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**PREVIEW; United States v. Cooley: Tribal Police Authority Over a  
Non-Indian on a Public Right-of-Way in Indian Country**

Shelby Danna\*

The United States Supreme Court is set to hear oral argument in the matter of *United States of America v. Joshua James Cooley* on Tuesday, March, 23, 2021, at 9:00 a.m. via telephone. Jeffery B. Wall will likely appear on behalf of the Petitioner, United States of America. Eric R. Henkel will likely appear on behalf of the Respondent, Joshua James Cooley.

## I. INTRODUCTION

This case presents a question about tribal jurisdiction in Indian Country over non-Indians. Specifically, the Court will decide whether a tribal police officer has the authority to detain and search a non-Indian on a public right-of-way within a reservation for a possible violation of state or federal law.

## II. FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2016, Joshua Cooley and his child were sitting in a parked truck with Wyoming license plates on the westbound shoulder of U.S. Route 212 at around 1:00 a.m.<sup>1</sup> This portion of the highway is within the Crow Indian Reservation in southern Montana.<sup>2</sup> Around that time, law enforcement officer for the Crow Police Department, James D. Saylor, drove past Mr. Cooley's truck and decided to stop for a welfare check on the vehicle's occupants.<sup>3</sup> During the encounter, Officer Saylor perceived that Mr. Cooley was a non-Indian and had bloodshot eyes.<sup>4</sup> Mr. Cooley informed Officer Saylor that he travelled to Lame Deer to purchase a vehicle from a man named Thomas "Spang" or Thomas "Shoulderblade."<sup>5</sup> Mr. Cooley was unsure of Thomas's last name.<sup>6</sup> Officer Saylor recognized both potential names: Thomas Shoulderblade was a local probation officer, and Thomas Spang was "associated with drug activities on the Northern Cheyenne Indian Reservation."<sup>7</sup>

Based on the surrounding circumstances, including the time of night, the Wyoming license plates, and the reference to a "Thomas," Officer Saylor concluded that Mr. Cooley's story did not make sense.<sup>8</sup> Mr. Cooley then became agitated and, at Officer Saylor's request, lowered the

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<sup>1</sup> Brief for Petitioner at 4, *United States v. Cooley*, <https://perma.cc/EM4L-6ZYC> (U.S. Jan. 8, 2021) (No. 19-1414) [hereinafter Brief for Petitioner].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Brief for Respondent at 5, *United States v. Cooley*, <https://perma.cc/NB5U-XDJL> (U.S. Feb. 20, 2021) (No. 19-1414) [hereinafter Brief for Respondent].

<sup>8</sup> *Id.*

window further.<sup>9</sup> Officer Saylor saw two rifles in the passenger seat and ordered Mr. Cooley to produce identification, while continuing to interrogate him.<sup>10</sup> Mr. Cooley, searching for identification, started slurring his speech, and his breathing became shallow and rapid.<sup>11</sup> Concerned, Officer Saylor ordered Mr. Cooley to show his hands and to again produce identification.<sup>12</sup> Mr. Cooley produced his Wyoming driver's license.<sup>13</sup> Officer Saylor ordered Mr. Cooley out of his truck and performed a pat down search. Officer Saylor placed him in the back of the patrol car while waiting for backup.<sup>14</sup> To secure the area, Officer Saylor went back to Mr. Cooley's truck, where he seized the ignition key and weapons, and discovered a glass pipe and plastic bag that appeared to contain methamphetamine.<sup>15</sup> When backup officers from the county and the federal Bureau of Indian Affairs arrived, they transported Mr. Cooley to the Crow Police Department, where he was interviewed and arrested by a county officer.<sup>16</sup>

Mr. Cooley was charged by a federal grand jury with one count of possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(a).<sup>17</sup> Mr. Cooley moved to suppress evidence on the ground that Officer Saylor exceeded the Crow Tribe's authority during the seizure, in violation of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1301 et seq.<sup>18</sup> The district court granted the motion, and the Ninth Circuit Court of Appeals affirmed.<sup>19</sup> This appeal followed.

### III. SUMMARY OF ARGUMENTS

#### A. *Petitioner United States' Argument*

Petitioner argues on appeal that, as independent sovereigns, Indian tribes retain the inherent authority to reasonably investigate and detain non-Indians within tribal reservations for potential violations of state or federal law.<sup>20</sup> Petitioner states that *United States v. Wheeler*<sup>21</sup> further solidified these longstanding rights, because they have not been diminished by treaty or statute.<sup>22</sup> Further, Petitioner contends ICRA's Fourth Amendment analogue ensures the public is adequately protected and laws are enforced on Indian reservations.<sup>23</sup> The policy behind this

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Brief for Petitioner, *supra* note 1, at 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 7–8.

<sup>17</sup> Brief for Respondent, *supra* note 7, at 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8–9.

<sup>20</sup> Brief for Petitioner, *supra* note 1, at 17.

<sup>21</sup> 435 U.S. 313 (1978).

<sup>22</sup> *Id.* at 323.

<sup>23</sup> Brief for Petitioner, *supra* note 1, at 14.

inherent authority, Petitioner maintains, is to ensure tribal police have the right to respond to criminal activity and protect themselves and others from harm.<sup>24</sup>

Petitioner then argues that, historically, the Court has never questioned a tribe's authority to police and patrol roads and rights-of-way within reservation boundaries and to detain non-tribal members and turn them over to state officers for violating state law.<sup>25</sup> Petitioner asserts the Ninth Circuit's decision restricts the ability of tribal officers to investigate and detain non-Indians on public rights-of-way within reservation boundaries, which directly conflicts with precedent and tribal authority.<sup>26</sup>

Petitioner further contends the Ninth Circuit's approach would limit tribal officers on public rights-of-way to only stop individuals known to be Indian, or whose Indian status is unknown, that are violating only tribal law.<sup>27</sup> This approach is problematic, Petitioner maintains, because it would preclude investigation that would otherwise be constitutional under the Fourth Amendment and *Terry v. Ohio*<sup>28</sup> and would lead to an increase in crime.<sup>29</sup>

In summation, Petitioner argues the Ninth Circuit's decision would leave a gap in law enforcement on Indian reservations—a gap that can be easily filled by tribal police, and the decision should be vacated and remanded for further proceedings.<sup>30</sup>

### B. Respondent Cooley's Argument

Respondent argues that powers over non-Indians on public rights-of-way have never been included in an Indian tribe's inherent sovereign authority.<sup>31</sup> According to Respondent, when Officer Saylor concluded Mr. Cooley was a non-Indian, he lacked the authority to investigate and detain him and thus violated ICRA.<sup>32</sup> Respondent asserts that, historically, tribal sovereignty was limited to self-government.<sup>33</sup> Respondent cites to *Oliphant v. Suquamish Indian Tribe*<sup>34</sup> for the proposition that when tribal officers detain, search, and seize a non-Indian, they intrude on that non-Indian's personal liberty and unlawfully exceed the tribes' Congressionally delegated powers.<sup>35</sup> Respondent further contends the United States prioritizes, above all else, protecting its citizens from intrusions over their personal liberty, which directly conflicts with the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 12 (citing *Strate v. A-1 Contr's.*, 520 U.S. 438, 456 (1997)).

<sup>26</sup> *Id.* at 15.

<sup>27</sup> *Id.*

<sup>28</sup> 391 U.S. 1 (1968).

<sup>29</sup> Brief for Petitioner, *supra* note 1, at 16.

<sup>30</sup> *Id.*

<sup>31</sup> Brief for Respondent, *supra* note 7, at 10.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (citing *Plains Commr'c. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008)).

<sup>34</sup> 435 U.S. 191 (1978).

<sup>35</sup> *Id.* at 209.

notion that Indian tribes have retained police power over non-Indians.<sup>36</sup> Respondent also notions that *Mcgirt v. Oklahoma*<sup>37</sup> established that Congress is the exclusive authority over Indian affairs, and the courts should defer to Congress to fill any jurisdictional gaps.<sup>38</sup>

In summation, Respondent argues ICRA does not create tribal police jurisdiction over non-Indians, and the Ninth Circuit appropriately upheld the suppression of evidence obtained as a result of the illegal searches and seizures.<sup>39</sup>

#### IV. ANALYSIS

The question before the Court is whether the lower courts erred in granting a motion to suppress evidence on the basis that a tribal police officer lacked authority to temporarily detain and search Respondent, a non-Indian, within a reservation on a public right-of-way, based on a potential violation of state or federal law. The outcome could limit tribal authority on public rights-of-way, as well as affect tribal criminal procedure. However, the Court here will likely find for Petitioner United States, on the grounds that public rights-of-way within reservations are included in the definition of “Indian Country,” and the Court has never suggested the tribes’ authority to patrol and protect on-reservation highways excludes non-Indian suspects.

Questions of criminal jurisdiction in Indian Country generally depend on the following three factors: (1) the location of the crime; (2) the Indian status of the offender and victim; and (3) the nature of the crime.<sup>40</sup> Further, criminal jurisdiction of offenses committed in Indian Country “is governed by a complex patchwork of federal, state, and tribal law.”<sup>41</sup> The Indian Law and Order Commission went as far as to say, “criminal jurisdiction in Indian Country is an indefensible morass of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions and without the consent of tribal nations.”<sup>42</sup> Despite the complexities of this system, it is long standing Circuit precedent that tribes retain inherent authority to reasonably protect persons and property within reservation boundaries from Indian or non-Indian suspects—a right Congress has never eliminated.<sup>43</sup> ICRA’s Fourth Amendment analogue also maintains that a tribal officer may stop on reasonable suspicion, and further detain on probable cause, non-Indian suspects for custody and potential prosecution by state or federal

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<sup>36</sup> Brief for Respondent, *supra* note 7, at 11.

<sup>37</sup> 140 S. Ct. 2452 (2019).

<sup>38</sup> Brief for Respondent, *supra* note 7, at 11.

<sup>39</sup> *Id.* at 13.

<sup>40</sup> Brief for the Former United States Attorneys as Amicus Curiae at 5, *United States v. Cooley*, <https://perma.cc/82RQ-X9HH> (U.S. Jan. 15, 2021) (No. 19-1414).

<sup>41</sup> *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993).

<sup>42</sup> ILOC, A Roadmap for Making Native America Safer, Report to the President and Congress of the United States, at ix (Nov. 2013), <https://perma.cc/TJU5-L3GF>.

<sup>43</sup> Brief for Petitioner, *supra* note 1, at 17.

authorities.<sup>44</sup> Additionally, Title 18 U.S.C. § 1151 defines “Indian Country” broadly, and provides in full:

(a) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running the same.<sup>45</sup>

In *Strate v. A-1 Contractors*,<sup>46</sup> the Court addressed the scope of tribal authority in situations involving the same type of land at issue in this case—a public highway over Indian reservation land.<sup>47</sup> Although the Court held tribes lack the authority to adjudicate civil tort disputes between non-Indians arising from state rights-of-way, the Court distinguished a tribe’s authority to police the activities of non-Indians on a reservation’s public roads.<sup>48</sup> The Court further emphasized that the Court has never “questioned the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers non-members stopped on the highway for conduct violating state law.”<sup>49</sup>

Respondent maintains that inherent tribal sovereignty does not include police power over non-Indians on rights-of-way, and Officer Saylor’s search and seizure of Respondent was outside tribal authority, because he identified Respondent as a non-Indian, and the search and seizure took place on a public right-of-way.<sup>50</sup> However, the well-settled precedent establishes that public rights-of-ways on an Indian reservation are included in the definition of “Indian Country,” and the Court has not suggested that tribal authority to patrol these public rights-of-way excludes non-Indian suspects.<sup>51</sup> In actuality, tribal officers may exercise their power to detain a suspected offender and transport them to the proper authorities, which Officer Saylor did when he notified the local county of the situation.<sup>52</sup> If the Court ruled for the Respondent and affirmed the Ninth Circuit’s decision, it would severely limit a tribal officer’s authority to make an investigative stop of anyone on a public right-of-way, which would undermine a tribe’s authority to protect persons within reservation

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<sup>44</sup> *Id.* at 8.

<sup>45</sup> 18 U.S.C. § 1151 (2012).

<sup>46</sup> 520 U.S. 438 (1997).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 455–56 n.11.

<sup>49</sup> *Id.*

<sup>50</sup> Brief for Respondent, *supra* note 7, at 15.

<sup>51</sup> Brief for Petitioner, *supra* note 1, at 22.

<sup>52</sup> *Id.*

boundaries by prohibiting tribal police from detaining a non-Indian for an apparent or obvious state or federal crime during the encounter.

#### V. CONCLUSION

The Court will likely reverse the Ninth Circuit's decision and find for Petitioner United States. The Court will also likely follow Ninth Circuit precedent stating tribal officers may detain non-Indian suspects and transport them to the proper authorities. When Officer Saylor detained Respondent, secured the area, and subsequently notified the proper authorities to make an arrest, he was following the correct procedure to protect himself and others on tribal land. Based on the above facts and analysis, the Court will likely reverse and remand the Ninth Circuit's decision for further proceedings.