Case No. _____

IN THE UNITED STATES

SUPREME COURT

STEVEN J. BURGESS,

Petitioner,

v.

STEVEN WATTERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Does Public Law 280 (18 U.S.C. § 1162 and 28 U.S.C. 1360) give the State of Wisconsin jurisdiction to involuntarily civilly commit a member of a federally recognized Indian tribe who is a legal resident of his tribal reservation under Wisconsin's sexually violent person law (Wis. Stat. Ch. 980)?

2. Have prior decisions of this court adequately defined the scope of civil jurisdiction granted to states under Public Law 280 such that a clearly established rule exists which can be applied by federal district and appellate courts within the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" found in 28 U.S.C. § 2254(d)(1), otherwise known as AEDPA?

3. Was Wisconsin's involuntary civil commitment of Burgess contrary to, and/or an unreasonable application of this court's clearly established law limiting Public Law 280's grant of civil jurisdiction to private civil matters?

4. Was AEDPA intended to limit the power of the federal courts to enforce the long standing federal bar against states asserting jurisdiction over Indian lands absent an express grant of authority by Congress?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

All the parties to this action appear in the caption of the case on the cover page. Neither party is a corporation.

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PETITION FOR WRIT OF CERTIORARI

Steven J. Burgess respectfully prays that a Writ of Certiorari issue to review the judgment and decision below.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix A and is designated for, but not yet published. Also available at 2006 U.S. App. LEXIS 27161.

2. The opinion of the United States District Court appears at Appendix B and is unpublished, but available at 2005 U.S. Dist. LEXIS 2363.

3. The Report and Recommendation of the Magistrate appears at Appendix D and is unpublished, but available at 2005 U.S. LEXIS 811.

4. The Wisconsin Supreme Court opinion appears at Appendix E, and is reported at 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124.

JURISDICTION

The United States Court of Appeals decided this case on November 2, 2006. No petition for rehearing was filed.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

I. PUBLIC LAW 280:

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

18 U.S.C. § 1162.

* * *

> Each of the States or Territories listed shall have jurisdiction over civil causes of action between Indians or to which Indians are parties...to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory...

28 U.S.C. § 1360.

II. ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

28 U.S.C. § 2254(d)(1)

STATEMENT OF THE CASE

This case is unique among habeas corpus cases in that it does not involve a criminal conviction. Rather the issues here concern the jurisdictional relationship between the federal government, the state government and the sovereign rights of a federally recognized Indian tribe over its reservation lands.

Petitioner, hereafter referred to as Burgess, is an enrolled member of a federally-recognized Indian tribe, the Lac du Flambeau Band of Lake Superior Chippewa Indians. He has resided for virtually his entire life on his tribal reservation land.

In 1995 Burgess was convicted in state court of a crime which occurred on the reservation and sentenced to the Wisconsin State Prison System. He was scheduled to be released from prison in 1998. On the day of his scheduled release, the State filed a petition to commit Burgess under Wisconsin's sexually violent person (SVP) law, Wis. Stat. Ch. 980.

Burgess moved to dismiss the petition asserting that the state lacked any jurisdiction or authority to conduct involuntary

civil mental commitment proceedings over tribal reservation Indians.

The trial judge denied the motion to dismiss, stating that while he believed the motion had merit, prior precedent of the Wisconsin Supreme Court required him to deny the motion. The trial judge indicated that ***County of Vilas v. Chapman***, 122 Wis. 2d 212, 361 N.W.2d 699 (1995), compelled him to deny the motion, although he believed that ***Chapman*** was decided incorrectly and was in conflict with well settled United States Supreme Court law.[1]

Following a trial by jury, Burgess was committed, and he appealed. The Wisconsin Court of Appeals ruled that the state had jurisdiction to commit Burgess, not based upon ***Chapman***, *supra*, but rather under the grant of civil jurisdiction found in Public Law 280, 28 U.S.C. § 1360. *See* ***State v. Burgess***, 2002 WI App 264, ¶ 19, 258 Wis. 2d 548, 654 N.W.2d 81.

The Wisconsin Supreme Court reviewed the decision of the court of appeals and primarily concluded that Wisconsin had jurisdiction to commit Burgess under the grant of criminal jurisdiction found in Public Law 280, 18 U.S.C. § 1162. The supreme court added a one paragraph backup ruling that the state might also assert jurisdiction under the Public Law 280 civil grant, *See* ***State v. Burgess***, 2003 WI 71, ¶¶ 11-21, 262 Wis. 2d 354, 665 N.W.2d 124, § III, Appendix E.

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[1] ***Chapman*** holds that the state courts may exercise jurisdiction over any area in which the tribe is not or has not asserted its own authority regardless of an express federal grant of authority, relying on this court's decision in ***Rice v. Rehner***, 463 U.S. 713(1983).

Burgess petitioned this Court for a Writ of Certiorari to review the state supreme court ruling, but his petition was denied. 124 S. Ct. 1713, (2003).

Burgess next sought Habeas Corpus relief in the Western District of Wisconsin. The magistrate and the district judge both concluded that Burgess had strong arguments that the State was without jurisdiction to involuntarily civilly commit tribal reservation Indians. *See* Magistrate's Report, Appendix D; Opinion and Order of Judge, Appendix B; and judge's decision and order granting Certificate of Appealability, Appendix C.

Nonetheless, despite acknowledging Burgess' strong jurisdictional arguments, the district court did not reach the merits and rule on Burgess' jurisdictional claims.

Instead, the district court ruled that the Supreme Court case law on state/federal jurisdiction over Indian land lacked a sufficiently bright-line rule to allow the district court to find that the state court ruling was "contrary to, or an unreasonable application of clearly established Federal law," as required by AEDPA, 28 U.S.C. § 2254(d).

Burgess next appealed to the United States Court of Appeals for the Seventh Circuit. There, the court characterized Burgess' claims as "powerful." The court of appeals further indicated that it could not sustain the Wisconsin Supreme Court's ruling that Wisconsin could assert jurisdiction under the grant of criminal jurisdiction in Public Law 280, and that it would grant relief on that ground alone. *See* slip opinion at 13-16, Appendix A.

However, the Seventh Circuit ultimately ruled that it could not conclude that the Wisconsin Supreme Court "unreasonably applied clearly established federal law" under the "generous AEDPA standards" in ruling that the state did have jurisdiction under the civil grant found in Public Law 280. *See* slip opinion at 17-20, Appendix A.

The Seventh Circuit questioned whether this Court's pronouncements on the scope of civil jurisdiction granted to the states by Public Law 280 were sufficiently clear to allow a finding of "clearly established" law under AEDPA. The court also found that one other court in the country had reached a similar conclusion on the scope of the civil jurisdiction grant of Public Law 280,[2] thereby rendering the Wisconsin Supreme Court's view not "unreasonable."

The court of appeals then affirmed the denial of relief by the district court under the AEDPA standards.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. PREFACE

As noted in the Statement of the Case, this is not a typical state prisoner Habeas Corpus. Burgess is not challenging any state court proceeding or rule. Rather the issue involved here is

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[2] In ***Doe v. Mann***, 415 F. 3d 1038 (9th Cir. 2005), (cert. denied 2005) the Ninth Circuit relied on the Wisconsin Supreme Court's civil jurisdiction analysis from ***State v. Burgess***, in ruling that California had civil jurisdiction under Public Law 280 to conduct involuntary Termination of Parental Rights proceedings against reservation Indians in California.

whether the State of Wisconsin has jurisdiction to conduct involuntary civil mental commitments against members of federally recognized Indian tribes who are legal residents of their federally recognized tribal reservation land.

Both the District Court and the Seventh Circuit acknowledged that Burgess raised significant jurisdictional claims, and both courts went so far as to suggest Burgess may well have been correct in his assertion that the state lacked jurisdiction. However, both courts ultimately ruled that they could not grant relief because of the posture of the case as a Habeas petition and the application of AEDPA. The courts ruled that this Court had not issued sufficiently clear rules to apply to the jurisdictional claim, and that even if this Court's rules were sufficiently clear, that Wisconsin's decision that it did have jurisdiction was neither unreasonably wrong nor contrary to this Court's rules.

Burgess submits that this Court has enunciated clear rules precluding Wisconsin from conducting involuntary civil mental commitment against tribal reservation Indians, and that Wisconsin has unreasonably refused to follow this Court's pronouncements on Indian jurisdiction for many years. Wisconsin has adopted rules allowing it to assert jurisdiction over reservation Indians that are completely contrary to this Court's prior pronouncements.

II. THIS COURT HAS SET FORTH CLEARLY ESTABLISHED AND UNAMBIGUOUS RULES LIMITING A STATE'S JURISDICTION OVER RESERVATION INDIANS

A state may not impose its authority over a tribal reservation Indian absent a specific grant of authority to do so from Congress.

> The Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory," and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." **It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.**

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (citations omitted; emphasis added).

Only in the most exceptional circumstances may a state assert jurisdiction over the on-reservation activities of a tribal member. *See e.g.,* ***New Mexico v. Mescalero Apache Tribe***, 462 U.S. 324, 331-33 (1983):

> The sovereignty retained by tribes includes "the power of regulating their internal and social relations." A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that "'absent governing Acts of Congress,'" a State may not act in a manner that '"infringes[s] on the right of reservation Indians to make their own laws and be ruled by them.'" (citations omitted).

In Wisconsin, the state's jurisdiction is governed by Public Law 280, 18 U.S.C. § 1162; 28 U.S.C. § 1360.

As relevant to this case, Public Law 280 provides in part:

> Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or

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

18 U.S.C. § 1162.

> Each of the States or Territories [sic] listed shall have jurisdiction over civil causes of action between Indians or to which Indians are parties...to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory...

28 U.S.C. § 1360.

It is not disputed that Wisconsin is a state covered by Public Law 280, and that Burgess was a lawful resident of his tribal reservation land. *See e.g.,* ***State v. Burgess,*** *supra,* 258 Wis. 2d 558-60 (Ct. App. Decision), and ***State v. Burgess***, *supra*, 262 Wis. 2d 361, 365-367. (Wisconsin Supreme Court decision).

This Court has examined and explained the scope of jurisdiction conferred upon the state by Public Law 280 on more than one occasion.

> In ***Bryan v. Itasca County***, [426 U.S. 373 (1976)] **we interpreted § 4 [of PL 280] to grant States jurisdiction over private civil litigation involving reservation Indians in state court,** but not to grant general civil regulatory authority...Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations. The Act plainly was not intended to effect total assimilation of Indian reservations would result in the destruction of trial institutions and values. **Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or**

> **civil nature, and applicable only as it may be relevant to private civil litigation in state court.**

California v. Cabazon, *supra*, 480 U.S. at 208 (emphasis added, citations omitted).

This Court has ruled that the civil jurisdiction allowed by PL 280 is strictly limited to private litigation. PL 280's grant of civil jurisdiction was expressly intended only to allow the state to provide a judicial forum for the litigation of private civil disputes involving reservation Indians:

> Public Law 280 merely permits a state to assume jurisdiction over "civil causes of action" in Indian Country.

Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505, 513 (1991).

The general operative presumption from this Court's cases is that the state does not have jurisdiction absent a specific grant of authority. ***Bryan v. Itasca County,*** *supra*, has consistently been interpreted as precluding, not allowing, the state to impose its sovereign regulatory authority over Indian land. *See e.g.,* ***Felix S. Cohen's Handbook of Federal Indian Law***, 1982 Edition, Michie Bobbs-Merrill, Ch. 6, Sec. C3a(1), stating that ***Bryan's*** rationale "precludes new state regulatory jurisdiction generally."

III. THIS COURT HAS SET FORTH CLEARLY ESTABLISHED AND UNAMBIGUOUS RULES THAT INVOLUNTARY CIVIL MENTAL COMMITMENTS OF SO-CALLED SEXUALLY VIOLENT PERSONS ARE NOT PENAL IN ANY WAY, BUT RATHER ARE A PROPER EXERCISE OF A STATE'S CIVIL REGULATORY AND/OR POLICE POWERS.

The key underpinning that allows all sexually violent person [SVP] commitments to pass constitutional muster is their uniquely non-criminal, non-punitive character, and the fact that they are a variety of ordinary involuntary civil mental commitments. Such civil commitments have always been legally classified as an exercise of the state's regulatory power, wither as a police power function to protect citizens, or as a *parens patriea* power to treat the subject. *See* ***Addington v. Texas***, 441 U.S. 418, 426 (1979). This Court has emphasized that point in ***Kansas v. Crane***, 534 U.S. 407 (2002), ***Kansas v. Hendricks***, 521 U.S. 345 (1997), and ***Allen v. Illinois***, 478 U.S. 364 (1986).

In upholding various commitment schemes, the Court repeatedly pointed out the civil, regulatory and non-criminal nature of such commitment schemes. In upholding the Illinois scheme in ***Allen,*** *supra,* the Court noted that the Illinois scheme did not promote either of the traditional criminal/punitive aims of deterrence, or retribution, which led to the conclusion that the scheme was indeed civil in nature. In ***Kansas v. Hendricks***, *supra*, 521 U.S. at 361-62, the Court relied on ***Allen,*** *supra*, and further elaborated on the civil nature of sexually violent person commitments:

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly

> dangerous individuals; provided strict procedural safeguards; directed that confinement persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims.

521 U.S. at 368-69.

Indeed, until this very case the Wisconsin Supreme Court fully adopted this Court's reasoning that SVP commitments were a civil regulatory exercise of the state's police powers. In ***State v. Carpenter***, 197 Wis. 2d 252, 273-74, 541 N.W.2d 105 (1995), the supreme court wrote:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation...
>
> * * *
>
> Therefore, we must consider the language and structure of the statute to determine whether it serves a **legitimate regulatory public purpose** apart from punishment for the predicate act.
>
> * * *
>
> **Where a statute serves a legitimate, regulatory, nonpunitive purpose**, it only violates the Ex Post Facto Clause if the regulatory sanction "bears no rational connection to the purposes of the legislation..."

* * *

> The restriction on such person comes about **incident to a regulation of a present situation**. Accordingly, we hold that ch. 980 is not an ex post facto law.

(Citations omitted, emphasis added).

Thus, Wisconsin's SVP law cannot be considered anything but an exercise of the state's civil regulatory power.

IV. UNDER THE CLEAR PRECEDENT RECITED ABOVE WISCONSIN'S SVP LAW IS NEITHER CRIMINAL IN NATURE, NOR AKIN TO PRIVATE CIVIL LITIGATION. HENCE, WISCONSIN LACKS JURISDICTION TO IMPOSE SVP COMMITMENTS ON TRIBAL RESERVATION INDIANS.

As shown above, under PL 280 Wisconsin only has jurisdiction over reservation Indians with respect to criminal laws or to provide a forum for private civil disputes.

A. Wisconsin's SVP Law is Not Criminal.

As shown above, the entire premise for upholding the constitutionality of SVP laws is their completely non-punitive civil regulatory nature. Wisconsin has defined its law as completely civil in every case save this one. As the Seventh Circuit noted, "[w]ith respect we cannot agree...that chapter 980 qualifies as a 'criminal' statute... In the final analysis, if this case turned solely on the question whether clearly established federal law would permit a characterization of chapter 980 as criminal, we would need to reverse." Slip opinion at 13, 16, APPENDIX A.

B. Wisconsin's SVP Law Does Not Involve Private Civil Litigation.

As this Court succinctly stated, "...when a state seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280 it must be determined whether the law is criminal in nature...**or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.**" ***California v. Cabazon***, *supra* 480 U.S. at 208, (emphasis supplied).

In case the ***Cabazon*** rule was not clear enough, this Court later wrote "Public Law 280 merely permits a state to assume jurisdiction over 'civil causes of action' in Indian Country." ***Oklahoma Tax Commission v. Potawatomi Tribe***, *supra* 498 U.S. at 513.

Prior to this case, Wisconsin had also unambiguously ruled that its P.L. 280 civil jurisdiction was strictly limited to private civil actions:

> The civil jurisdiction component [of PL 280] was included in order to "redress the lack of adequate Indian forums for resolving **private legal disputes between reservation Indians, and between Indians and other private citizens**, by permitting the courts of the States to decide such disputes."

Teague v. Bad River, 2000 WI 79, ¶ 32, 236 Wis. 2d 384, 612 N.W.2d 709. (emphasis added).

As discussed above, in § III, all government initiated involuntary civil mental commitments, including SVP commitments are a proper exercise of a government's police powers. As such, these commitments are not in any way akin to "private civil litigation."

Here the very caption of the case in state court dispels any notion of a private civil matter. The case was titled "State of Wisconsin v. Steven J. Burgess." The purpose and goal of the action by the state against Burgess was to involuntarily confine Burgess in a state run custodial institution potentially for the rest of his life. That does not exactly describe a "private civil matter." Indeed, until the litigation in this very case, Wisconsin was very candid and explicit that these SVP commitments were purely state government police power regulatory actions by the government against an individual. *See e.g.* ***State v. Carpenter,*** *supra,* cited above in § III.

The leading case in the country concerning the jurisdiction of a state to conduct involuntary civil mental commitments against tribal reservation Indians concluded that such actions were not private civil matters, and that the state had no jurisdiction to conduct such proceedings:

> As the procedures heretofore outlined illustrate, **the process of committing someone involuntarily brings the power of the state deep into the lives of the person involved in the commitment process.** The power of the state intrudes no less if the subject is an Indian person living in Indian country. The nature of that intrusion is critical.
>
> * * *
>
> In addition to the procedure for commitment and the accompanying penetration of state power, the fact of commitment itself must not be forgotten. **Although an involuntary commitment is made to meet a grave human need** (as well as to protect society from antisocial conduct), and is in no way intended as an act of punishment, **the loss of freedom is analogous to that brought about through the application of criminal law. A person involuntarily committed is torn away from family, friends, and community; after commitment the person may be allowed no greater liberty than a person**

> **convicted of a criminal offense. One can scarcely conceive how the power of the state could be brought to bear upon a person with any greater severity.**

White v. Califano, 437 F. Supp. 543, 549, (S.D., 1977), aff'd 581 F. 2d 697. While ***White*** was not decided under PL 280, its lesson is clear: involuntary civil mental commitments are not akin to private civil matters.

C. Wisconsin Does Not Have Jurisdiction Under PL 280 to Conduct Involuntary Civil Commitments Against Tribal Reservation Indians.

Public Law 280 authorizes states to enforce their criminal laws against tribal reservation Indians, and it authorizes states to allow the use of their civil court systems for the resolution of private civil matters involving tribal reservation Indians.

A state government initiated involuntary civil mental commitment proceeding which has as its goal the involuntary confinement of an individual in a state run institution potentially for the rest of one's life is neither a criminal law not a private civil litigation matter.

Absent some other authority beyond PL 280, Wisconsin has no jurisdiction to conduct such proceedings against tribal reservation Indians.

V. AEDPA SHOULD NOT BAR RELIEF IN THIS CASE IF BURGESS IS CORRECT ON THE MERITS.

As discussed above, both the district court and the appellate court indicated that Burgess made strong arguments that Wisconsin did not have jurisdiction to commit him. However, both courts ultimately ruled that they were barred from granting relief by the AEDPA limits found in 28 U.S.C. § 2254(d). The

reasons given by both courts was that the law as established by this Court was somehow not clearly enough established to allow for a determination that Wisconsin's rulings were an unreasonable application of, or contrary to, this Court's decisions.

A. The Law Governing This Case is Clearly Established Within the Meaning of AEDPA.

The "clearly established Federal law as determined by the Supreme Court of the United States" requirement has been explained as requiring that the constitutional rules and principles being relied upon by a habeas petitioner be rules in existence at the time of the state court decision, and rules binding upon the state court. *See* Hertz and Liebman, ***Federal Habeas Corpus Practice and Procedure,*** 5th ed. Lexis-Nexis, Matthew Bender, 2001, vol. 2, § 32.3, fn. 6-11.

Here, there can be no question that this Court had clearly articulated rules governing the scope of jurisdiction given to the states under PL 280 at the time that Wisconsin began its SVP commitment proceeding against Burgess. Those rules are fully discussed above in § II.

Burgess has sought no new rule nor any new interpretation of the scope of PL 280 jurisdiction. All Burgess seeks is federal enforcement of the pre-existing limits on state jurisdiction over reservation Indians. As shown, PL 280 permits state jurisdiction in two ways – to enforce criminal laws and to provide a state court forum for private civil litigation. The rules relied on by Burgess are "clearly established" and plainly articulated by the

Supreme Court of the United States, and have been so for a long time.

B. Wisconsin's Decision That It Has Jurisdiction to Involuntarily Civilly Commit Reservation Indians Is Contrary to, And/Or An Unreasonable Application of the Clearly Established Federal Limits on State Jurisdiction.

As discussed above in § II–IV, there is a long and clear legal history limiting the states' assertions of civil regulatory jurisdiction over reservation Indians. Likewise, there is a crystal clear body of law declaring SVP commitments to be purely civil, remedial and regulatory in nature.

Nonetheless, the Wisconsin Supreme Court ruled in this one case that Ch. 980 (Wisconsin's SVP law) was really more of a criminal law than a civil law for purposes of allowing PL 280 criminal jurisdiction. This ruling was not only completely contrary to every pronouncement of this Court on the nature of SVP commitments, but it was contrary to the Wisconsin court's own prior pronouncements on the subject. Even the Seventh Circuit rejected the criminal jurisdiction theory and stated it would reverse on that theory alone.

However, the Wisconsin Supreme Court added a few paragraphs to its opinion, in the nature of a back-up ruling, holding that if Ch. 980 was not really a criminal law, then it must surely be akin to private civil litigation, thereby allowing state jurisdiction under the civil aspect of PL 280. This notion is just as wrong, just as contrary and just as unreasonable as the court's ruling that Ch. 980 was a criminal law.

As detailed above, the Wisconsin courts are the only courts, state or federal, in the entire country that have ruled that states have jurisdiction to involuntarily civilly commit reservation Indians. The very fact that the Wisconsin court felt compelled to rule that Ch. 980 is both simultaneously criminal and/or civil in nature speaks volumes to the unreasonableness of its application of this Court's well established law on state jurisdiction over reservation Indians. Some might even find the decision of the state court a tad cynical, hedging its bets as it did.

C. The Abuses of Habeas Corpus That AEDPA Was Intended To Curb Are Not Present In This Case.

This case is not a typical habeas corpus involving a state prisoner seeking federal review of a state court proceeding. The question here is one of the sovereignty of Indian nations and the interaction of the state, federal and tribal governments.

AEDPA was not enacted to set a bar on the power of the federal courts to protect the sovereign rights of tribal reservation Indians from incursions by overreaching state and local governments. Those are the issues that this case is about. The fact that this case reaches this court as a habeas case is simply a quirk of procedure. If this Court does not grant review, there is no other remedy possible. What is the next reservation Indian to do?

There has been a trend among state governments to become more and more aggressive in the assertion of authority over the activities of reservation Indians on their own tribal lands. This

case and ***Doe v. Mann,*** *supra*, 415 F. 3d 1038 (9th Cir. 2005) represent huge, sweeping changes in the equation of what rights were generally believed reserved to the tribes versus the power of the state governments.

In ***Doe v. Mann***, California asserted the right to terminate the parental rights of tribal reservation Indians, and here Wisconsin has asserted the right to involuntarily civilly commit tribal reservation Indians. In both cases the state asserted its authority under the civil grant of jurisdiction in PL 280. Both cases stand alone, and are in conflict with the prevailing views of Indian scholars and the spirit and language of this Court's prior decisions.

Both cases demonstrate the need for this Court to reiterate the limits of the civil grant of jurisdiction in PL 280, before the limits cease to exist at all.

CONCLUSION

The Court is respectfully urged to grant review of this case.

Dated this ___ day of January, 2007.

Respectfully submitted,

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