. *Licklider*, 576 F.2d at 147-49. A war with the French had reduced the Fox population, and by 1800, the combined tribe established villages along the Mississippi in current-day Illinois and Iowa. *Id.* at 147. Soon after, the United States recognized the Sac and Fox as a single tribe in a treaty ceding to the federal government

tribal lands making up much of current-day Wisconsin, Illinois, and Missouri in exchange for federal payments, annuities, and services. *Id.* (citing Treaty of Nov. 3, 1804, 7 Stat. 84 (1846)).

The combined tribe in the Treaty of 1832 ceded a fifty-mile wide strip along the west bank of the Mississippi River but reserved four hundred square miles surrounding Chief Keokuk's village on the Iowa River. 7 Stat. 374. Four years later, the tribe ceded that land as well. Treaty of 1836, 7 Stat. 517. A year later, the tribe ceded a twenty-five-mile-wide strip immediately west of the previously ceded strip along the Mississippi. Treaty of 1837, 7 Stat. 520.

Thereafter, the combined tribe relocated to a reservation in what was then the Iowa Territory. *Sac & Fox Indians of the Miss. in Iowa v. Sac & Fox Indians of the Miss. in Okla.*, 220 U.S. 481, 482 (1911). In 1842, in exchange for payments and guarantees, the Sac and Fox agreed to move to a reservation in current-day Kansas and ceded to the United States all lands west of the Mississippi River, including all lands in Tama County. *Licklider*, 576 F.2d at 147-49; Treaty of 1842, 7 Stat. 596. The tribe ceded its reservation land in the Iowa Territory in the treaty of October 11, 1842. 7 Stat. 596; *Sac & Fox*, 220 U.S. at 482. In 1845 and 1846, as part of the treaty, the tribe

relocated to a reservation in what is now Kansas. *Sac & Fox*, 220 U.S. at 482. As of 1845, the Sac and Fox had no tribal land in Iowa. *Licklider*, 576 F.2d at 147. Some tribe members, however, remained scattered in Iowa. *In re Lelah-puc-ka-chee*, 98 F. 429, 431 (N.D. Iowa 1899).

Iowa was admitted into the Union as a state on December 28, 1846. Act of December 28, 1846, 9 Stat. 117. A prior act admitting both Iowa and Florida required a popular vote approving the boundaries contained in the act. An Act for the Admission of the States of Iowa & Florida Into the Union, March 3, 1845 ch. 75, 76, 5 Stat. 789. The people of the Iowa Territory rejected the boundaries, requiring the subsequent act of admission in 1846. In these acts admitting Iowa as a state, Congress included no exceptions to Iowa's criminal jurisdiction over acts on tribal land not by or against tribe members. 9 Stat. 117; 5 Stat. 789.

In the years following the tribe's removal to the Kansas Territory, and specifically in 1855, 1865, and 1866, an unknown number of Sac and Fox tribe members, not satisfied with the Kansas reservation, returned to a part of the former reservation lands in the new State of Iowa, joining with some of the holdouts who had not

gone to the reservation. *Sac & Fox*, 220 U.S. at 482-83; *Licklider*, 576 F.2d at 147; *Lelah-puc-ka-chee*, 98 F. at 431. Iowa legislation of July 15, 1856, consented to the tribe members then residing on the former reservation land, but no others, remaining there. *Sac & Fox*, 220 U.S. at 483. The federal government had initially endeavored to convince those tribe members in Iowa to remove themselves to the reservation, *Lelah-puc-ka-chee*, 98 F. at 431, but after Iowa's legislative assent, the federal government assigned an agent to supervise the Sac and Fox of the Mississippi in Iowa in 1865. *Licklider*, 576 F.2d at 147. As of that year, the United States began to treat the settlement as a de facto reservation. *Id.* at 149.

The agent in 1866 took a census of, and paid a share of annuities, to the Sac and Fox members who had returned to Iowa. *Sac & Fox*, 220 U.S. at 483. Treaty obligations generally required members to remain on reservations in order to receive payments due to concerns, founded or not, that tribe members not on reservations would make war against settlers. An 1867 treaty, this time removing the Sac and Fox in Kansas to a reservation in Oklahoma, carved out an exception for those tribe members residing in Iowa—those residing in Iowa were exempted from a requirement that payment of

annuities only go to tribe members permanently residing on the Oklahoma reservation. *Id.* at 484-85 (citing 15 Stat. 495). An appropriation act of the same year provided for pro rata payment to Sac and Fox members residing in Tama County, Iowa, as long as they were peaceful and the state continued to assent to their presence. *Id.* at 485 (citing 14 Stat. 492, 507).

The tribe gradually purchased more Tama County land using funds from commercial dealings, charitable contributions, and annuity payments. *Licklider*, 576 F.2d at 148. In 1896, between holdings of the Iowa governor and the U.S. agent, 3,000 acres was held in trust for the tribe. *Id.* That year, the State of Iowa tendered, and the federal government accepted, exclusive jurisdiction over the tribe and the lands held in trust. *Id.* The act, described in section A, contained the noted exception:

> Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state . . . .

1896 Iowa Acts p. 114, ch. 110; *Licklider*, 576 F.2d at 148. The federal government accepted the tender subject to the expressed limitations. *Licklider*, 576 F.2d at 148 (quoting Act of June 10, 1896, ch. 398, 29 Stat. 321, 331 (1897)).

Pursuant to the Indian Reorganization Act of 1934, the tribe in 1937 adopted a constitution and bylaws. *Id.* (citing 25 U.S.C. § 461 et seq.). As discussed above in section B, in 1948's Public Law 846, the federal government conferred on the State of Iowa criminal jurisdiction over crimes on the settlement in Tama County, Iowa, committed by and against tribe members. *Id.* (quoting Act of June 30, 1948, ch. 759, 62 Stat. 1161).

Public Law 846 was interpreted to retain the federal government's exclusive jurisdiction over acts constituting crimes set forth in the Indian Major Crimes Act, 18 U.S.C. § 1153, and give the State of Iowa jurisdiction over all others. *Youngbear v. Brewer*, 549 F.2d 74, 76 (8th Cir. 1977). The Iowa Supreme Court followed that interpretation in *State v. Bear*, 452 N.W.2d 430, 433 (1990). Yet, subsequent to *Youngbear* and *Bear*, the United States Supreme Court held that an earlier, nearly identical grant of criminal jurisdiction to Kansas was concurrent to the Major Crimes Act. *Negonsott*, 507 U.S.

at 110. The Iowa Supreme Court's original interpretation in *State v. Youngbear*, 229 N.W.2d 728, 733 (1975), held incorrect by the federal courts in habeas review, was thus effectively affirmed by *Negonsott*.

Turning back to 1953, Congress passed legislation known as Public Law 280, which gave six states besides Iowa and Kansas criminal jurisdiction over acts by or against tribe members on tribal lands within their borders. Act of Aug. 15, 1953, ch. 505 § 2, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000)). Iowa already had criminal jurisdiction over the Meskwaki Settlement, but another provision of Public Law 280 gave those six states and any other states "accepting Congress's invitation" civil jurisdiction over private civil actions involving tribe members on tribal lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), *superseded by statute as recognized by*, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). That grant did not include general regulatory authority. *Id.* A test that has developed regarding state power under Public Law 280 evaluates whether a law is criminal/prohibitory or civil/regulatory. *Lasley*, 705 N.W.2d at 489. But that test concerning erosion of tribal sovereignty has no application here because it only applies when a state has criminal

jurisdiction over, and the crime is charged against, a tribe member. *Cabazon*, 480 U.S. at 207; *Lasley*, 705 N.W.2d at 489. Stanton is not a tribe member and the prior grant of jurisdiction to Iowa over tribe members' crimes has been revoked. Public Law 301, 132 Stat. 4395.

In 1967, Iowa accepted Congress's invitation and asserted civil jurisdiction involving tribe members to the extent permissible under Public Law 280. *Licklider*, 576 F.2d at 149 (citing 67 Stat. 588, 589, and Iowa Code § 1.12); *see also Meier v. Sac & Fox Indian Tribe of the Miss. in Iowa*, 476 N.W.2d 61, 63 (Iowa 1991). Section 1.12 provides:

> The state of Iowa hereby assumes jurisdiction over civil causes of actions between Indians or other persons or to which Indians or other persons are parties arising within the Sac and Fox Indian settlement in Tama county. The civil laws of this state shall obtain on the settlement and shall be enforced in the same manner as elsewhere throughout the state.

Iowa Code § 1.12. From 1967 on, however, no relevant legislation passed until Congress enacted Public Law 301 in 2018, discussed in section B. The Meskwaki Tribe has continued to transfer its lands to the federal government to hold in trust for the benefit of the tribe. *See Tama County Board of Supervisors*, 52 I.B.I.A. 179, 179 & 179 n.1, *available at* 2010 WL 4653809, at *1 (Dep't of Interior October 22, 2010) (addressing transfer of additional parcels to the federal

government to hold for benefit of the tribe); Marvin Murphy, 3 I.B.I.A. 47, 48, *available at* 1974 WL 15360, at *1 (Dep't of Interior Sept. 9, 1974) (addressing leasehold rights of tribal land).

Public Law 301 was part of a federal recognition that Congress granting states criminal jurisdiction over crimes by and against tribe members on tribal land did not necessarily have the intended effect. *United States v. Bryant*, __ U.S. __, 136 S.Ct. 1954, 1960, 195 L. Ed. 2d 317 (2016). "Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country." *Id.*; *see also* Jimenez & Song, *Concurrent Tribal & State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1636 (1998) (noting Public Law 280 increased lawlessness on tribal lands). Thus, Congress has granted capable tribes, including the Meskwaki, the power to regulate crimes by or against members on tribal lands. Public Law 301, 132 Stat. 4395.

As this history shows, Congress has not modified the State of Iowa's criminal jurisdiction over crimes committed by nonmembers of the tribe on tribal lands. In fact, the Meskwaki Settlement, only a de facto reservation, was not created by treaty, and Congress

approved payment of 1842 treaty annuities to Sac and Fox members in Iowa "so long as they are peaceful and have the assent of the government of Iowa to reside in that State." *Licklider*, 576 F.2d at 151 (quoting 14 Stat. 492, 507 (1868)). Iowa also tendered jurisdiction over the Sac and Fox in Iowa to the federal government with the stipulation: "Nothing contained in this Act shall be so construed as . . . to prevent such [Iowa] courts from exercising jurisdiction of crimes against the laws of Iowa committed [on the Tribe's land] . . . ." *Id.* at 152; 1896 Iowa Acts p. 114, ch. 110. Congress accepted Iowa's tender of jurisdiction "subject to the limitations [the state legislation] contained." *Id.* (quoting 29 Stat. 321, 331). As described by a United States Circuit Court Judge shortly after that tender and acceptance:

> But as it was clearly contemplated that these Indians would continue to reside as a tribe upon their lands in Tama county, and would be brought in some respect into contact with the people of Iowa, it was deemed wise and proper to reserve, for the protection of the latter, jurisdiction in certain particulars over the lands of the reservation, and jurisdiction to punish crimes against the people of Iowa; and these are the purposes of section 3 of the act, which reserves to the state . . . jurisdiction in the courts of the state over crimes against the laws of Iowa committed on the reservation by Indians or others . . . .

Peters v. Malin, 111 F. 244, 253–54 (C.C. Iowa 1901).

Iowa's jurisdiction over crimes not by or against tribe members, included in the grant of statehood, endures. *See Lasley*, 705 N.W.2d at 490 (noting State would apparently have jurisdiction if the record had showed Lasley was not a tribe member) (citing *John*, 587 F.2d at 686). There is nothing in the history of the Meskwaki Tribe that precludes the State of Iowa from exercising criminal jurisdiction over Stanton.

The district court's order dismissing the charges should be reversed.

D. Neither the Tribe Nor the Federal Government has Jurisdiction to Charge Stanton with the Crimes at Issue.

In respect to Stanton's alleged crimes, neither the Meskwaki Tribe nor the federal government has jurisdiction to prosecute. The federal government's jurisdiction does not extend to the state's exclusive jurisdiction over victimless crimes on the settlement by nonmembers. S*ee United States v. Reza-Ramos*, 816 F.3d 1110, 1120 (9th Cir. 2016) ("[W]hen *McBratney* is read together with the exception in § 1152, the general laws of the United States extend to Indian country under § 1152 only when an Indian perpetrator commits a crime against a non-Indian victim, or a non-Indian

perpetrator commits a crime against an Indian victim.") The Meskwaki Tribe's remaining sovereignty does not give its tribal courts the power to criminally prosecute nonmembers of a tribe. *Oliphant v. Suqamish Indian Tribe*, 435 U.S. 191, 195-96 (1978), *superseded by statute on other grounds recognized by*, *Lara*, 541 U.S. at 207. "If tribal courts have no jurisdiction over non-Indians, if state courts do not, who does? No one, I reckon, and that would be sheer chaos." *Vandermay*, 478 N.W.2d at 291 (Henderson, J., concurring).

The *McBratney* rule was established in an appeal from a federal criminal prosecution, and the specific question was whether federal courts had jurisdiction at all—the answer was no. *United States v. McBratney*, 104 U.S. 621, 624 (1881). Federal courts thus have no jurisdiction over nonmembers' crimes on tribal land if the criminal acts do not violate a federal criminal statute and are not committed against a tribe member. *Draper v. United States*, 164 U.S. 240, 242 (1896); *Hilderbrand v. United States*, 261 F.2d 354, 356 (9th Cir. 1958). When the victim of a nonmember's crime is a tribe member, however, federal courts have jurisdiction, and state courts do not. *Donnelly v. United States*, 228 U.S. 243, 272 (1913).

General laws of the United States that apply where federal jurisdiction is exclusive do extend to "Indian Country." 18 U.S.C. §§ 3, 1152. Yet the exclusivity of federal jurisdiction does not. *Ex Parte Wilson*, 140 U.S. 575, 578 (1891). "The words 'sole and exclusive' in section [1152] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it." *Id.* These so-called "assimilated crimes" do not apply to nonmembers' crimes against nonmembers. *United States v. Wheeler*, 435 U.S. 313 (1978), *superseded by statute on other grounds recognized by, Lara*, 541 U.S. 193, 207 (2004). In other words, § 1152 applies to tribe members' crimes against nonmembers or to nonmembers' crimes against tribe members. *Williams v. United States*, 327 U.S. 711, 714 (1946). With no tribe member perpetrator or victim, these provisions do not apply. *John*, 587 F.2d at 686-87; *see United States v. Langford*, 641 F.3d 1195, 1197 (10th Cir. 2011) ("The only issue is whether there is federal jurisdiction for a victimless crime, perpetrated by a non-Indian in Indian country. This is a question of first impression, but the answer is clear. There is no jurisdiction.").

And the Meskwaki Tribal Court cannot prosecute Stanton for any act because tribal courts have no criminal jurisdiction over nonmembers. *Oliphant*, 435 U.S. at 195-96. Yet, when a nonmember is a member of a different tribe, the tribal court, not the state court, has jurisdiction. *Olson v. N.D. Dept. Trans.*, 909 N.W.2d 676, 681 (N.D. 2018) (citing *Lara*, 541 U.S. at 197-98). Tribal courts have jurisdiction over criminal offenses committed by tribe members on tribal land. *Walker v. Rushing*, 898 F.2d 672, 674 (8th Cir. 1990). "Unlike certain other aspects of tribal sovereignty, this power was not 'implicitly lost by virtue of [the tribe's] dependent status.' " *Id.* (quoting *Wheeler*, 435 U.S. at 326). Stanton did not establish that she is a member of a tribe, Meskwaki or otherwise. Thus, despite the district court's statement that the tribal court has jurisdiction, it does not.

If the district court is correct and Public Law 301 extinguished all State of Iowa criminal jurisdiction on the Meskwaki Settlement, then no laws govern what would otherwise be criminal acts by Stanton. Crimes committed on the settlement by nonmembers against other nonmembers or crimes without a victim would be unpunishable—a chaotic state indeed. *Vandermay*, 478 N.W.2d at

291 (Henderson, J., concurring). If there is any question whether Public Law 301 ended State of Iowa jurisdiction over such crimes, the lack of federal or tribal jurisdiction should help clarify that it did not.

E. The State of Iowa Has Criminal Jurisdiction Over the Three Crimes Charged Against Stanton.

Possession of drug paraphernalia, trespass, and violation of a no-contact order are victimless crimes. The State has exclusive criminal jurisdiction over nonmembers' victimless crimes. *McBratney*, 104 U.S. at 624; *Langford*, 641 F.3d at 1197. The district court therefore erred when it dismissed the charges against Stanton for lack of subject matter jurisdiction.

Stanton might argue that trespass is a crime against the Meskwaki Tribe and not within the State's power to enforce. The Supreme Court rejected that argument, however, in *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 370 (1858). Further, trespass as a civil offense against the tribe is subject to civil suit in state court. Iowa Code § 1.12; 42 C.J.S. § 81. The State has jurisdiction over the trespass charge. *Dibble*, 62 U.S. at 370.

Violation of a no-contact order is a victimless crime over which the State of Iowa has jurisdiction. It is not a crime against the party

protected by the order but is sanctionable because the court prohibited contact. *See Vandermay*, 478 N.W.2d at 291 (concluding operating an overweight truck is victimless); *Ryder v. State*, 648 P.2d 774, 775, (N.M. 1982) (concluding distribution of marijuana has no tribe member victim). If the protected party is not Meskwaki, which should be presumed until proved otherwise, then there is certainly state criminal jurisdiction. If the protected party is a tribe member, however, there may be a closer issue. Yet, there is no indication that is the situation here. *See Thomas*, 760 P.2d at 98 (distinguishing charge of failure to report injury to property from an offense charging damage to tribe-owned property on the basis that the criminal act was not causing the damage but failing to report it). Even if it were, violation of the no-contact order is not like an assault and battery with an obvious victim but is a victimless crime like contempt of court. *Id*.

Possession of drug paraphernalia is also a victimless crime. *See Jones*, 546 P.2d at 235 (concluding possession of marijuana by nonmember on tribal land did not involve a tribe member); *Collins*, 826 N.W.2d at 180 (possession of a controlled substance is a victimless crime).

The district court wrongly dismissed the charges against Stanton for lack of jurisdiction because the State of Iowa has exclusive jurisdiction over victimless crimes on the Meskwaki Settlement. *Solem*, 465 U.S. at 465 n. 2 ("[J]urisdiction is limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians.") The effect of the district court's misreading of Public Law 301 is a law enforcement vacuum on the settlement. *See Vandermay*, 478 N.W.2d at 291 (Henerson, J., concurring) (predicting chaos). Tribal authorities must have the ability to keep the settlement safe. If Congress intended to make federal jurisdiction exclusive over crimes not by or against tribe members, if that is within Congress's powers, surely Congress would have ensured there was an enforcement mechanism in place before doing so. It has not established an enforcement mechanism because it intended no such thing.

The ramifications of the court's legal error extend beyond the dismissal of simple misdemeanor complaints here. There is no principle limiting the court's error to simple misdemeanors. Applying the district court's logic, serious and aggravated misdemeanor charges would certainly suffer the same treatment, as would felonies. The proof is in the court's order: beyond merely dismissing the

complaints at issue, the court instructs the sheriff and county attorney to discuss whether detainees should be received at the jail for any crimes whatsoever committed on the settlement. Order Dismiss; App. 10.

Because the State has jurisdiction over Stanton's alleged crimes, the Court should put an end to the law-enforcement vacuum and reverse the district court's dismissal of charges.

F. The Matter is Not Moot or Precluded by Rule.

The action against Stanton was not mooted by the district court's dismissal, and this discretionary review is not precluded by rule.

Iowa Rule of Criminal Procedure 2.33(1) precludes refiling a simple misdemeanor charge after dismissal in the interests of justice, i.e., to facilitate the State gathering evidence, procuring witnesses, or plea bargaining. *State v. Lasley*, 705 N.W.2d 481, 493 (Iowa 2005) (citing *State v. Hartley*, 549 N.W.2d 794, 795-96 (Iowa 1996)). Yet Rule 2.33(1) does not preclude future prosecution after an erroneous dismissal prior to jeopardy attaching. *Id.*

The district court's mistaken dismissal for lack of subject matter jurisdiction was not in the interests of justice. *Id.* Rule 2.33(1) thus

does not preclude reinstatement of the prosecution of the charges against Stanton. *Id*. The issue is not moot.

Also, the criminal rule governing simple misdemeanor appeals does not preclude the Iowa Supreme Court from addressing this appeal. *Id*. at 485-86. Iowa Rule of Criminal Procedure 2.73(1) provides that simple misdemeanor appeals may be taken only when an ordinance or statute is found invalid. Iowa R. Crim. P. 2.73(1). Yet the appellate courts are duty bound to address subject-matter-jurisdiction issues "whether a statutory provision or rule permitted appeal by the State." *Lasley*, 705 N.W.2d at 485-86. It is thus proper for the Iowa Supreme Court to review a simple misdemeanor appeal on discretionary review. *Id*.

This action is not moot or precluded by rule.

CONCLUSION

For the reasons articulated above, the district court mistakenly dismissed simple misdemeanor charges against Jessica Stanton for lack of subject matter jurisdiction. This Court should reverse the district court and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

This matter involves a significant question of federal law governing a tribe—a sometimes complicated area infrequently before this Court. The State thus requests that the Court grant the parties oral argument.

Respectfully submitted,

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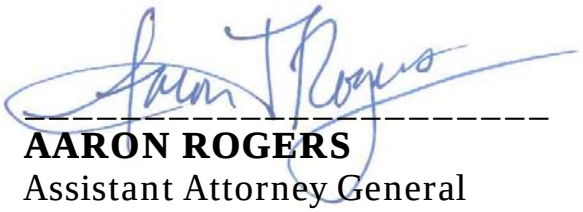

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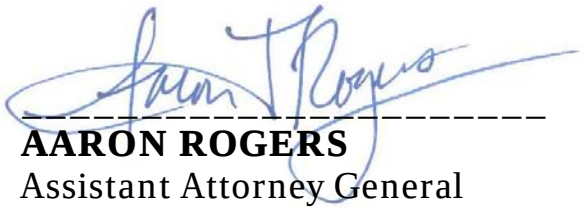

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