No.

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOSHUA JAMES COOLEY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


NOEL J. FRANCISCO
*Solicitor General*
*Counsel of Record*
BRIAN A. BENCZKOWSKI
*Assistant Attorney General*
ERIC J. FEIGIN
*Deputy Solicitor General*
AUSTIN L. RAYNOR
*Assistant to the Solicitor General*
DAVID M. LIEBERMAN
*Attorney*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the lower courts erred in suppressing evidence on the theory that a police officer of an Indian tribe lacked authority to temporarily detain and search respondent, a non-Indian, on a public right-of-way within a reservation based on a potential violation of state or federal law.

**RELATED PROCEEDINGS**

United States District Court (D. Mont.):

*United States* v. *Cooley*, No. 16-cr-42 (Feb. 7, 2017)

United States Court of Appeals (9th Cir.):

*United States* v. *Cooley*, No. 17-30022 (Mar. 21, 2019) (petition for reh'g denied, Jan. 24, 2020)

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## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 919 F.3d 1135. The order of the court of appeals denying panel rehearing and rehearing en banc (App., *infra*, 32a-80a) is reported at 947 F.3d 1215. The order of the district court (App., *infra*, 22a-31a) is not published in the Federal Supplement but is available at 2017 WL 499896.

### JURISDICTION

The judgment of the court of appeals was entered on March 21, 2019. A petition for rehearing was denied on January 24, 2020 (App., *infra*, 32a-80a). By order of March 19, 2020, this Court extended the deadline for all

petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 81a-85a.

**STATEMENT**

A federal grand jury in the District of Montana charged respondent 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). App., *infra*, 5a. The district court granted respondent's motion to suppress evidence obtained as a result of his interaction with a tribal officer. *Id.* at 22a-31a. The court of appeals affirmed. *Id.* at 1a-21a.

1. At approximately 1 a.m. on February 26, 2016, Officer James Saylor of the Crow Tribe of Montana was driving on the section of U.S. Route 212 that lies within the boundaries of the Crow Reservation. App., *infra*, 2a, 23a. That portion of Route 212—a public highway that crosses the reservation pursuant to a right-of-way, see *id.* at 7a-8a—is defined as "Indian country" for many jurisdictional purposes under federal law. See 18 U.S.C. 1151 (defining "'Indian country'" to include "all land within the limits of any Indian reservation * * * including rights-of-way running through the reservation"). When Officer Saylor saw a pickup truck parked on the shoulder in a location with spotty cellphone reception, with its engine running and headlights on, the officer—who "regularly found motorists on the highway

in need of assistance"—pulled over and parked behind it. App., *infra*, 2a; see *id.* at 23a.

Because the truck's windows were closed and tinted, Officer Saylor knocked on the side of the truck. App., *infra*, 2a. At that point, the rear driver's side window briefly lowered, then went up again. *Ibid.* Officer Saylor shined his flashlight into the front window and saw respondent, sitting in the driver's seat, make a thumbs-down signal. *Ibid.* At Officer Saylor's request, respondent then lowered the window approximately six inches—just enough for Officer Saylor to see the top of his face. *Ibid.* Respondent had "watery, bloodshot eyes" and, based on his appearance, "seemed to be" a non-Indian. *Id.* at 2a-3a. A small child climbed from the truck's backseat into respondent's lap. *Id.* at 23a.

Respondent told Officer Saylor that he had pulled over because he was tired. App., *infra*, 3a. In response to further questions, respondent claimed that he had driven from the Town of Lame Deer (26 miles away), where he had tried to buy a car from a man named "Thomas" with the last name of either "Spang" or "Shoulder Blade." *Ibid.* Officer Saylor knew men with both names: Shoulder Blade was a probation officer, and Spang was a suspected drug trafficker. *Id.* at 3a, 24a, 180a-181a. Respondent stated that the car he had intended to purchase had broken down, and the seller had loaned him the truck so that he could drive home. *Ibid.*

Officer Saylor was confused by respondent's claim that he had been attempting to purchase a vehicle at that time of night. App., *infra*, 49a. Officer Saylor was also skeptical that the potential seller "would allow the use of a vehicle with all the personal belongings that [Officer Saylor had] seen in the bed." *Id.* at 50a. And

based on his familiarity with vehicle-registration practices in the area, Officer Saylor was doubtful that Spang or Shoulder Blade would own a truck registered in Wyoming. *Ibid.* When Officer Saylor suggested to respondent that the explanation did not make sense, respondent became agitated, lowered his voice, and started taking long pauses. *Id.* at 3a.

At Officer Saylor's request, respondent rolled his window down further, at which point Officer Saylor noticed two semiautomatic rifles in the front passenger seat. App., *infra*, 4a. Respondent claimed that the rifles belonged to the person who had loaned him the truck. *Id.* at 50a. As the conversation progressed, Officer Saylor detected that respondent was slurring his speech. *Id.* at 182a-183a. Officer Saylor requested identification, and respondent pulled several wads of cash out of his pocket and placed them in the center console. *Id.* at 51a. When respondent placed his hand near his pocket area again, his breathing became shallow and rapid, and he glanced forward with "what is sometimes called a 'thousand-yard stare.'" *Ibid.* In Officer Saylor's experience, such a stare is an indication that a suspect may be about to use force. *Ibid.*

Officer Saylor unholstered his service pistol, held it to his side, and ordered respondent to stop and show his hands. App., *infra*, 4a, 51a. Respondent complied. *Ibid.* On further instruction, respondent produced a Wyoming driver's license. *Ibid.* Officer Saylor attempted to call in respondent's license number, but the call failed due to lack of connectivity. *Id.* at 4a. Officer Saylor then circled the truck and opened the passenger-side door, where he noticed a loaded semiautomatic pistol in the area near respondent's right hand. *Ibid.* Respondent claimed not to have realized that the pistol

was there. *Ibid.* Officer Saylor seized and disarmed the pistol. *Ibid.*

Respondent then "vaguely mentioned that somebody might be coming to meet him at the side of the road." App., *infra*, 52a; see *id.* at 185a. At that point, Officer Saylor ordered respondent to exit the truck, conducted a pat-down, and escorted both him and the child to the patrol car. *Id.* at 5a. Before getting into the police car, respondent took several small, empty plastic bags—which Officer Saylor recognized as the kind commonly used to package methamphetamine—out of his pocket and set them on the hood. *Id.* at 5a, 116a-118a. Officer Saylor placed respondent in the back of the patrol car and called for backup, including from county police, because respondent "seemed to be" a non-Indian. *Ibid.*

While awaiting assistance, and in light of respondent's vague suggestion that someone else might soon be arriving, Officer Saylor took steps to secure the area, including returning to the truck to take possession of the firearms in the cab. App., *infra*, 26a, 52a, 118a. In the course of securing the cab, Officer Saylor noticed in plain view a glass pipe and a plastic bag that appeared to contain methamphetamine, wedged between the driver and middle seats. *Id.* at 5a, 26a, 157a-158a, 188a. Officer Saylor moved the firearms to the hood of his patrol car. *Id.* at 118a. Officers from the county and the Bureau of Indian Affairs (BIA) subsequently arrived on the scene. *Id.* at 120a. In coordination with the county officer, Officer Saylor transported respondent back to the Crow Agency Police Department, where he was interviewed by BIA and local investigators and then arrested by the county officer. *Id.* at 189a-190a.

2. A federal grand jury in the District of Montana indicted respondent on one count of possessing with intent to distribute methamphetamine, 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). App., *infra*, 5a. Respondent moved to suppress the evidence obtained as a result of his interaction with Officer Saylor, on the theory (as relevant here) that Officer Saylor had acted outside the scope of his authority as a tribal law enforcement officer in detaining respondent and conducting a search. *Ibid.*

The district court granted respondent's motion, concluding that Officer Saylor's actions were unauthorized and unreasonable, and that suppression of the drug and firearm evidence was required under the analogue to the Fourth Amendment in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1302(a)(2). App., *infra*, 22a-31a. The court reasoned that Officer Saylor had discovered that respondent was non-Indian based on respondent's appearance when he "initially rolled [the] window down," and it found that Officer Saylor had seized respondent when he drew his sidearm and ordered respondent to show his hands. *Id.* at 29a-30a. And the court took the view that a tribal officer's authority to detain a non-Indian stopped on a public highway "for the reasonable time it takes to turn the person over to state or federal authorities" is limited solely to circumstances in which "'it is apparent that a state or federal law has been violated.'" *Id.* at 27a (quoting *Bressi* v. *Ford*, 575 F.3d 891, 896 (9th Cir. 2009)).

The district court emphasized that the "apparent" standard is "more stringent" than probable cause and stated that it had not been satisfied here. App., *infra*,

27a-28a. The court concluded that Officer Saylor's observations before the seizure—including respondent's "bloodshot and watery eyes," "wads of cash," and "answers to questions that seemed untruthful"—did not suffice to establish an "'apparent'" violation of law. *Id.* at 30a.

3. The government appealed the district court's suppression order, and the court of appeals affirmed. App., *infra*, 1a-21a.

The court of appeals recognized that although an Indian tribe's sovereign authority to charge and punish wrongdoers under its own criminal laws is limited to Indians, a tribe retains the power to "investigate crimes committed by non-Indians on tribal land"—including reservation land held by the tribe or its members (or in trust for them)—"and deliver non-Indians who have committed crimes to state or federal authorities." App., *infra*, 7a (citing *Duro* v. *Reina*, 495 U.S. 676, 697 (1990)). The court also recognized that a tribe could help to enforce state and federal law against non-Indians on non-tribal reservation lands as well. *Id.* at 7a-8a. Like the district court, however, the court of appeals held that in the latter circumstance, a tribe's authority depends upon the existence of an "apparent" or "obvious" violation of state or federal law. *Id.* at 8a-9a (citation omitted).

The court of appeals set forth a framework that allows tribal authorities to "stop those suspected of violating tribal law on public rights-of-way as long as the suspect's Indian status is unknown," but only for the limited purpose of "ascertaining whether the person is an Indian." App., *infra*, 8a. It instructed that such a stop "must be a brief and limited one; authorities will typically need to ask one question to determine whether the suspect is an Indian." *Ibid.* (brackets, citation, and

internal quotation marks omitted). If that "'brief and limited'" inquiry fails to establish that the person is an Indian, then the court would allow a tribal officer to detain the person only if "'it is apparent'"—or "'obvious'"—"that state or federal law * * * has been violated," in which case the person could be detained "'for a reasonable time in order to turn him or her over to state or federal authorities.'" *Id.* at 8a-9a (quoting *Bressi*, 575 F.3d at 896, and *United States* v. *Patch*, 114 F.3d 131, 134 (9th Cir.), cert. denied, 522 U.S. 983 (1997)) (brackets omitted). As to whether a tribal officer could investigate suspected criminal activity, the court took the view that "the power to detain non-Indians on public rights-of-way for 'obvious' or 'apparent' violations of state or federal law does not allow officers to search a known non-Indian for the purpose of finding evidence of a crime." *Id.* at 9a (citation omitted).

The court of appeals acknowledged that it had "not elaborated on when it is 'apparent' or 'obvious' that state or federal law is being or has been violated." App., *infra*, 9a (citation omitted). But, like the district court, the court of appeals concluded that the seizure when Officer Saylor unholstered his sidearm was not justified by any "'apparent'" or "'obvious'" violation of law. *Id.* at 9a-10a, 21a (citation omitted). It further held, despite the absence of adversarial briefing on the issue (which the government had conceded), that the ICRA's Fourth Amendment analogue contains an exclusionary rule, applicable to evidence obtained as the fruit of an unlawful seizure. *Id.* at 11a-14a. And it found that the seizure here was unreasonable, on the theory that when a tribal officer acts in excess of the tribe's sovereign jurisdic-

tion, he is limited to a citizen's arrest authority for felonies committed in his presence—a standard not satisfied here. *Id.* at 18a, 20a-21a.

4. The government petitioned for rehearing en banc, which was denied. App., *infra*, 32a-80a. Judges Berzon and Hurwitz, the two Ninth Circuit judges on the original panel (which had included a Fourth Circuit judge), concurred in the denial of rehearing en banc. *Id.* at 33a-41a. They believed that the framework laid out in the panel opinion would not create significant practical problems for law enforcement on Indian reservations. *Id.* at 33a-34a. And they expanded on their view that the only inherent law-enforcement authority that Indian tribes retain must rest either on the power to enforce criminal law against Indians or the power to exclude unwanted persons from tribal lands. *Id.* at 34a-35a.

Judge Collins, joined by three other judges, dissented from the denial of rehearing en banc. App., *infra*, 41a-80a. He criticized the panel for adopting a "convoluted series of rules that turn on what the officer does or does not know about the driver's tribal status," as well as a standard "more demanding than ordinary probable cause." *Id.* at 42a-44a (emphasis omitted). He explained that he would instead have recognized that tribal officers have the "authority to conduct *Terry*-style investigations"—*i.e.*, brief investigations based on reasonable suspicion—"of non-Indians and, if probable cause arises, to then turn the non-Indian suspect over to the appropriate state or federal authorities for criminal prosecution." *Id.* at 42a; see *Terry* v. *Ohio*, 392 U.S. 1 (1968).

Judge Collins observed that even when articulating limits on "a tribe's *civil* jurisdiction" over public highways on an Indian reservation, this Court had not

"'question[ed] 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 nonmembers stopped on the highway for conduct violating state law.'" App., *infra*, 54a, 65a (quoting *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997)). And he explained that "th[is] Court's explicit recognition that tribal officers may conduct traffic stops of non-Indians for violations of state law on state highways within reservations can only be understood against the familiar backdrop of the settled law governing such stops" under the Fourth Amendment. *Id.* at 66a-67a (emphasis omitted).

Judge Collins also stated that the panel's rule would govern law enforcement not only on public rights-of-way on an Indian reservation, but also on "reservation land that is held in fee by non-Indians," App., *infra*, 76a, which this Court has treated as jurisdictionally equivalent to public rights-of-way, see *Strate*, 520 U.S. at 456. And he stressed that "[r]aising the bar for tribal investigations of non-Indian misconduct on fee lands from reasonable suspicion to 'probable-cause-plus' is a very big deal, and one that literally may have life-or-death consequences for many of the hundreds of thousands of persons who live on Indian reservations located within this circuit." App., *infra*, 76a. Noting the high volume of non-tribal land and the large numbers of non-Indians residing on reservations, *id.* at 76a-77a, he feared that "the troubling consequence of the panel's opinion will be that tribal law enforcement will be stripped of *Terry*-stop investigative authority with respect to a significant percentage (and in some cases a majority) of the people and land within their borders," *id.* at 78a, an issue of

"potential practical significance to the safety and welfare of hundreds of thousands of our fellow citizens," *id.* at 80a.

## REASONS FOR GRANTING THE PETITION

The decision below erroneously diminishes the inherent sovereign authority of Indian tribes and unjustifiably impedes the enforcement of state and federal law on Indian reservations throughout the Ninth Circuit. The panel recognized that Indian tribes must retain *some* authority to assist in the enforcement of the state and federal laws applicable to non-Indians on rights-of-way or alienated land within the boundaries of a tribe's reservation. But in limiting such authority solely to detention for "apparent" or "obvious" violations of those laws, App., *infra*, 8a-9a (citation omitted), the Ninth Circuit imposed an unprecedented, indeterminate, and unworkable standard that appears to be significantly more stringent than the traditional legal standards of reasonable suspicion and probable cause. The Ninth Circuit's *sui generis* framework disrupts long-held understandings, reflected in decisions of this Court and others, about law enforcement on reservation land. And its curtailment of meaningful tribal policing authority creates gaps in law enforcement that state and federal governments cannot practically fill, thereby threatening the safety and welfare of everyone on Indian reservations. This Court should grant a writ of certiorari and reverse.

### A. The Decision Below Is Incorrect

The ability to protect people and property within its borders is a fundamental aspect—perhaps the most fundamental aspect—of a sovereign's power. See, *e.g.*, *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905). Although

Congress has circumscribed the inherent sovereign power of Indian tribes in certain ways, it has not left them wholly dependent on state or federal largesse to police illegal activity by non-Indians on public roads (or alienated lands) within a reservation. Instead, a tribal officer may reasonably investigate—and, where appropriate, detain—non-Indian suspects to allow for their prosecution by state or federal authorities. The Ninth Circuit erred in reading this Court's cases to hold otherwise.

1. Indian tribes are "distinct, independent political communities," *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), "qualified to exercise many of the powers and prerogatives of self-government," *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). Because tribes enjoy only a "dependent status" in our political order, however, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). It encompasses those powers "not withdrawn by treaty or statute, or by implication as a necessary result of [tribes'] dependent status." *Ibid.*

This Court's decisions establish certain general principles, informed by historical practice, governing inherent tribal authority over non-Indians. In the criminal context, the Court has held that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians" for criminal offenses. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Instead, on lands defined as "Indian country," 18 U.S.C. 1151, the substantive criminal law applicable to non-Indians generally depends on the nature of the crime. Unless Congress has provided otherwise, crimes by non-Indians against Indians generally are exclusively federal, while

crimes by non-Indians against non-Indians are subject to state law, and crimes with no specific victim (like drug trafficking) may be prosecuted under state or federal law, depending on the circumstances. See *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990); *United States* v. *John*, 437 U.S. 634, 651 & n.22 (1978).

Although state and federal law displace tribes' inherent authority to define and punish crimes by non-Indians, tribes are not powerless to police non-Indians for violations of state or federal law within a reservation. Whereas the "exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe," *Duro*, 495 U.S. at 688, investigation and brief law-enforcement detention do not. The rationale for denying tribes the authority to prosecute non-Indians—namely, that non-Indians lack membership in the political community of any Indian tribe, see, *e.g.*, *Oliphant*, 435 U.S. at 210-211—is thus inapplicable to tribal policing of non-Indians within reservation boundaries for violations of the state and federal laws to which those non-Indians are subject. Instead, "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Duro*, 495 U.S. at 697.

This Court described such authority just after noting tribes' "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Duro*, 495 U.S. at 696; see *id.* at 697. Tribal sovereignty is at its apex in cases involving "the land held by the tribe" and "tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. at 327.

But a tribe's authority to protect those on its reservation from the illegal activities of non-Indians is not limited to such lands, and this Court has recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987). Even as to reservation land "beyond the tribe's immediate control"—such as land owned in fee by non-Indians—"the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same." *Plains Commerce Bank*, 554 U.S. at 336. Tribal police need not stand idly by, waiting for state or federal authorities, while a non-Indian robs a restaurant on non-Indian fee land, or drives drunkenly on a public highway, within the tribe's reservation.

2. The Court effectively recognized as much in *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), which addressed the scope of inherent tribal authority on the same type of land at issue in this case, namely, "a public highway * * * over Indian reservation land," *id.* at 442. The Court observed that the tribe had "reserved no right to exercise dominion or control over the right-of-way," *id.* at 455, and thus treated the highway, "for nonmember governance purposes," as equivalent to "land alienated to non-Indians," *id.* at 454, 456. The Court determined that the tribe lacked jurisdiction to adjudicate a civil tort dispute stemming from a traffic accident on the highway between two non-Indians. *Id.* at 442-443. But it emphasized that "[w]e do not here question 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

nonmembers stopped on the highway for conduct violating state law." *Id.* at 456 n.11.

The Court in *Strate* included an approving "Cf." citation to the Supreme Court of Washington's decision in *State* v. *Schmuck*, 850 P.2d 1332 (en banc), cert. denied, 510 U.S. 931 (1993), which had recognized a tribal officer's "inherent authority to stop and detain a non-Indian who has allegedly violated state and tribal law while on the reservation until he or she can be turned over to state authorities for charging and prosecution." *Id.* at 1342; see *Strate*, 520 U.S. at 456 n.11. *Schmuck* had specifically reasoned that a tribe's "authority to stop and detain is not necessarily based *exclusively* on the power to exclude non-Indians from tribal lands, but may also be derived from the Tribe's general authority as sovereign." 850 P.2d at 1341. This Court's decision in *Strate*, which distinguished a tribe's authority to patrol public roads on a reservation from its (circumscribed) authority to assert civil jurisdiction over traffic accidents on them, 520 U.S. at 456 n.11, reflects similar reasoning. If a tribe's inherent policing authority were limited to tribal lands, or simply coextensive with its regulatory or adjudicatory powers, then the holding of *Strate* necessarily *would* have called such policing authority into "question." *Ibid.* But *Strate* expressly "did not question the ability of tribal police to patrol the highway." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 651 (2001).

Historical practice reinforces the tribes' retention of inherent authority to exercise certain police functions with respect to non-Indians within the reservation. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-140 (1982) (recognizing relevance of history in as-

sessing tribal authority). Various treaties in the eighteenth and nineteenth centuries imposed obligations on tribes to hand over suspects apprehended in tribal territory to the relevant authorities. For example, the Suquamish Tribe agreed "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory art. 9, *ratified* Mar. 8, 1859, 12 Stat. 929; see also, *e.g.*, Treaty between the United States of America and the Crow Tribe of Indians art. 1, *ratified* July 25, 1868, 15 Stat. 649; A Treaty of Peace and Friendship (Creek Nation Treaty) art. 8, *signed* Aug. 7, 1790, 7 Stat. 37. The Suquamish Tribe would not be able to comply with its obligation under that treaty to "promptly deliver up any non-Indian offender," *Oliphant*, 435 U.S. at 208 (construing treaty), unless it in fact had the authority to do so. And because the treaty did not itself expressly confer that authority, it appeared to rely on inherent sovereign authority that the tribe retained. Cf. *Wheeler*, 435 U.S. at 327 n.24 (referring "to treaties made with the Indians as 'not a grant of rights to the Indians, but a grant of rights from them'") (quoting *United States* v. *Winans*, 198 U.S. 371, 381 (1905)).

3. The Ninth Circuit identified no sound basis for concluding that the Crow Tribe has been divested of its inherent authority to investigate and detain non-Indian suspects like respondent for prosecution by the state or federal government. The panel purported to premise its legal analysis on the view that "tribal officers" have only "two sources of authority"—the power to enforce criminal law against Indians within the reservation, and

the power to exclude non-Indians from tribal lands—neither of which authorizes stops of non-Indians on public rights-of-way on the reservation. App., *infra*, 35a (Berzon and Hurwitz, J.J., concurring in the denial of rehearing en banc); *id.* at 7a (panel opinion). But even the panel was not willing to go so far as to hold that tribes lack *any* inherent authority to detain non-Indians for state or federal crimes—an implausible result that this Court's decisions do not support. The panel instead imposed a *sui generis* framework under which tribal officers may stop vehicles that are apparently violating tribal law, ask (typically only one question) about the driver's Indian status, and detain a driver who is not thereby revealed to be an Indian only for an "'apparent'" or "'obvious'" violation of law. *Id.* at 8a-9a (citation omitted).

That ad hoc regime lacks legal grounding. The standards for tribal policing are not ripe for judicial invention, but instead are the subject of congressional legislation—namely, the ICRA's Fourth Amendment analogue. Indian tribes are not directly bound by the Fourth Amendment, see *Duro*, 495 U.S. at 693, but Congress provided in the ICRA that "[n]o Indian tribe in exercising powers of self-government shall * * * violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures," 25 U.S.C. 1302(a)(2). Courts have interpreted that language in the ICRA *in pari materia* with the similar language in the Fourth Amendment. See, *e.g.*, App., *infra*, 15a (citing *United States* v. *Becerra-Garcia*, 397 F.3d 1167, 1171-1172 (9th Cir. 2005), cert. denied, 547 U.S. 1005 (2006)). And this Court has long held that the Fourth Amendment's similar language al-

lows for investigatory stops based on reasonable suspicion, see, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968), and arrests based on probable cause, see, *e.g.*, *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

Because a tribe lacks authority to try or punish a non-Indian, its "arrest" authority with respect to one is necessarily limited to detention for the purpose of allowing state or federal law enforcement to take custody. See *Duro*, 495 U.S. at 697. But so long as neither the length nor the conditions of such detention are excessive, it is not "unreasonable," 25 U.S.C. 1302(a)(2). See, *e.g.*, *Heien* v. *North Carolina*, 574 U.S. 54, 60 (2014) ("As the text indicates and we have repeatedly affirmed, the ultimate touchstone of the Fourth Amendment is reasonableness.") (citation and internal quotation marks omitted). No heightened level of suspicion, above and beyond probable cause, should be required for such reasonable detention, simply because it is carried out by a tribal officer. "[A] limited tribal power 'to stop and detain alleged offenders in no way confers an *unlimited* authority to regulate the right of the public to travel on the Reservation's roads.'" *Strate*, 520 U.S. at 456 n.11 (quoting *Schmuck*, 850 P.2d at 1341). And Congress, through the ICRA, has made clear that the familiar Fourth Amendment standards supply the appropriate limits.

Even without the ICRA, the Ninth Circuit's "'apparent' or 'obvious'" standard, App., *infra*, 9a (citation omitted), would make little sense. Early treaties appeared to contemplate tribal detention of non-Indian suspects accused of having committed crimes *in the past*, which is inconsistent with limiting detention to those who commit an "apparent" violation of law in the presence of a tribal officer. See, *e.g.*, Creek Nation

Treaty art. 8, 7 Stat. 37 (obligation to "deliver * * * up" certain offenders "who shall take refuge in [a tribal] nation"). Under normal Fourth Amendment standards, the police may stop someone who matches a description of a suspect that another law-enforcement agency is looking to arrest. See *United States* v. *Hensley*, 469 U.S. 221, 223 (1985) (holding that "police officers may stop and briefly detain a person who is the subject of a 'wanted flyer' while they attempt to find out whether an arrest warrant has been issued"). The Ninth Circuit's standard, however, would apparently deny tribes that authority.

The Ninth Circuit's "'apparent' or 'obvious'" standard, App., *infra*, 9a (citation omitted), remains unsound in the present day. As a threshold matter, the Ninth Circuit has not meaningfully defined the standard, see *ibid.*, leaving tribal officers and courts largely at sea as to what is permissible. Like traditional Fourth Amendment standards, the Ninth Circuit's new one "has to be applied on the spur (and in the heat) of the moment," but the Ninth Circuit has failed "to draw [a] standard[] sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); see *ibid.* (noting the "essential interest in readily administrable rules" under the Fourth Amendment). Even the familiar Fourth Amendment "legal rules for probable cause and reasonable suspicion acquire content only through application," *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996), and starting over with a newly minted standard will sow confusion and inconsistency, leading (as in this

case) to the exclusion of highly probative evidence of serious criminal conduct through no fault of a tribal officer.

In addition, whatever its precise contours, a standard more stringent than reasonable suspicion or probable cause would substantially handicap tribal officers' ability to police illegal activity on the reservation. The panel's rule would preclude investigation and detention across a broad spectrum of cases falling squarely within well-established Fourth Amendment doctrine. For example, a tribal officer would be unable to detain a non-Indian on a public highway based on a 911 tip that the non-Indian had run another car off the road. See *Navarette* v. *California*, 572 U.S. 393, 404 (2014) (finding reasonable suspicion on the basis of such a tip). A tribal officer would be precluded from investigating further if, during an interaction with a non-Indian motorist, he smelled alcohol on the driver's breath or a drug-detecting dog alerted. See *Florida* v. *Harris*, 568 U.S. 237, 248 (2013) (recognizing that dog alert can provide probable cause). And because the decision appears likely to apply not only to public rights-of-way but also to fee land owned by non-Indians, see *Strate*, 520 U.S. at 456 (treating the two as equivalent for jurisdictional purposes), a tribal officer could not investigate a non-Indian who appeared to be casing a store on such land for a possible robbery. See *Terry*, 392 U.S. at 28 (finding reasonable suspicion in that circumstance).

**B. The Decision Below Warrants This Court's Review**

The broad legal and practical implications of the decision below warrant this Court's review. In imposing such novel impediments on tribal law enforcement, the decision below departs from traditional understandings

of tribes' ability to maintain public safety within reservation boundaries. State-court decisions within and outside the Ninth Circuit have viewed the sort of normal law-enforcement activity here as unproblematic, and both the States and the federal government depend on tribal law enforcement to police reservations in precisely this way. As the judges dissenting from the denial of rehearing en banc recognized, the panel's holding carries "potential practical significance to the safety and welfare of hundreds of thousands of * * * fellow citizens" living within the Ninth Circuit, App., *infra*, 80a (Collins, J., dissenting from the denial of rehearing en banc), which contains a significant percentage of all the Indian reservations in the United States. See Bureau of Indian Affairs, *Indian Lands of Federally Recognized Tribes of the United States*, https://biamaps.doi.gov/bogs/gallery/PDF/IndianLands_2017.pdf (map displaying geographical distribution of Indian reservations).

1. The decision below is in serious tension with decisions from various state courts addressing similar issues. First among those is the Supreme Court of Washington's decision in *Schmuck*, which this Court approvingly cited in *Strate*. See *Strate*, 520 U.S. at 456 n.11. The tribal officer in that case stopped a non-Indian driver for speeding on a public road through a reservation; the driver smelled of alcohol and acknowledged "'ha[ving] a few [drinks],'" but initially refused a field sobriety test; the officer temporarily detained the suspect "until the Washington State Patrol could respond to their location to investigate whether [the suspect] had been driving while under the influence of alcohol or drugs," during which time the driver consented to sobriety testing; and after the State took custody, the

driver was eventually convicted of driving while intoxicated. *Schmuck*, 850 P.2d at 1333-1334 (footnote omitted). In upholding the stop, the Supreme Court of Washington recognized that "public roads * * * are within the territorial jurisdiction of the * * * tribal police * * * for the limited purpose of asserting the Tribe's authority to detain and deliver alleged offenders." *Id.* at 1341. And it emphasized that under a contrary rule, the suspect "could have easily caused extensive property damage or seriously injured other motorists" on the reservation. *Id.* at 1342.

The Supreme Court of Wyoming subsequently adopted *Schmuck*'s basic rationale in *Colyer* v. *State*, 203 P.3d 1104 (2009). There, a BIA officer—whom the court treated as equivalent to a tribal officer for jurisdictional purposes, see *id.* at 1111 n.5—stopped a suspected drunk driver and detained him until a county officer arrived. *Id.* at 1106. Citing *Schmuck* as well as this Court's decision in *Duro* v. *Reina*, *supra*, see *Colyer*, 203 P.3d at 1109-1110, the court found "the law * * * clear that the appropriate action to be taken in circumstances such as those presented in this case is for the reservation officer to detain the appellant for formal arrest by a state officer," *id.* at 1111. State intermediate appellate courts have followed a similar approach in other cases involving stops on public roads through a reservation. See *State* v. *Ryder*, 649 P.2d 756, 757-758 (N.M. Ct. App. 1981), aff'd, 648 P.2d 774 (N.M. 1982); *State* v. *Pamperien*, 967 P.2d 503, 506 (Or. Ct. App. 1998).

2. The Court of Appeals of New Mexico explained that "[t]o hold that an Indian police officer may stop offenders but upon determining they are non-Indians must let them go, would be to subvert a substantial

function of Indian police authorities and produce a ludicrous state of affairs which would permit non-Indians to act unlawfully, with impunity, on Indian lands." *Ryder*, 649 P.2d at 759. To the extent that the Ninth Circuit avoided such a holding, it did so only by qualifying its otherwise categorical elimination of tribal authority with a novel "'apparent' or 'obvious'" standard, App., *infra*, 9a (citation omitted), of uncertain application to the scenarios described in the state decisions cited above. But particularly given that tribal officers have little information as to what the new standard means, it is likely to significantly chill their policing activities.

Officer Saylor, for example, has "regularly found motorists on the highway in need of assistance." App., *infra*, 2a. But according to the Ninth Circuit, he had no law-enforcement authority when he encountered a truck on the side of the road in the middle of the night, with a small child in the cab, and a driver who slurred his speech, gave an implausible story, and looked as though he were about to use a weapon that he had within reach. See pp. 2-4, *supra*. And in finding that Officer Saylor violated ICRA by seizing respondent in the face of a risk of imminent violence, the Ninth Circuit's rule deters officers from taking reasonable steps to protect their own physical safety.

The impediments to law enforcement are exacerbated by the difficulty that tribal officers will have in determining whether a suspect is an Indian (in which case an officer may investigate further) or a non-Indian (in which case he may not). In the panel's view, "authorities will typically need 'to ask one question' to determine whether the suspect is an Indian." App., *infra*, 8a (citation omitted). That presumably means that the officer must take "no" for an answer, even if the suspect

is lying. "The incentive to lie, of course, will be significant, and because (according to the panel) there is no authority to investigate or search a non-Indian, the officer presumably cannot search (for example) for a tribal identification card." *Id.* at 64a (Collins, J., dissenting from the denial of rehearing en banc). Indeed, under the Ninth Circuit's rule, any follow-up questions might themselves provide a basis for a suspect (even one who *does* turn out to be Indian) to move to suppress evidence. In short, the panel's decision "plac[es] enormous weight on a factor that will often be ill-suited for such on-the-spot resolution." *Id.* at 63a. The inevitable result is that tribal officers will err on the side of caution and decline to enforce the law even against many Indians.

3. The decision below will have widespread effects on the many Indian reservations within the Ninth Circuit. As the state decisions above reflect, a tribe's inherent authority to investigate and briefly detain non-Indians anywhere within a reservation has previously been well-accepted. Indeed, the Court's own reference to such authority in *Strate*, even if not an explicit endorsement, has for the last quarter-century provided significant assurance that tribal officers can, in fact, "patrol roads within a reservation, including rights-of-way made part of a state highway," and "detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law." 520 U.S. at 456 n.11; see *Atkinson Trading Co.*, 532 U.S. at 651 (similar).

The Ninth Circuit's break with that common understanding would, as a practical matter, produce a virtual law-enforcement vacuum affecting "a significant percentage (and in some cases a majority) of the people and

land within [the] borders" of tribal reservations. App., *infra*, 78a (Collins, J., dissenting from the denial of rehearing en banc). Public highways frequently cross such reservations, and can often—as in this drug-trafficking case—be conduits for crime. Traffic offenses are in themselves "a serious issue." *Id.* at 77a. The inability of a tribal officer to detain a possible drunk driver who is non-Indian—or who forecloses further investigation by falsely claiming to be non-Indian—could have life-threatening effects. Cf. *Navarette*, 572 U.S. at 403 (upholding tip-based stop of suspected drunk driver notwithstanding "the absence of additional suspicious conduct, after the vehicle was first spotted by an officer").

Applying the Ninth Circuit's framework to reservation lands that have been alienated to non-Indians, which this Court has previously treated as jurisdictionally equivalent to public rights-of-way, see *Strate*, 520 U.S. at 456, substantially increases the scope of the problem. Over time, tribes have "alienate[d]" large portions of their "land to * * * non-Indian[s]." *Montana* v. *United States*, 450 U.S. 544, 548 (1981). In 1981, this Court observed that of the 2.3 million acres on the tribal reservation at issue in this case—the Crow Reservation—approximately 30% of the land was owned in fee by non-Indians, *ibid.*, and that percentage has likely increased over the last four decades. Making matters even more difficult, an officer may not even be able to determine in the moment whether his encounter with a suspect is occurring on tribal land, because land status may vary from plot to plot. See, *e.g.*, *Oliphant*, 435 U.S. at 193 & n.1 (describing Port Madison reservation near Seattle, which in 1978 consisted of 63% non-Indian fee land, as "a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians,

and various roads and public highways maintained by Kitsap County").

The number of non-Indians living on reservations is likewise substantial. Although the numbers vary widely, "for the reservations in [the Ninth Circuit] with the largest Indian populations, the percentage of non-Indians residing on the reservation ranges [as] high [as] 68%." App., *infra*, 77a (Collins, J., dissenting from the denial of rehearing en banc). All told, therefore, tribal officers will frequently encounter non-Indians on alienated lands within a reservation. But a tribal officer will now lack, for example, the ability to detain a non-Indian husband, who refuels at a gas station on non-Indian fee land during a car trip with his wife, to ask questions about a fresh-looking bruise on his wife's face. And the officer may be deterred from asking questions even of an Indian husband in similar circumstances, if the officer is uncertain of the husband's Indian status.

4. Other sovereigns cannot be expected to fill the void created by the Ninth Circuit's rule. Due to the sheer size of reservations and the lean staffing of law-enforcement departments in remote areas, federal and state authorities often have only a limited footprint on reservation land. See, *e.g.*, *United States* v. *Terry*, 400 F.3d 575, 579 (8th Cir. 2005) (local sheriff, with "only one patrol car and a single part-time deputy," was 80 miles away from reservation). They often do not perform the day-to-day patrolling necessary to discover domestic, street-level, or traffic-related crimes. "Tribal officers are often the first responders to investigate offenses that occur on the reservation," *State* v. *Kurtz*, 249 P.3d 1271, 1279 (Or. 2011), with federal and state authorities frequently unable to respond expeditiously. See, *e.g.*, Sierra Crane-Murdoch, *On Indian Land*,

*Criminals Can Get Away With Almost Anything*, The Atlantic, Feb. 22, 2013 ("If an incident [on the Fort Berthold Reservation] requires a [county] deputy, he could take hours to arrive, due to the volume of calls he receives and the reservation's enormity."). Thus, unless detained by tribal law enforcement, a non-Indian suspect on a public highway will, in many cases, have ample time to "drive away," "cause[] property damage," "injure[] other motorists," and "elude[] capture." *Schmuck*, 850 P.2d at 1342.

Because tribal officers are often the first responders to suspected illicit activity, they serve as important sources of evidence for state and federal prosecutions of on-reservation crime. Cf. U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions* (2018), https://www.justice.gov/otj/page/file/1231431/download (explaining federal jurisdiction over on-reservation crime and detailing enforcement efforts). Without that evidence, many of those prosecutions will—like this one—simply dry up. Nor does cross-deputization, by which state or federal governments delegate authority to tribal officers to act on their behalf, supply "a panacea to the problems wrongly created by the panel's decision." App., *infra*, 79a (Collins, J., dissenting from the denial of rehearing en banc). Significant practical obstacles—including a lack of resources for tribal officers to complete the requisite certifications and trainings—frequently impede such arrangements. See Andrew G. Hill, *Another Blow to Tribal Sovereignty: A Look at Cross-Jurisdictional Law-Enforcement Agreements Between Indian Tribes and Local Communities*, 34 Am. Indian L. Rev. 291, 308, 310 (2010). Moreover, cross-deputization agreements often contain reciprocity provisions (authorizing state officers to arrest tribal

members on reservations) or other provisions that tribes may view as an affront to their sovereignty. See, *e.g.*, Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. Rev. 65, 91-93 (2019). Requiring tribes to give up even *more* of their limited sovereignty merely to preserve law and order within reservation boundaries is not an adequate solution to the problems created by the decision below.

5. The "volume of criminal activity within reservation boundaries" amplifies all of these concerns. App., *infra*, 77a (Collins, J., dissenting from the denial of rehearing en banc). As previously noted, see p. 25, *supra*, traffic offenses alone "are a serious issue" on reservations, and "'[a]lcohol-related offenses are exceptionally problematic.'" App., *infra*, 77a (citation omitted). Alcohol-impaired driving caused 43% of traffic fatalities on reservations between 2011 and 2015. See Roadway Safety Inst., University of Minnesota, *Understanding Roadway Safety in American Indian Reservations: Perceptions and Management of Risk by Community, Tribal Governments, and Other Safety Leaders* 2-3 (Oct. 2018), http://www.its.umn.edu/Publications/ResearchReports/reportdetail.html?id=2720.

Violent crime is likewise a serious concern. Between 1992 and 2001, "American Indians experienced approximately 1 violent crime for every 10 residents." Bureau of Justice Statistics, U.S. Dep't of Justice, *American Indians and Crime* 4-5 (Dec. 2004) (BJS), https://www.bjs.gov/content/pub/pdf/aic02.pdf (tallying major categories of violent crime). In a 2016 study, 39.8% of Native American women and 34.6% of Native American men reported experiencing certain types of violence or

other forms of aggression over the previous year. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, Nat'l Inst. of Justice, Sept. 2016, at 2-3, https://www.ncjrs.gov/pdffiles1/nij/249822.pdf. And although data specific to reservations are sparse, from 2000 to 2002, there were nearly 94,000 violent victimizations on Indian reservations and Indian lands. BJS 11.

The decision below nevertheless denies Indian tribes the inherent authority necessary to effectively investigate many crimes by non-Indians, including many crimes with Indian victims, within the boundaries of their own reservations. It thereby disrupts law enforcement in large portions of Indian country, and threatens tribes' ability to protect "the health or welfare of the tribe," *Montana*, 450 U.S. at 566. It does so without any sound basis in this Court's precedents or support from any other court of appeals or state court of last resort. This Court should grant certiorari and correct the Ninth Circuit's significant error.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
*Solicitor General*
BRIAN A. BENCZKOWSKI
*Assistant Attorney General*
ERIC J. FEIGIN
*Deputy Solicitor General*
AUSTIN L. RAYNOR
*Assistant to the Solicitor General*
DAVID M. LIEBERMAN
*Attorney*

JUNE 2020

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 17-30022
D.C. No. 1:16-cr-00042-SPW-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

JOSHUA JAMES COOLEY, DEFENDANT-APPELLEE

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Argued and Submitted: May 14, 2018
Seattle, Washington
Filed: Mar. 21, 2019

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Appeal from the United States District Court
for the District of Montana
Susan P. Watters, District Judge, Presiding

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**OPINION**

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Before: MARSHA S. BERZON, STEPHANIE DAWN THACKER,[*] and ANDREW D. HURWITZ, Circuit Judges.

Opinion by Judge BERZON

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[*] The Honorable Stephanie Dawn Thacker, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

BERZON, Circuit Judge:

At around one in the morning, Joshua James Cooley and his young child were parked in a white truck on the westbound shoulder of United States Route 212, within the Crow Indian Reservation in southern Montana.[1] James D. Saylor, a highway safety officer for the Crow Police Department, passed Cooley's truck while driving eastbound on Route 212. Saylor regularly found motorists on the highway in need of assistance. He also knew that this particular section of Route 212 lacked consistent cellphone reception.

Saylor turned around and pulled up behind the truck. He left his patrol car and approached the driver's side of the truck. The truck's engine was running; its headlights were on. The truck's windows were closed and tinted, and the truck appeared to be on a raised suspension. So it was difficult for Saylor to see into the passenger compartment.

Saylor knocked on the side of the truck. When he did that, the rear driver's side window briefly lowered, then went up again. Saylor shined his flashlight into the driver's side front window and saw Cooley making a thumbs-down sign with his right hand.

Saylor next asked Cooley to lower his window. Cooley complied—he lowered the front driver's side window around six inches, just enough for Saylor to see the top of his face. According to Saylor, Cooley had "watery,

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[1] The facts presented here come largely from the district court's order granting the motion to suppress, but include material from Saylor's testimony at the hearing held on Cooley's motion to suppress and from the police report Saylor wrote after the encounter with Cooley.

bloodshot eyes," and "seemed to be non-native." Saylor also noticed a young child climbing from the back seat of the truck into the front.

Cooley told Saylor that everything was okay—he had stopped driving just because he was tired, "which isn't uncommon" in Saylor's experience. "A lot of travelers go through that particular stretch of highway," Saylor testified, "and they will pull over because of various reasons, tired, bathroom, et cetera."

But Saylor did not leave at that point. Instead, he asked Cooley more questions. In response, Cooley reported that he had come from the town of Lame Deer, which is around 26 miles from where the truck was stopped; he was in town to purchase a vehicle from a man named Thomas; and he was not sure of Thomas's last name, but it may have been Spang or Shoulder Blade. Saylor knew men with both names—Thomas Spang and Thomas Shoulder Blade: Shoulder Blade had been a tribal officer for the Northern Cheyenne tribe; Saylor believed Spang was associated with drug trafficking.

Cooley's explanations did not add up for Saylor, and he conveyed that sentiment to Cooley. In response, Cooley "became agitated and stated[,] '[I] don't know how it doesn't make any sense, I told you I cam[e] up to buy a vehicle.'" At some point during this conversation, Cooley brought his child onto his lap.

According to Saylor, as this exchange continued Cooley's hands started to shake. He "began to speak in a lower volume[,] making it difficult . . . to hear him." And he started to take long pauses before answering questions.

Saylor asked Cooley to lower the front window further. When Cooley did so, Saylor noticed what appeared to be two semiautomatic rifles on the front passenger seat of the truck. But "just having weapons in a vehicle, especially in Montana, isn't cause for too much alarm, in my mind," Saylor testified.

Still, Saylor continued to ask Cooley about why he had traveled to Lame Deer. At some point during this additional questioning, Saylor asked Cooley for written identification. Instead of retrieving his identification, Cooley twice pulled small bills from his right pocket and placed them in the truck's center console.

Cooley then put his hand in his pocket yet another time. His breathing became shallow and rapid, according to Saylor, and Cooley "stared straight forward out of the windshield of his truck, as if he was looking through his" child. Saylor testified that such a "thousand-yard" stare is, to him, an indication that a suspect is possibly about to use force. So, while Cooley's hand was in his pocket, Saylor unholstered his pistol, drew the pistol to his side, and ordered Cooley to stop what he was doing and show his hands. Cooley complied. Saylor then again ordered Cooley to provide him with his identification; this time, Cooley handed over his Wyoming driver's license.

Saylor attempted to call in Cooley's license number to dispatch but failed, as he was unable to connect. When he then moved to the other side of the truck and opened the passenger side door, Saylor noticed a loaded semiautomatic pistol in the area near Cooley's right hand. Asked why he had not mentioned the pistol earlier, Cooley stated that he did not know the pistol was there. Saylor then took the pistol and disarmed it.

At that point, Saylor ordered Cooley to get out of the truck, which he did. After conducting a pat down, Saylor escorted Cooley and his child to the patrol car. Once there, Cooley took some more of his belongings out of his pocket—this time, a few small, empty plastic bags —and placed them on the hood of Saylor's car. In Saylor's experience, such bags are commonly used to package methamphetamine.

Saylor then placed Cooley in the back of his patrol car and called for additional assistance from Crow Reservation officers. He also called for assistance from Bighorn County officers, because Cooley "seemed to be non-[n]ative." While waiting for backup, Saylor returned to the truck to turn off the engine: There, he found in the cab a glass pipe and a plastic bag that appeared to have methamphetamine in it.

After County and Bureau of Indian Affairs officers arrived, the Bureau of Indian Affairs officer directed Saylor to conduct an additional search of the truck. He did, and discovered more methamphetamine.

Cooley was charged in the District of Montana with one count of possession with intent to distribute methamphetamine, under 21 U.S.C. § 841(a)(1), and one count of possession of a firearm in furtherance of a drug trafficking crime, under 18 U.S.C. § 924(c)(1)(A). He moved to suppress evidence obtained as a result of his encounter with Saylor. The motion argued that Saylor was acting outside the scope of his jurisdiction as a Crow Tribe law enforcement officer when he seized Cooley, in violation of the Indian Civil Rights Act of 1968 ("ICRA").

The district court granted Cooley's motion. It determined that Saylor had identified Cooley as a non-

Indian "when Cooley initially rolled his window down," and that Saylor seized Cooley when he drew his gun, ordered Cooley to show his hands, and demanded his driver's license. The court reasoned that a tribal officer cannot detain a non-Indian on a state or federal right-of-way unless it is apparent at the time of the detention that the non-Indian has been violating state or federal law, and that Saylor therefore had no authority to seize Cooley when and where he did. The district court also concluded that ICRA, which contains language mirroring the Fourth Amendment, requires suppression in federal court of evidence obtained by tribal officers in violation of ICRA.

The government appealed the order under 18 U.S.C. § 3731. We review the factual findings underlying the district court's determination for clear error and the ultimate grant or denial of a motion to suppress de novo. *United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017).

**I**

We consider first whether the district court correctly determined that Saylor exceeded his jurisdiction in detaining Cooley. We cannot agree that Saylor appropriately determined that Cooley was a non-Indian just by looking at him. But Saylor did act outside of his jurisdiction as a tribal officer when he detained Cooley, a non-Indian, and searched his vehicle without first making any attempt to determine whether Cooley was in fact an Indian.

**A**

An Indian tribe's authority to enforce criminal laws on tribal land is nuanced. On tribal land, a tribe has inherent powers as a separate sovereign to enforce criminal laws, but only as to its tribal members and non-member Indians. *United States v. Lara*, 541 U.S. 193, 197-99 (2004). An Indian tribe's authority over non-Indians is more limited. A tribe has no power to enforce tribal criminal laws to non-Indians, even when they are on tribal land.[2] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). But a tribe may exclude non-Indians from tribal land. *Duro v. Reina*, 495 U.S. 676, 696-97 (1990). Therefore, tribal officers can investigate crimes committed by non-Indians on tribal land and deliver non-Indians who have committed crimes to state or federal authorities. *Id.* Thus, "tribes retain considerable control over non-member conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

Tribes have less power over non-Indians on public rights-of-way that crossover tribal land—such as Route 212—than on non-encumbered tribal property. If a tribe has granted an easement allowing public access to

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[2] Tribal officers are often delegated authority by a state or the federal government to act broadly on its behalf. *See, e.g.*, *Bressi v. Ford*, 575 F.3d 891, 894, 897 (9th Cir. 2009); *see also United States v. Wilson*, 699 F.3d 235, 239 (2d Cir. 2012) (noting that tribal officers "had full authority to act as New York police officers within the boundaries of the St. Regis Reservation" under New York law, and that some tribal officers were cross-designated as United States customs officers); *Olson v. N.D. Dep't of Transp.*, 909 N.W.2d 676, 681-82 (N.D. 2018), *State v. Eriksen*, 259 P.3d 1079, 1083 (Wash. 2011). The limitations discussed here do not apply to deputized officers. *See Bressi*, 575 F.3d at 894, 897; *Eriksen*, 259 P.3d at 1083.

tribal land, the tribe cannot exclude non-Indians from a state or federal highway constructed on that easement. *See Strate*, 520 U.S. at 454-56. Tribes also lack the ancillary power to investigate non-Indians who are using such public rights-of-way. *See Bressi*, 575 F.3d at 895-96. But where, as here, a public highway is within the boundaries of a tribal reservation, tribal authorities may arrest Indians who violate tribal law on the public right-of-way. *Strate*, 520 U.S. at 456; *Bressi*, 575 F.3d at 896; *see also* 18 U.S.C. § 1151 (defining Indian country as including rights-of-way within Indian reservations).

Finally, tribal authorities may stop those suspected of violating tribal law on public rights-of-way as long as the suspect's Indian status is unknown. In such circumstances, tribal officials' initial authority is limited to ascertaining whether the person is an Indian. *Bressi*, 575 F.3d at 896; *see also United States v. Patch*, 114 F.3d 131, 134 (9th Cir. 1997). The detention must be "a brief [and] limited" one; authorities will typically need "to ask one question" to determine whether the suspect is an Indian. *Patch*, 114 F.3d at 134. If, during this limited interaction, "it is apparent that a state or federal law has been violated, the [tribal] officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities."[3] *Bressi*, 575 F.3d at 896; *see also Strate*, 520 U.S. at 456 n.11.

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[3] *Bressi* held that "a roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and nature of inquiry, that can establish whether or not they are Indians." 575 F.3d at 896-97. The government contends that *Bressi* applies only to roadblocks. The government's cabined reading of *Bressi* is not persuasive. Although

We have not elaborated on when it is "apparent" or "obvious" that state or federal law is being or has been violated. *Bressi*, 575 F.3d at 896-97. But *Bressi* made clear that the power to detain non-Indians on public rights-of-way for "obvious" or "apparent" violations of state or federal law does not allow officers to search a known non-Indian for the purpose of finding evidence of a crime. *Id.*

**B**

Here, the district court noted that when Saylor first observed Cooley through the truck's partially open driver's window, Cooley "seemed to be non-Native," and held that Saylor had no authority to detain Cooley from thenceforward. The holding regarding Saylor's lack of authority was correct, but the district court's basis for its conclusion—how Cooley looked to Saylor—was not.

Saylor never asked Cooley whether he was an Indian or otherwise ascertained that he was not. Instead, he reached a conclusion about Cooley's status as a non-Indian based on physical appearance alone. Officers cannot presume for jurisdictional purposes that a person is a non-Indian—or an Indian—by making assumptions based on that person's physical appearance.

Indian status is a political classification, not a racial or ethnic one. Indian status requires only "(1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with,

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*Bressi* involved a roadblock, the opinion sets forth general principles governing the scope of tribal officers' authority to seize and question on a public right-of-way within an Indian reservation non-Indians and those whose Indian status is unknown. *Id.* at 896.

a federally recognized tribe." *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc). A person can have significant Native American ancestry and nonetheless not be an Indian for tribal law enforcement purposes. *See id.* at 1114. And a person can be an Indian for tribal law enforcement purposes even if that person does not have any of the physical characteristics associated with Native American heritage. *See United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005); William C. Canby, Jr., *American Indian Law in a Nutshell* 9-11 (6th ed. 2014). *United States v. Antelope*, emphasized this distinction, explaining that the Indian defendants "were not subjected to federal criminal jurisdiction because they [were] of the Indian race but because they [were] enrolled members of the Coeur d'Alene Tribe." 430 U.S. 641, 646 (1977).

A law enforcement officer can, of course, rely on a detainee's response when asked about Indian status. *See Patch*, 114 F.3d at 134. But Saylor posed no such question to Cooley.

Nonetheless, his assumption based on physical appearance aside, Saylor did exceed his legal authority as a Crow officer during the interaction with Cooley. The district court correctly found that Saylor seized Cooley when he drew his weapon and ordered him to provide identification.[4] Although Saylor had been questioning Cooley for a significant period by that point, he had not asked Cooley whether he was an Indian. Yet, still not having ascertained whether Cooley was an Indian, Say-

[4] As the issue has not been raised, we do not address whether there was a seizure earlier in the encounter.

lor detained Cooley and twice searched his truck. Continuing to detain—and searching—a non-Indian without first attempting to ascertain his status is beyond the authority of a tribal officer on a public, nontribal highway crossing a reservation. *See Bressi*, 575 F.3d at 896; *see also Strate*, 520 U.S. at 456.

**II**

Because we conclude that Saylor acted outside his authority as a tribal officer when he seized Cooley and later twice searched Cooley's truck, we next must consider whether the district court properly suppressed the evidence obtained during the searches.

**A**

The district court held that the exclusionary rule applies in federal court to violations of ICRA's Fourth Amendment counterpart. The government agrees, stating in its opening brief that "suppression of evidence in a federal proceeding would be appropriate if the [officer's] conduct violated ICRA," quoting *United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005).[5] We also agree with the district court, but because *Becerra-Garcia* did not squarely decide the exclusionary rule issue, we address it.

The Fourth Amendment expressly limits federal power to conduct searches and seizures, and equally limits state power to do so via its incorporation into the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643,

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[5] Likewise, the government does not argue that the district court erred in applying exclusionary rules principles in this case. Thus, we have no occasion to consider whether any exception to the exclusionary rule applies in this context.

650 (1961). But the Fourth Amendment—like the rest of the Bill of Rights—"does not apply to Indian tribal governments." *Duro*, 495 U.S. at 693 (citing *Talton v. Mayes*, 163 U.S. 376 (1896)); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978).

"[H]owever, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo*, 436 U.S. at 56. The Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, enacted pursuant to that authority, "impos[es] certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo*, 436 U.S. at 57; *see also* 25 U.S.C. § 1302(a).

Before ICRA, Indian litigants could not "claim protection from illegal search and seizure protected by the [F]ourth [A]mendment." S. Rep. No. 90-841, at 10 (1967). To address that concern, ICRA includes a prohibition on unreasonable searches and seizures nearly identical to the prohibition in the Fourth Amendment. *See United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981). The section of ICRA parallel to the Fourth Amendment states:

> No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

25 U.S.C. § 1302(a)(2).

This parallelism does not directly settle whether the exclusionary rule applies to violations of § 1302(a)(2). The exclusionary principle is a "judicially created rule . . . designed to safeguard Fourth Amendment rights generally through its deterrent effect," *United States v. Herring*, 555 U.S. 135, 139-40 (2009) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)); there is no language in the Fourth Amendment—or its ICRA counterpart—alluding to it. But the exclusionary principle is now firmly embedded in our judicial tradition, interwoven with our understanding of the Fourth Amendment's protections. As the Supreme Court wrote in 1914, "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the [Fourth] Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Weeks v. United States*, 232 U.S. 383, 393 (1914).[6]

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[6] In *Weeks*, the Court applied the exclusionary rule only to violations of the Fourth Amendment by federal officers and only to prosecutions in federal court. 232 U.S. at 398. After determining that the Fourth Amendment binds the states via the Fourteenth Amendment in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court then held that the exclusionary rule for evidence sought to be introduced in federal court applies to evidence seized by state officers in violation of the Fourth and Fourteenth Amendments. *Elkins v. United States*, 364 U.S. 206, 213-15, 223 (1960). The next year, in *Mapp*, the Court held that the exclusionary rule also applies to state court proceedings. 367 U.S. at 655.

Congress enacted language in ICRA that mirrors the Fourth Amendment's protections, and it expressed concern that tribal authorities were violating the protections of that Amendment. The exclusionary rule would play the identical safeguarding function for subsection (a)(2) of ICRA, as it does for the Fourth Amendment. Given that the exclusionary rule applied in federal court to both state and federal Fourth Amendment violations at the time ICRA was enacted and was understood as essential to the effective functioning of the Fourth Amendment, the most reasonable inference is that the substantive parallelism between the Fourth Amendment and ICRA continues at the remedy level. The exclusionary rule therefore applies in federal court prosecutions to evidence obtained in violation of ICRA's Fourth Amendment counterpart. We have previously so assumed, *see Becerra-Garcia*, 397 F.3d at 1171, *United States v. Manuel*, 706 F.2d 908, 911 & n.3 (9th Cir. 1983), and now so hold.[7]

**B**

The district court determined that Saylor violated ICRA's Fourth Amendment analogue by seizing Cooley, a non-Indian, while operating outside the Crow Tribe's jurisdiction. We agree in the main, but with a caveat. In our view, a tribal officer does not *necessarily* conduct an unreasonable search or seizure for ICRA purposes when he acts beyond his tribal jurisdiction. But the tribal authority consideration is highly pertinent to determining whether a search or seizure is unreasonable

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[7] We do not decide whether the exclusionary rule also applies in tribal court proceedings to evidence obtained in violation of ICRA's Fourth Amendment analogue. *Cf. Elkins*, 364 U.S. at 213-15, 223.

under ICRA. And in this case, taking into account both the jurisdictional defect and other factors, Saylor violated ICRA's Fourth Amendment counterpart.

**1**

We rely on Fourth Amendment jurisprudence to analyze the validity of a search or seizure under ICRA. *See Becerra-Garcia*, 397 F.3d at 1171. Whether a search or seizure is unreasonable under the Fourth Amendment often depends on whether the officer had probable cause for a search or arrest, or reasonable suspicion for an investigatory detention. *See, e.g.*, *Virginia v. Moore*, 553 U.S. 164, 171 (2008); *Illinois v. Gates*, 462 U.S. 213, 243-44 (1983), *Terry v. Ohio*, 392 U.S. 1, 27-28 (1968). In some circumstances, however, a search or seizure may be unreasonable even if the officer had sufficient substantive grounds to conduct it. *See, e.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995); *Payton v. New York*, 445 U.S. 573, 586 (1980); *see also Wilson*, 699 F.3d at 245.

*United States v. Henderson*, 906 F.3d 1109 (9th Cir. 2018), a case somewhat analogous to this one, recently addressed such a circumstance. In *Henderson*, a magistrate judge in the Eastern District of Virginia signed off on a so-called "network investigative technique" ("NIT") warrant, which allowed the Federal Bureau of Investigation to obtain the IP address for computers "*wherever located*" that connected to a site suspected of distributing child pornography. *Id.* at 1112. Using this NIT warrant, the FBI identified the IP address of "a computer at the San Mateo, California, home of Bryan Henderson's grandmother, with whom Henderson lived." *Id.* at 1112. The FBI obtained a separate warrant to

search the grandmother's home. *Id.* That search uncovered child pornography belonging to Henderson. *Id.* at 1112-13.

*Henderson* held that the initial NIT warrant violated Federal Rule of Criminal Procedure 41(b), which at the time authorized magistrates to "issue a warrant to search for and seize a person or property located *within the district*" of that magistrate.[8] *Id.* at 1113 (quoting Fed. R. Crim. P. 41(b)(1)). *Henderson* further decided that because the magistrate violated Rule 41(b), she had exceeded her jurisdictional authority. The magistrate's only jurisdictional basis for issuing the NIT warrant was 28 U.S.C. § 636, which allows magistrates "to exercise 'all powers and duties conferred or imposed' by the Federal Rules of Criminal Procedure," *id.* at 1115 (quoting 28 U.S.C. § 636(a)(1)). The magistrate was not exercising a power conferred or imposed by those Rules, as her issuance of a warrant for a search outside her district exceeded Rule 41(b)'s authorization. *Id.*

Because "the magistrate judge issued a warrant in excess of her jurisdictional authority," *Henderson* concluded, the search supported by the NIT warrant violated the Fourth Amendment. *Id.* at 1116. In reaching this conclusion, *Henderson* relied on the well-settled principle that the Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *Id.* (quoting *United States v. Jones*, 565 U.S. 400, 411 (2012)). When assessing the protec-

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[8] Rule 41(b) was subsequently amended to allow magistrates to issue warrants like the one at issue in *Henderson*. *Id.* at 1119; Fed. R. Crim. P. 41(b)(6).

tions afforded at the Amendment's adoption, courts examine the protections provided by "statutes and common law of the founding era." *Moore*, 553 U.S. at 168; *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001). *Henderson* determined that under the common law of the founding era, a search was unreasonable unless the warrant authorizing that search was issued by "a court or magistrate empowered by law to grant it." 906 F.3d at 1116 (quoting Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 210 (1880)).

The common law of the founding era often deemed searches and seizures unreasonable when police officers acted outside the bounds of their sovereign's jurisdiction. When the Fourth Amendment was adopted, the common law drew clear distinctions based on whether an officer was acting within or outside the scope of his sovereign's authority. When attempting to execute a warrant, for example, an officer could execute the warrant only "so far as the jurisdiction of the magistrate and himself extends." *Henderson*, 906 F.3d at 1116 (quoting 4 William Blackstone, *Commentaries* *291). And "[a]t common law, an officer [could not] arrest a person outside of his precinct, even though the offense was committed within it." 2 David S. Garland & Licius P. McGehee, *The American and English Encyclopaedia of Law* 863 (2d ed. 1896).

The Constitution provides support for the principle that police officers' legitimate power was limited under the common law by the jurisdictional reach of the sovereign that officer served. The Extradition Clause requires states to comply with requests made by other states to extradite accused felons. U.S. Const. art. IV,

§ 2, cl. 2; *see also Puerto Rico v. Branstad*, 483 U.S. 219, 226 (1987); *Engleman v. Murray*, 546 F.3d 944, 949 (8th Cir. 2008). This requirement necessarily rests on the assumption that one state's officers could not lawfully seize a felon in another state, regardless of where the felony had been committed.

At the same time, under the common law of the founding era, an officer operating without any sovereign authority could lawfully conduct a seizure in limited circumstances. At the time of the Fourth Amendment's adoption, private individuals who personally observed the commission of a felony could lawfully seize the perpetrator. 4 Blackstone, *supra*, at *293; *see also* Garlan & McGehee, *supra*, at 884-89. Officers had this same power when operating outside their sovereign's jurisdiction. 4 Blackstone, *supra*, at *293. Under the historical approach relied upon in *Henderson* (and many other cases, *see, e.g.*, *Moore*, 553 U.S. at 168-69), a seizure of a felon by an officer acting outside of the scope of his sovereign's authority may be reasonable if the common law would allow a private person to seize the felon in the same circumstances.[9] This principle roughly comports with our holding in *Bressi*—that tribal officers can seize non-Indians on a state highway within Indian territory who have *obviously* committed a crime, even when the officers have no authority to exclude the perpetrator from Indian territory. 575 F.3d at 896.

The Tenth and Third Circuits, outside the context of tribal authority, have suggested that a state officer does

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[9] A private citizen's ability to seize felons at common law did not also provide private citizens the ability to conduct searches. *See* 4 Blackstone, *supra*, at *293; *cf. Bressi*, 575 F.3d at 896.

not violate the Fourth Amendment by seizing a suspect in another state.[10] *See United States v. Jones*, 701 F.3d 1300, 1309-10 (10th Cir. 2012); *United States v. Sed*, 601 F.3d 224, 228 (3d Cir. 2010); *but see Ross*, 905 F.2d at 1354 (holding that a warrantless arrest by a state officer within Indian country violated the Fourth Amendment). But, the defendants in both *Jones* and *Sed* principally argued that their arrests violated the Fourth Amendment because those arrests violated state law. *Jones*, 701 F.3d at 1308-09 (relying on *Moore*, 553 U.S. at 176); *Sed*, 601 F.3d at 228 (same). Those courts rightly rejected that argument; it is well-established that a search is not unreasonable under the Fourth Amendment simply on the ground that the search violated state statutes.[11]

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[10] *Jones* and *Sed* both involved officers who unwittingly seized a felon across state lines. *Jones*, 701 F.3d at 1305; *Sed*, 601 F.3d at 226-27; *see also Engleman*, 546 F.3d at 946, 949 (same). Saylor took no such unwitting actions. He assumed that Cooley was a non-Indian, yet continued to investigate him, detain him, and search his possessions. We do not today address circumstances in which, for example, a tribal officer asks whether the individual is an Indian and is told, incorrectly, that he is.

We also do not address whether an officer violates the Fourth Amendment when conducting a search or seizure in another political subdivision of the same state. *See Rose v. City of Mulberry*, 533 F.3d 678, 680 (8th Cir. 2008); *Pasiewicz v. Lake Cty. Forest Preserve Dist.*, 270 F.3d 520, 526 & n.3 (7th Cir. 2001). We leave open as well whether there are other circumstances in which an officer may comply with the Fourth Amendment even if acting outside his geographical authority—for example, if in hot pursuit of a suspect or in another exigent circumstance he arrests a suspect. *See Patch*, 114 F.3d at 134; *United States v. Goings*, 573 F.3d 1141 (11th Cir. 2009); *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990); *Eriksen*, 259 P.3d at 1083 n.6.

[11] The defendants in *Jones* and *Sed* did not, it appears, present a historical analysis similar to the one in *Henderson*. That analysis

*Jones*, 701 F.3d at 1309-10; *Sed*, 601 F.3d at 228; *see also Moore*, 553 U.S. at 176; *Goings*, 573 F.3d at 1143.

In this case, however, the problem is not that the tribal officer was acting in violation of state (or federal) law. The divisions between tribal authority on the one hand, and federal and state authority on the other, have deep roots that trace back to the nation's founding. Whether a tribal officer's actions violate ICRA's Fourth Amendment analogue does not turn on whether his actions are lawful under current statutory law. Rather, the limitations on tribal authority derive from the recognition that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations." *Antelope*, 430 U.S. at 645 (internal citations and quotation marks omitted). The tribes are "separate sovereign[s]" that possess the "inherent or sovereign authority" over tribal members and other Indians, *Lara*, 541 U.S. at 197, but not others. Consistent with the fundamental nature of the sovereignty concepts governing the scope of tribal authority, the Tenth Circuit in *Ross* held that state officers violate the Fourth Amendment if they make an arrest in tribal territory. 905 F.2d at 1352-54; *see also Jones*, 701 F.3d at 1311-12.

In sum, when a tribal officer exceeds his tribe's sovereign authority, his actions may violate ICRA's Fourth Amendment counterpart because, when the Fourth

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demonstrates that the common law of the founding era, not contemporary statutory law, is most pertinent to whether a search by an officer acting beyond his sovereign's power is invalid under the Fourth Amendment. We therefore do not read *Jones* and *Sed* as inconsistent with *Henderson*.

Amendment was adopted, officers could not enforce the criminal law extra-jurisdictionally in most circumstances. The tribal officers' extra-jurisdictional actions do not violate ICRA's Fourth Amendment parallel only if, under the law of the founding era, a private citizen could lawfully take those actions. Whether the officer's actions violate current state, federal, or tribal law is not the fulcrum of this inquiry. *Moore*, 553 U.S. at 176.

**2**

There is also no doubt that under the standard we have set forth, Saylor violated ICRA's Fourth Amendment parallel when he twice searched Cooley's truck after seizing him. At those times, Saylor was acting outside the tribe's jurisdictional authority. Under the law of the founding era, Saylor would not have had authority as a private citizen to seize Cooley and detain him in his patrol car until state or federal officers arrived on the scene, as it was not obvious to that point that a crime had been or was being committed. In any event, Saylor lacked authority, by analogy to a private person, to return to Cooley's truck and enter the car to retrieve the rifles still in the truck, or to search the truck a second time. *See supra* 18-22 & n.9.

**III**

We affirm the district court's grant of the motion to suppress evidence. Saylor exceeded his jurisdictional authority when he twice searched Cooley's truck. We hold that the exclusionary rule applies to violations of ICRA's Fourth Amendment counterpart, and that Saylor violated ICRA's Fourth Amendment parallel. Suppression of the fruits of this unlawful search was therefore proper.

**AFFIRMED, AND REMANDED.**

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CR 16-42-BLG-SPW

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JOSHUA JAMES COOLEY, DEFENDANT

[Filed: Feb. 7, 2017]

**ORDER**

Defendant Joshua James Cooley (Cooley) is charged with Possession of Methamphetamine with Intent to Distribute and Possession of a Firearm in Furtherance of a Drug Trafficking Crime. (Doc. 1). He has moved to suppress evidence under the Indian Civil Rights Act (ICRA) and the Fourth Amendment. (Doc. 33).

On January 6, 2017, the Court held an evidentiary hearing. The Court heard testimony from Tribal Highway Safety Officer James Saylor and Bureau of Indian Affairs Special Agent Kevin Proctor. Having read and reviewed the parties' submissions and having heard the testimony of the witnesses noted above, the Court GRANTS Cooley's motion.

## I. Statement of facts

Around 1:00 AM on February 26, 2016, Tribal Highway Safety Officer James Saylor (Officer Saylor) was traveling eastbound on State Highway 212 within the exterior boundaries of the Crow Reservation when he noticed a white pickup truck stopped on the shoulder of the westbound lane. Officer Saylor, knowing this portion of Highway 212 has bad cellphone reception, turned his vehicle around and pulled up behind the truck to see if the truck's occupants needed assistance. As he pulled up behind the truck, Officer Saylor turned on his rear emergency lights but did not turn on his overhead lights. The truck had an extended cab and Wyoming plates.

The truck's engine was running. With his flashlight on, Officer Saylor approached the driver's side of the truck and knocked on the truck's side. The rear driver's side window rolled partway down and then back up. In the backseat, Officer Saylor saw a child's car seat and a small child crawling to the front of the truck. As Officer Saylor came to the front driver's side window, he saw Cooley in the driver's seat. Officer Saylor asked Cooley to roll his window down, which Cooley did about six inches. The child was sitting in Cooley's lap, content.

Officer Saylor observed Cooley was non-Indian and had bloodshot, watery eyes. Officer Saylor did not smell any alcohol. Officer Saylor asked Cooley if everything was okay. Cooley responded that everything was fine, he pulled over because he was tired. In Officer Saylor's experience, it is common for travelers along this stretch of highway to pull over because they are tired. Officer Saylor asked Cooley where he'd come from, to which Cooley responded Lame Deer, about 26

miles away. Officer Saylor could not tell whether Cooley's speech was slurred.

Officer Saylor pressed Cooley on his answer, asking him what his business was in Lame Deer, who he had seen, and why he was traveling so late. Cooley explained he had been there to purchase a vehicle but the vehicle had broken down. He further explained the truck he was in was loaned to him by either a Thomas Spang or a Thomas Shoulderblade. Officer Saylor knew both a Thomas Spang and a Thomas Shoulderblade. Thomas Spang was a person Officer Saylor suspected of drug activity on the Northern Cheyenne Reservation. Thomas Shoulderblade was a former probation officer with the Bureau of Indian Affairs on the Northern Cheyenne Reservation.

Officer Saylor suspected Cooley was not telling the truth and asked Cooley to roll his window down further. When Cooley rolled the window down, Officer Saylor saw the butts of two semiautomatic rifles in the front passenger seat and observed the center console was folded down. Officer Saylor asked Cooley about the rifles. Cooley stated they belonged to the owner of the truck, Thomas. Officer Saylor asked Cooley for some identification. The child was still sitting in Cooley's lap.

Cooley reached into his right pants pocket and pulled out a wad of cash, which he placed on the dashboard. Cooley did this two or three times. The last time Cooley reached toward his pocket, his breath became shallow and his hand hesitated slightly around his pocket area. Officer Saylor drew his service pistol, held it to his side, and ordered Cooley to stop and show his hands. Cooley immediately complied, attempting to raise both

his hands while holding onto the child in his lap. Officer Saylor told Cooley he was no longer allowed to move his hands unless told to do so. Officer Saylor instructed Cooley to slowly reach into his pocket and retrieve his identification. Cooley complied and produced a Wyoming driver's license.

Using his portable unit, Officer Saylor, attempted to radio dispatch to run Cooley's identification. Officer Saylor could not reach dispatch because the portable unit had poor reception in this area. The unit in Officer Saylor's patrol car was capable of reaching dispatch because it had much better reception than the portable unit. Instead of returning to his patrol unit, Officer Saylor maneuvered around the truck to the passenger side and opened the door. Officer Saylor saw that the two semiautomatic rifles in the passenger seat were unloaded. He also saw there was a pistol tucked underneath the folded down center console. Officer Saylor asked Cooley why he hadn't said anything about the pistol. Cooley responded he did not know it was there because the truck and its contents belonged to Thomas.

Officer Saylor reached into the truck under the center console, removed the pistol, removed the magazine from the pistol, and removed a round from the pistol's chamber. Officer Saylor ordered Cooley out of the truck. Cooley, holding the child, exited the truck and met Officer Saylor at the rear of the truck. Officer Saylor patted Cooley down and, after finding no weapons, ordered Cooley into the back of the patrol unit. Cooley asked Officer Saylor if he could empty his pockets first, to which Officer Saylor said yes. Cooley removed cash, credit cards, and a few small Ziploc bags

from his pockets and placed the items on the patrol car's hood. The Ziploc bags were empty.

Officer Saylor placed Cooley and the child in the patrol car's backseat and radioed dispatch to send another unit and, because Cooley was non-Indian, a county unit. Officer Saylor returned to the truck to retrieve the rifles. The truck was still running. From the passenger side, Officer Saylor reached across the seats to remove the keys from the ignition. While reaching for the keys, Officer Saylor saw a glass pipe and a plastic bag containing a white powder wedged between the driver seat and middle seat. Shortly thereafter, Bureau of Indian Affairs Lieutenant Sharon Brown and Big Horn County Deputy Gibbs arrived. Lt. Brown instructed Officer Saylor to seize all contraband in the truck within plain view. Subsequent searches discovered more white powder, which was later determined to be methamphetamine.

## II. Law

### A. Standard of review

Whether an investigatory stop was proper is reviewed de novo. *United States v. Becerra-Garcia*, 397 F.3d 1167, 1170 (9th Cir. 2005). Factual findings are reviewed for clear error. *Becerra-Garcia*, 397 F.3d at 1171.

### B. The scope of Officer Saylor's authority

Tribes have the power to exclude non-Indians they deem undesirable from tribal lands. *Duro v. Reina*, 495 U.S. 676, 696-697 (1990). Pursuant to that power, tribal police have the authority to investigate on-reservation violations of state and federal law by non-Indians. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir.

1975). However, tribes have no power to exclude non-Indians from a public right of way that crosses the reservation. *Bressi v. Ford,* 757 F.3d 891, 895-896 (9th Cir. 2009). Tribal police therefore have no authority to investigate violations of state and federal law by non-Indians on a public right of way that crosses the reservation. *Bressi,* 575 F.3d at 896. But tribal police do not have to overlook obvious violations of state or federal law by non-Indians on a public right of way that crosses the reservation. *See Strate v. A-1 Contractors,* 520 U.S. 438, 455-456 n.11 (1997). A tribal officer that reasonably suspects a person of violating tribal law on a public right of way that crosses the reservation must determine, shortly after stopping the person, whether the person is Indian. *Bressi,* 575 F.3d at 896. If the person is non-Indian, the tribal officer may detain the person for the reasonable time it takes to turn the person over to state or federal authorities only when "it is apparent that a state or federal law has been violated." *Bressi,* 575 F.3d at 896.

Although the Ninth Circuit has not yet articulated the guideposts of *Bressi's* "apparent" standard, precedent indicates the standard is more stringent than particularized suspicion and probable cause. First, *Bressi* uses "apparent" and "obvious" interchangeably. 575 F.3d at 896-897. Particularized suspicion and probable cause require considerably less of police officers than an obvious law violation. *See United States v. Sokolow,* 490 U.S. 1, 7 (1989) (reasonable suspicion requires "some minimal level of objective justification."); *Illinois v. Gates,* 462 U.S. 213, 238 (1983) (probable cause requires "a fair probability that contraband or evidence of a crime will be found."). Second, *Bressi*'s "apparent" standard was a

carefully drawn exception borne of practical necessity: tribal police have no power to exclude, i.e. investigate, non-Indians on public right of ways, yet, as police officers, should not have to turn a blind eye to an obvious violation of state or federal law. *Bressi*, 575 F.3d at 895-896. Construing "apparent" to require no more than reasonable suspicion or probable cause would undermine *Bressi's* purpose and grant the tribes power they do not have. The Court concludes *Bressi's* "apparent" standard is notably higher than "probable cause."

The remedy for evidence obtained by a tribal officer acting outside the scope of his authority is suppression. "No Indian tribe in exercising powers of self-government" shall "violate the right of the people to be secure . . . against unreasonable search and seizures. . . . " 25 U.S.C. § 1302(a)(2). Under *Bressi*, a tribal police officer commits an unreasonable seizure when he detains a non-Indian on a public right of way that crosses the reservation unless there is an apparent state or federal law violation. *Bressi*, 575 F.3d at 896. Suppression of evidence in a federal proceeding is appropriate if the tribal officer's conduct violated § 1302(a)(2). *See Becerra-Garcia*, 397 F.3d at 1171.

**III. Officer Saylor had no authority to detain Cooley because he quickly determined Cooley was non-Indian and it was not apparent Cooley had violated a state or federal law when the seizure occurred**

Whether a seizure occurred is analyzed under the Fourth Amendment because, although the Fourth Amendment technically does not apply to conduct by tribal police, the ICRA imposes identical limitations. *Becerra-Garcia*, 397 F.3d at 1171.

A seizure occurs when an officer, through coercion, "physical force, or a show of authority, in some way restricts the liberty of a person." *United States* v. *Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004). A person's liberty is restrained when, "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Washington*, 387 F.3d at 1068 (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). The Ninth Circuit has identified five factors that aid in determining whether a reasonable person would have felt "at liberty to ignore the police presence and go about his business." *Washington*, 387 F.3d at 1068. The factors are: (1) the number of officers; (2) whether weapons were displayed; (3) whether the encounter occurred in a public or non-public setting; (4) whether the officer's officious or authoritative manner would imply that compliance would be compelled; and (5) whether the officers advised the detainee of his right to terminate the encounter. *Washington*, 387 F.3d at 1068.

Here, Officer Saylor seized Cooley when he drew his weapon, ordered Cooley to show his hands, and commanded Cooley to produce identification. A reasonable person would not feel free to ignore the commands of a police officer with a weapon drawn. *Washington*, 387 F.3d at 1068.

Normally, under *Bressi*, Officer Saylor would be required to determine whether Cooley was non-Indian shortly after seizing him. 575 F.3d at 896. However, Officer Saylor determined Cooley was non-Indian when

Cooley initially rolled his window down. Because Cooley was non-Indian, Officer Saylor had the authority to detain Cooley only if it was "apparent" Cooley had violated state or federal law. *Bressi*, 575 F.3d at 896. Officer Saylor's observations up to that point fell considerably below an "apparent" state or federal law violation. When Officer Saylor seized Cooley, he had observed bloodshot and watery eyes, no odor of alcohol, possible but unconfirmed slurred speech, two semi-automatic rifles, wads of cash in Cooley's pocket, and answers to questions that seemed untruthful to him. Officer Saylor had also heard Cooley explain that he pulled over because he was tired—an occurrence Officer Saylor acknowledged was common on Highway 212—and that the vehicle did not belong to him but instead to a Thomas Spang or Thomas Shoulderblade, one of whom Officer Saylor suspected of drug activity and one of whom was a former probation officer. None of Cooley's actions, whether taken individually or cumulatively, establish an obvious state or federal law violation. The Court holds Officer Saylor exceeded the scope of his authority when he detained Cooley. All evidence obtained subsequent to Cooley's seizure is suppressed because it is "fruit of the poisonous tree." *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1395 (9th Cir. 1989) (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

The Government argues the evidence should not be suppressed because the inevitable discovery exception to the "fruit of the poisonous tree" doctrine applies. The inevitable discovery exception allows the introduction of illegally obtained evidence if the government can show by a preponderance of the evidence that the

tainted evidence would inevitably have been discovered through lawful means. *Ramirez-Sandoval,* 872 F.2d at 1396 (citing *Nix v. Williams,* 467 U.S. 431, 444 (1984)). The exception requires that "the fact or likelihood that makes the discovery inevitable arises from the circumstances other than those disclosed by the illegal search itself." *United States v. Boatwright,* 822 F.2d 862, 864-65 (9th Cir. 1987). The Government failed to introduce any evidence that the search of the truck would have occurred without the illegal seizure of Cooley. Therefore, the inevitable discovery exception to the fruit of the poisonous tree doctrine does not apply.

**IV. Conclusion**

For the reason stated above, Cooley's Motion to Suppress (Doc.33) is GRANTED.

DATED this [7th] day of Feb., 2017.

/s/ SUSAN P. WATTERS
SUSAN P. WATTERS
United States District Judge

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-30022
D.C. No. 1:16-cr-00042-SPW-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

JOSHUA JAMES COOLEY, DEFENDANT-APPELLEE

Filed: Jan. 24, 2020

**ORDER**

Before: MARSHA S. BERZON, STEPHANIE DAWN THACKER,[*] and ANDREW D. HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed R. App. P. 35.

[*] The Honorable Stephanie Dawn Thacker, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

The petition for rehearing en banc is denied. Attached are a dissent from and a concurrence respecting the denial of rehearing en banc.

BERZON and HURWITZ, Circuit Judges, concurring in the denial of rehearing en banc:

Even within the questionable genre of dissents from denial of rehearing en banc, *see Martin v. City of Boise*, 920 F.3d 584, 588 (9th Cir. 2019) (Berzon, J., concurring in denial of rehearing en banc), Judge Collins's dissent to the denial of rehearing ("dissent") is an outlier. It misrepresents the legal context of this case and wildly exaggerates the purported consequences of the panel opinion.

**I**

This case involves an unusual factual scenario and a technical issue of Indian tribal authority. It certainly does not present a "question of exceptional importance" meriting en banc consideration. Fed. R. App. P. 35(a)(2). There is no conflict among the circuits regarding the question presented here, the opinion is not in conflict with a Supreme Court decision, and the practical implications are limited. The opinion recognizes that tribal officers *can* stop non-Indians on state and federal rights-of-way across Indian reservations long enough to determine whether they are Indians, and also *can* detain them long enough to turn them over to state or federal authorities *if* they were obviously—apparently—violating state or federal law when stopped. So in the case of a speed demon or a drunk driver, Indian authorities can intervene. The issues in this case arise only when a tribal officer, as here, who is not cross-

deputized on non-Indian lands, takes it on himself to investigate whether a non-Indian on a federal or state highway right-of-way committed some crime that is not apparent—in other words, a crime that has nothing to do with demonstrated danger on the highway.

**II**

Nor does the panel opinion "conflict[] with a decision of the United States Supreme Court." Fed. R. App. P. 35(b)(1)(A). The dissent maintains that the panel opinion missed a whole category of Supreme Court authority for Indian law enforcement officers—Category Two in the dissent's taxonomy. Dissent at 25-27. According to the dissent, that category allows tribal officers to *Terry* stop and investigate non-Indians who are on alienated fee land or federal and state highways that cross Indian reservations. But Category Two does not exist.

As the panel opinion explains, the first basis of authority for tribal officers derives from the inherent power of Indian tribes, as sovereigns, to enforce criminal law against tribal members or nonmember Indians ("Indians") on tribal land. *United States v. Lara*, 541 U.S. 193, 197-200 (2004). Tribes have no criminal jurisdiction over non-Indians, even when they are in Indian country. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

The second source of tribal officers' enforcement authority is tribes' "undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Duro v. Reina*, 495 U.S. 676, 696 (1990). That power includes the authority of tribal officers to investigate and "eject" non-Indians who "disturb public order on the reservation." *Id.* at 697; *see United States v.*

*Becerra-Garcia*, 397 F.3d 1167, 1175 (9th Cir. 2005) ("Intrinsic in tribal sovereignty is the power to exclude trespassers from the reservation, a power that necessarily entails investigating potential trespassers.").

The Supreme Court has definitively ruled, however, that this power to exclude—and so the authority to investigate non-Indians—does not extend to land within the borders of Indian reservations that is non-Indian, including fee land owned by non-Indians and federal and state highways within reservations. *Strate v. A-1 Contractors* held that "for [non-Indian] governance purposes," state (and federal) rights-of-way are equivalent to "alienated, non-Indian land" and so "[t]ribes cannot assert a landowner's right to occupy and exclude" from such rights-of-way. 520 U.S. 438, 454, 456 (1997).

As this Court summarized in *Bressi v. Ford*, those two sources of authority are the only ones available to tribal officers:

> Unlike the case within most of the reservation, the Nation is not a gate-keeper on a public right of way that crosses the reservation. *See Strate v. A-1 Contractors,* 520 U.S. 438, 455-56. . . . *The usual tribal power of exclusion of nonmembers does not apply there. See id.*
>
> On the other hand, the state highway is still within the reservation and is part of Indian country. 18 U.S.C. § 1151(a). The tribe therefore has full law enforcement authority over its members and nonmember Indians on that highway. *See United States v. Lara,* 541 U.S. 193, 210. . . . The tribe accordingly is authorized to stop and arrest Indian violators

of tribal law traveling on the highway. *In the absence of some form of state authorization, however, tribal officers have no inherent power to arrest and book non-Indian violators. See Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191. . . . This limitation has led to obvious practical difficulties. For example, a tribal officer *who observes a vehicle violating tribal law on a state highway* has no way of knowing whether the driver is an Indian or non-Indian. *The solution is to permit the officer to stop the vehicle and to determine first whether or not the driver is an Indian.* In order to permit tribal officers to exercise their legitimate tribal authority, therefore, it has been held not to violate a non-Indian's rights when tribal officers stop him or her long enough to ascertain that he or she is, in fact, not an Indian. *See Schmuck,* 850 P.2d at 1337. *If the violator turns out to be a non-Indian, the tribal officer may detain the violator and deliver him or her to state or federal authorities. Id.; see Strate,* 520 U.S. at 456 n.11. . . .

This rule permitting tribal authority over non-Indians on a public right-of-way is thus a concession to the need for legitimate tribal law enforcement against Indians in Indian country, including the state highways. The amount of intrusion or inconvenience to the non-Indian motorist is relatively minor, and is justified by the tribal law enforcement interest. Ordinarily, there must be some suspicion that a tribal law is being violated, probably by erratic driving or speeding, to cause a stop, and the amount of time it takes to determine that the violator is not an Indian is not great. *If it is apparent that a state or federal law has been violated, the officer may detain the non-*

> *Indian for a reasonable time in order to turn him or her over to state or federal authorities. Id.*

575 F.3d 891, 895-96 (9th Cir. 2009) (emphases added). In sum, only "[i]f it is *apparent* that a state or federal law has been violated" may "the [tribal] officer . . . detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities." *Id.* at 896 (emphasis added).

No Supreme Court or Ninth Circuit case since *Strate* has divined a third source of tribal authority over criminal activities of non-Indians—the power to *investigate* criminal activity by *non-Indians* on alienated fee land or federal and state rights-of-way. The dissent nonetheless insists that implicit in the limited authority of tribal officers is the power to stop known non-Indians on reasonable suspicion, pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), and then investigate *whether* any law enforcement violation has occurred. Dissent at 25-27. If that authority existed, then tribal police could stop, investigate, and detain *known* non-Indians *anywhere* within the boundaries of a reservation for *any* reasonably suspected crime.

In support of this supposed broad authority, the dissent quotes *Duro*'s statement that "[t]ribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary to eject them." Dissent at 26 (quoting *Duro*, 495 U.S. at 697). But *Duro* was explaining the tribal power to exclude, as the preceding sentence indicates. 495 U.S. at 696-97. *Duro*, decided before *Strate*, did not delineate a separate power to detain and investigate non-Indians on alienated non-Indian land within a reservation's

boundaries or on federal and state rights-of-way (which were not at issue in *Duro*).

The dissent relies on two other sources for its vehement accusations that the panel ignored its supposed Category Two. The first is a brief and tentative footnote in *Strate*:

> We do not here question 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 nonmembers stopped on the highway for conduct violating state law. *Cf. State v. Schmuck*, 121 Wash. 2d 373, 390 . . . (en banc) (recognizing that a limited tribal power "to stop and detain alleged offenders in no way confers an *unlimited* authority to regulate the right of the public to travel on the Reservation's roads"), cert. denied, 510 U.S. 931 . . . (1993).

520 U.S. at 456 n.11. This footnote, as *Bressi* explained, at most preserved the right of tribal officers to detain non-Indians when, in the course of pulling over an unknown offender, the officer identifies the individual as non-Indian but the state or federal legal violation is "apparent." 575 F.3d at 896.

That was not the case here. Cooley was not "stopped on the highway for conduct violating state law." 520 U.S. at 456 n.11. He was not driving when approached by the tribal officer and was not seen "violating state law." Instead, the tribal officer undertook to investigate him for non-apparent, non-traffic-related criminal activity

and searched his vehicle. The opinion in this case is entirely consistent with the *Strate* footnote.[1]

The dissent's other key accusation is that the panel opinion disregarded a pre-*Strate* case from this Court, *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975). But *Ortiz-Barraza* is plainly no longer good law.

In *Ortiz-Barraza*, a non-Indian was stopped by a tribal officer and detained in the absence of an obvious legal violation. *Ortiz-Barraza* rested squarely on Indian tribes' "power to exclude trespassers from the reservation," *id.* at 1179; *see id.* at 1180—the same power that *Strate* later held does not extend within reservation boundaries to alienated fee land or federal and state rights-of-way, 520 U.S. at 456. Further, *Ortiz-Barraza* concluded that the "[r]ights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police." 512 F.2d at 1180. *Strate* held directly to the contrary on that point as well. 520 U.S. at 454.

**III**

The dissent also maintains that even if Officer Saylor did act beyond his authority in detaining Cooley to investigate whether he was violating some law, "Saylor did *not* act outside his *territorial* jurisdiction," Dissent

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[1] The dissent also points to *Strate*'s citation of *State v. Schmuck*, 121 Wash. 2d 373 (1993) (en banc). That *Strate* cites *Schmuck* to emphasize the *limits* of an officer's power to "stop and detain," 520 U.S. at 456 n.11, reinforces our holding that Officer Saylor acted beyond the scope of the Tribe's sovereign authority when he conducted a search of Cooley.

at 40, so *United States v. Henderson*, 906 F.3d 1109 (9th Cir. 2018), is not, as the panel held, controlling.

Wrong. Because Cooley is not an Indian, the highway was "equivalent, for [non-Indian] governance purposes, to alienated, non-Indian land" when Saylor conducted his investigation and search. *Strate*, 520 U.S. at 454. *Henderson* held that a magistrate judge who "issued a warrant in excess of her jurisdictional authority" violated the Fourth Amendment. 906 F.3d at 1116-17. In imagining some fundamental difference between the magistrate in *Henderson* and the tribal officer here, the dissent once again ignores that *Strate* held state and federal highways within reservations outside the jurisdiction of tribal officials with regard to non-Indians.

Nor is it true that "the problem here (if any)" is that Saylor's "actions were not within the scope of his authority." Dissent at 41. Saylor had no authority to act for the state *at all* because he was not a state actor. *Bressi*, 575 F.3d at 896. That Saylor *could* have been a state actor had he been deputized as one is irrelevant; the Federal Rules of Criminal Procedure *could* have authorized the magistrate in *Henderson* to issue warrants to search computers located outside her district, and they subsequently were amended to do just that. *See* Fed. R. Crim. P. 41(b)(6). Saylor's limited jurisdiction *under federal Indian law* as a tribal officer—not the unrealized potential for a voluntary agreement between the Crow Tribe and the State of Montana broadening his authority—is what is relevant. For that reason, *Virginia v. Moore*, 553 U.S. 164, 176 (2008), which held that "state restrictions do not alter the Fourth Amendment's protections," has no application here.

**IV**

The Supreme Court has in the last few decades prescribed distinct limits on tribal authority over non-Indians even within the geographical boundaries of Indian reservations. It is the dissent, not the panel, that has expanded tribal authority well beyond those limits by "mix[ing] up . . . distinct sources of tribal authority over non-Indians." Dissent at 29.

For the foregoing reasons, we concur in the denial of rehearing en banc.

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COLLINS, Circuit Judge, with whom BEA, BENNETT, and BRESS, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel's extraordinary decision in this case directly contravenes long-established Ninth Circuit and Supreme Court precedent, disregards contrary authority from other state and federal appellate courts, and threatens to seriously undermine the ability of Indian tribes to ensure public safety for the hundreds of thousands of persons who live on reservations within the Ninth Circuit. I respectfully dissent from our failure to rehear this case en banc.

For more than 40 years, we have held that, when a non-Indian is reasonably suspected of violating state or federal law anywhere within the boundaries of an Indian reservation (including state or federal highways traversing the reservation), tribal police officers have the authority to conduct on-the-spot investigations of the sort authorized under *Terry v. Ohio*, 392 U.S. 1 (1968). *See Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180-81 (9th Cir. 1975). Under this well-settled law,

the tribe's conceded lack of criminal jurisdiction over such non-Indians, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), does *not* deprive the tribe of the authority to conduct *Terry*-style investigations of non-Indians and, if probable cause arises, to then turn the non-Indian suspect over to the appropriate state or federal authorities for criminal prosecution. *Ortiz-Barraza*, 512 F.2d at 1180-81. Over the intervening years, numerous courts have expressly endorsed *Ortiz-Barraza*'s conclusion that tribes may detain and investigate non-Indians for suspected violations of state and federal law, correctly recognizing that "the power to maintain public order by investigating violations of state law on the reservation . . . is clearly an incident of general tribal sovereignty." *State v. Pamperien*, 967 P.2d 503, 505 (Or. Ct. App. 1998); *see also United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005); *State v. Schmuck*, 850 P.2d 1332, 1340-42 (Wash. 1993); *State v. Haskins*, 887 P.2d 1189, 1195-96 (Mont. 1994).

Without even so much as a mention of our controlling decision in *Ortiz-Barraza*, the panel in this case sweeps away four decades of settled law and instead announces that Indian tribes now "*lack* the ancillary power to investigate non-Indians" for reasonably suspected violations of state or federal law that occur on state or federal highways, or on non-Indian fee lands, within the reservation. *United States v. Cooley*, 919 F.3d 1135, 1141 (9th Cir. 2019) (emphasis added). According to the panel, tribal officers' previously straightforward authority to stop any driver, Indian or non-Indian, based on the familiar reasonable suspicion standard, *see Heien v. North Carolina*, 574 U.S. 54, 60 (2014), has now been replaced by the following convoluted series of rules that turn on

what the officer does or does not know about the driver's tribal status:

- A tribal officer *only* has the authority to "stop those suspected of violating *tribal* law on public rights-of-way"—*not* state or federal law—and even then only "as long as the suspect's Indian status is *unknown*" (or is known to be Indian). *Cooley*, 919 F.3d at 1142 (emphasis added).
- Once a tribal officer has stopped a driver whose status is unknown, the officer's "initial authority is limited to ascertaining whether the person is an Indian." *Id.*
- If, in the course of the "limited interaction" necessary to determine that the driver is a non-Indian, the officer happens to discover an "'obvious' or 'apparent' violation[] of state or federal law," he or she may continue to detain that person until the appropriate state or federal officials can take custody. *Id.* (citation omitted). This limited detention authority, however, "does *not* allow officers to search a known non-Indian for the purpose of finding evidence of a crime." *Id.* (emphasis added).
- But if the non-Indian has not committed an "obvious" violation of state or federal law, then the officer may not detain the person further, conduct *any* investigation of the non-Indian, or conduct any searches. *Id.* at 1142-43.
- If the officer nonetheless persists, then the officer is acting outside his or her jurisdiction, and the officer's conduct is presumptively unreasonable under Fourth Amendment principles. *Id.*

at 1145-46.[1] The officer, however, may still exercise the very limited authority that a private citizen would have had "under the common law of the founding era." *Id.* at 1146. That authority is limited to seizing a violator whom the officer has "personally observed" commit a "*felony*," and does not include *any* authority to conduct searches. *Id.* at 1146-47 & n.9 (emphasis added).

- Likewise, if *before* any stop is made, the tribal officer *already knows* that the suspected violator is a non-Indian, the officer's power is limited to the citizen's-arrest authority of seizing those whom the officer personally observed commit a felony. *Id.* at 1142, 1146.

By allowing tribal officers to detain non-Indians only for "obvious" violations of state or federal law or for felonies committed in the officer's presence, the net effect of the panel's remarkable decision is to replace the easily administered reasonable suspicion standard that has applied for decades under *Ortiz-Barraza* with a novel and complex set of standards, all of which are *more demanding than ordinary probable cause*.

Judge Berzon's and Judge Hurwitz's concurrence in the denial of rehearing en banc belatedly attempts to defend the panel's stealth overruling of *Ortiz-Barraza* by contending that our holding in that case was abrogated

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[1] Although the Fourth Amendment does not apply directly to Indian tribes, *see Duro v. Reina*, 495 U.S. 676, 693 (1990), Congress has subjected tribes to Fourth Amendment standards by statute under the Indian Civil Rights Act (ICRA). *See* 25 U.S.C. § 1302(a)(2).

by the U.S. Supreme Court's intervening decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *See* Concurrence at 9-10. That is demonstrably wrong. Far from undermining *Ortiz-Barraza*, *Strate* reaffirms its continued validity by expressly endorsing the authority of tribal officers to conduct traffic stops of "*nonmembers*" for "conduct violating *state* law," and to do so on all "roads within a reservation, including rights-of-way made part of a state highway." 520 U.S. at 456 n.11 (emphasis added). Indeed, as support for this conclusion, the U.S. Supreme Court quoted the Washington Supreme Court's express endorsement of such "limited tribal power 'to stop and detain alleged offenders'" in *Schmuck*, *see Strate*, 520 U.S. at 456 n.11 (quoting *Schmuck*, 850 P.2d at 1341), and on that very same cited page, *Schmuck* in turn explicitly based its recognition of that authority on our decision in *Ortiz-Barraza*. *See* 850 P.2d at 1341 ("We agree with the Ninth Circuit."). At a minimum, *Ortiz-Barraza* is easily reconciled with *Strate*, and the panel therefore wholly lacked authority to flout that controlling Ninth Circuit precedent. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (three-judge panel may disregard prior precedent only when it is "clearly irreconcilable" with intervening Supreme Court or en banc authority).

The panel's decision in this case is plagued by a further critical legal error that independently warrants en banc review. Having concluded that the tribal officer in this case acted outside the scope of what, "under the law of the founding era, a private citizen could lawfully" have done, the panel suppressed the evidence "obtained

as a result" of that encounter. 919 F.3d at 1140, 1148.[2] But the panel's limitation of tribal officer authority to that of founding-era private citizens rests on an erroneous analogy to searches and seizures conducted outside of an officer's *geographic* jurisdiction. Even if one assumes *arguendo* that the panel is correct in concluding that tribal officers who have not been cross-deputized under state law may not conduct *Terry*-style inquiries of non-Indians on state or federal highways *within* the reservation, the proper analogy would be to a law enforcement officer who lacks *state-law authority* to take particular actions *within* his or her territorial jurisdiction. The law is settled, however, that such deficiencies in state-law authorization are irrelevant to the Fourth Amendment evaluation of the reasonableness of a search or seizure. *See*, *e.g.*, *Virginia v. Moore*, 553 U.S. 164, 171-76 (2008); *Martinez-Medina v. Holder*, 673 F.3d 1029, 1037 (9th Cir. 2011); *Saunders v. Silva*, 473 Fed. App'x 769, 770 (9th Cir. 2012); *see also Johnson v. Phillips*, 664 F.3d 232, 238 (8th Cir. 2011).

Moreover, the panel's deeply flawed decision involves questions of extraordinary practical importance that merit en banc review. Although the concurrence claims that this case involves a "technical issue of Indian tribal authority" whose" practical implications are limited," *see* Concurrence at 3-4, nothing could be further from the truth. The elimination of tribal *Terry*-stop authority with respect to non-Indians on fee lands and public

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[2] This, in turn, involved the further novel holding that violations of ICRA warrant the remedy of suppression to the same extent as a Fourth Amendment violation. *See* 919 F.3d at 1143-45. The Government, however, conceded this issue in its opening brief, and it has not raised that issue in its petition for rehearing.

highways—which the panel replaces with standards that are higher than probable cause—is a very big deal, because it threatens to have a dramatic effect on public safety within the many Indian reservations in this circuit. Although reservations vary widely, there are some in which a large percentage of the reservation's land area is non-Indian fee land, and some that have very significant numbers of non-Indian residents. The panel thus strips tribes of a critical element of their sovereign authority to maintain public order with respect to what, in some cases, will be a significant portion of the people or land within the reservation. The concurrence may be right that the "practical limitations" of the panel decision are "limited" for those of us who do not live on Indian reservations, but for the hundreds of thousands who do, it makes a great deal of difference if tribal law enforcement lacks on-the-spot authority to detain and investigate non-Indians based on the familiar reasonable suspicion standard. If Supreme Court precedent truly required that we blow such a gaping hole in tribal law enforcement, then we would be obligated, as an "inferior Court[]," to do so. *See* U.S. Const., art. III, § 1. But nothing in *Strate* requires the panel's troubling disregard of sovereign tribal authority. On the contrary, adherence to Supreme Court and Ninth Circuit precedent forbids what the panel has done here.

I respectfully dissent from our refusal to rehear this case en banc.

**I**

**A**

Around 1:00 AM on February 26, 2016, after completing his shift, Crow Tribal highway safety officer James

Saylor was driving eastbound along U.S. Highway 212, a federal right-of-way on the Crow Indian Reservation in southern Montana.[3] Saylor passed a white Dodge pickup truck parked on the westbound shoulder of the highway with its headlights on, and since that area was known to him as "a very dangerous stretch of road," Saylor decided to go back and conduct a "welfare" check. In pulling up behind the Dodge, Saylor intentionally did not activate his overhead lights because he "didn't want the occupants of the vehicle to feel as though [he] was detaining them."

As he approached the vehicle, Saylor heard that the Dodge's engine was running and saw that it had Wyoming license plates. He also noticed that the pickup truck had "a lot of stuff in the bed of the truck," which was filled almost to the "bed rails with different items." The passenger compartment had dark windows, and it also "appeared to be lifted with some kind of lift or leveling kit" and had" oversized tires." Saylor knocked on the side of the truck, and the rear driver-side window briefly rolled down and then rolled backup. Saylor "expected the front driver's side window to roll down after that, as if maybe somebody had hit the wrong button," but it did not. During the brief period the rear window was down, Saylor thought he saw a small child "crawling around in the back."

Saylor shined his flashlight through the tinted front driver-side window, and he saw a man (Cooley) who then gave him what appeared to be a thumbs-down sign.

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[3] This summary is based primarily on the testimony of Officer Saylor at the suppression hearing. *See Cooley*, 919 F.3d at 1139 n.1.

Saylor "didn't know what he was trying to convey, if his window wouldn't go down, or if he wasn't okay." Saylor asked Cooley if he could get his window down, and Cooley lowered it about 4-6 inches. Saylor could see that Cooley "had watery, bloodshot eyes," and that he "appeared to be non-native." Saylor also saw a toddler (who turned out to be Cooley's son) crawl from the back seat onto Cooley's lap. Saylor asked if everything was OK, and Cooley responded that he had pulled over because he was tired. That was not uncommon in Saylor's experience, although it also was not "uncommon to come across a motorist that is impaired and has pulled over because of that impairment." Not having excluded the latter possibility, Saylor decided that "as long as [Cooley] was willing to talk with me, I was willing to talk with him to make sure of the welfare of him and the child."

Saylor asked where Cooley had driven from, expecting that he might have stopped after a long drive. Cooley responded, however, that he had driven from Lame Deer, which Saylor knew to be a town that was less than half an hour away in the adjacent Northern Cheyenne Indian Reservation. (Saylor had previously served as a Bureau of Indian Affairs (BIA) police officer on that reservation for several years.) Saylor asked, "what he was up to in Lame Deer," and Cooley responded that he had gone there to buy a vehicle from someone named "Thomas," either "Thomas Spang" or "Thomas Shoulder Blade." Saylor recognized both names—Thomas Spang had been involved in drug trafficking and Thomas Shoulder Blade had been a BIA employee.

Saylor thought it was odd that Cooley had been attempting to purchase a vehicle so late at night, and he

also thought it was odd that Cooley did not have another adult with him. As Saylor explained at the suppression hearing, when buying a car, "I've always had another passenger with me to drive my new purchase, especially if I'm going in a vehicle that I already own, unless I'm trading it in." Saylor questioned Cooley further, and Cooley responded that the vehicle he was supposed to buy "had broken down and that Thomas had allowed him to use the vehicle that he was in." This response puzzled Saylor even more, because he "didn't understand why somebody would allow the use of a vehicle with all the personal belongings that [he had] seen in the bed." He also did not understand why Thomas Spang or Thomas Shoulder Blade would have a vehicle registered in Wyoming; in his experience, most Northern Cheyenne members either had "a Northern Cheyenne license plate through the State of Montana, or they wouldn't have any registration at all."

Saylor was having a hard time understanding Cooley, because the engine was running and because Cooley "was even sounding as though he had some slurred words." Saylor asked Cooley to lower the window so that he could hear better, and Cooley did so. At that point, Saylor saw what appeared to be "two semiautomatic rifles" on the front passenger seat. Having weapons in a vehicle was not uncommon in Montana, in Saylor's experience, but he was further puzzled when Cooley said that the guns belonged to Thomas. As Saylor explained at the hearing, "I have never known an instance . . . where somebody has lent somebody else their vehicle with all of their property to include firearms."

At this point, Saylor asked Cooley for his ID. In response, Cooley did not retrieve his ID, but instead began pulling out of his pocket "small denomination bills" and putting them in a compartment in the console area. The third or fourth time Cooley reached for his pocket, Saylor "noticed a change in his demeanor." Rather than glance in Saylor's direction, as he had done on the other instances, Cooley "started staring straight forward out of the windshield of his truck, as if he was looking through his son" on his lap. Cooley's "breathing really became shallow and rapid, and he had a moment where he just wasn't doing anything, wasn't moving." As someone who taught other officers as a "use-of-force instructor," Saylor thought this seemed like what is sometimes called a "thousand-yard stare," which can be a sign of an imminent assault. At that point, Saylor drew his weapon, but did not point it at Cooley. Saylor ordered him to keep his hands visible and to slowly retrieve his ID "and only his ID." Cooley then produced a Wyoming driver's license. Saylor tried to call in the license on the spot with his hand-held radio, but he could not get a signal. Although Saylor thought the radio in his patrol car would work, he concluded that for safety reasons he could not simply go back to his vehicle.

Instead, Saylor went around the back of the Dodge to the passenger side, so that he would have some ability to shield himself if the encounter turned violent. Saylor then opened the passenger door and confirmed that no one else was in the vehicle. Saylor saw that, "in the area where [Cooley] had been reaching his hand" earlier, there was a loaded semiautomatic pistol. Saylor asked why Cooley had not mentioned the pistol, and Cooley said that he had not known it was there. Saylor

reached for the pistol and disarmed it, and he could see that the rifles were unloaded.

Saylor testified that, at a minimum, he wanted to run the driver's license at his patrol car, and so he ordered Cooley out of the truck. After patting down Cooley, Saylor moved to place Cooley and his son in the patrol unit. Cooley asked if he could first empty his pockets, and in addition to bills, Cooley removed small Ziploc bags that Saylor thought were commonly used "for the packaging and sale of narcotics, specifically, in [his] experience, methamphetamines." Recalling that at some point in their conversation Cooley had vaguely mentioned that somebody might be coming to meet him at the side of the road, Saylor decided to radio for backup and to secure the scene before running a records check. Saylor retrieved the rifles and pistol from the Dodge, turned off the ignition, and took the keys. In leaning to reach the keys, he noticed "glass, smoking pipe and [a] plastic baggie containing what appeared to be methamphetamine." Other officers soon arrived, including a county deputy. A subsequent search of the vehicle disclosed more than 50 grams of methamphetamine.

**B**

Cooley was indicted in the district court on drug-trafficking and firearms charges, and he moved to suppress evidence from his encounter with Saylor. The district court conducted a hearing and granted Cooley's motion to suppress.

The Government appealed and the panel affirmed. *See Cooley*, 919 F.3d 1135. The panel held that, because tribes lack the authority to exclude non-Indians from

state or federal highways that run through a reservation, tribes "lack the ancillary power to investigate non-Indians who are using such public rights-of-way." *Id.* at 1141. According to the panel, a tribe may stop anyone suspected of violating *tribal* law on public rights-of-way "as long as the suspect's Indian status is unknown." *Id.* at 1142. Once a suspected violator is stopped, the officer "will typically need 'to ask one question' to determine whether the suspect is an Indian." *Id.* (citation omitted). If the suspect turns out to be a non-Indian, then (according to the panel) the tribal officer may conduct no further investigation, and the officer may continue to detain the non-Indian only if it is then "obvious" or "apparent" that the non-Indian has committed a state or federal crime. *Id.* at 1142, 1147-48. In that circumstance, the panel stated, the non-Indian may be detained long enough to turn him or her over to the appropriate state or federal authorities. *Id.* at 1142. If the officer persists in the absence of an obvious violation, then the tribal officer's actions are presumptively unreasonable under Fourth Amendment principles, as made applicable under ICRA. *Id.* at 1145-46. The only exception would be that the officer could still exercise the citizen's-arrest authority of a private citizen under the "common law of the founding era." *Id.* at 1146. That, according to the panel, limits the officer to arresting for *felonies* committed in the officer's presence and forbids the officer from conducting any searches. *Id.* at 1146-47 & n.9.

Because Saylor's actions clearly exceeded the panel's narrow conception of tribal police authority, the panel held that Saylor violated the Fourth Amendment principles made applicable to tribes under ICRA. *Id.* at

1148. The panel therefore affirmed the order granting Cooley's motion to suppress.

**II**

To set the panel's analysis in context, and to make the panel's errors more apparent, it helps first to summarize the various sources of tribal authority over non-Indians within the boundaries of a reservation.

**A**

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). That authority, however, is subject to significant limitations. Chief among these is the settled rule that "Indian tribal courts" may not exercise "*criminal* jurisdiction over non-Indians." *Oliphant*, 435 U.S. at 195 (emphasis added). Thus, even with respect to conduct by non-Indians within the reservation, a tribe may neither apply its substantive criminal law to non-Indians nor try a criminal charge against a non-Indian.

As to a tribe's *civil* jurisdiction, the tribe's authority depends upon whether the non-Indian's conduct occurred "on tribal land" within the reservation or on land that, while still within the reservation, has been "alienated" in fee simple to a non-Indian. *Strate*, 520 U.S. at 454. Tribes "retain considerable control over nonmember conduct *on tribal land*," *id.* (emphasis added), but "the civil authority of Indian tribes and their courts with respect to *non-Indian fee lands*" only extends to non-Indians in the two situations set forth in *Montana v. United States*, 450 U.S. 544 (1981). *See Strate*, 520 U.S. at 453 (emphasis added). A state highway running through a reservation is considered, for jurisdictional purposes,

to be equivalent to reservation "land alienated to non-Indians." *Id.* at 456.

Under the first *Montana* exception, a tribe may exercise regulatory and adjudicatory jurisdiction over "'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Id.* at 446 (quoting *Montana*, 450 U.S. at 565). "The second exception to *Montana*'s general rule [of no civil jurisdiction over non-Indians on non-Indian fee lands] concerns conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 457 (quoting *Montana*, 450 U.S. at 566). To fall within this second exception, regulatory or adjudicatory jurisdiction must be "'necessary to protect tribal self-government'" or "crucial to 'the political integrity, the economic security, or the health or welfare'" of the tribe. *Id.* at 459 (quoting *Montana*, 450 U.S. at 564, 566).

**B**

Against this general framework of tribal authority over non-Indians, the case law recognizes three distinct sources of tribal authority to *investigate and detain* non-Indians within the boundaries of a reservation.

**1**

*First*, tribes retain, *on tribal land*, "a landowner's right to occupy and exclude" non-Indians entirely, *see Strate*, 520 U.S. at 456, and this "power to exclude trespassers from the reservation . . . necessarily entails *investigating* potential trespassers." *United States v. Becerra-Garcia*, 397 F.3d 1167, 1175 (9th Cir. 2005) (emphasis added). Once identified, such trespassers can

be detained for the limited amount of time necessary to expel them from the reservation.

**2**

*Second*, a tribe's sovereignty includes an additional, more limited power of expulsion that extends even to non-Indians on alienated fee lands. The fact that tribes lack criminal jurisdiction to try non-Indians does *not* mean that they must stand idly by and let non-Indians "violate the law with impunity" within the reservation. *Duro v. Reina*, 495 U.S. at 696. On the contrary, a tribe's sovereignty includes the authority to restrain criminal conduct within the reservation and to detain violators so that they may be prosecuted by those who *do* have criminal jurisdiction over them:

> Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.

*Id.* at 697. This more limited power to eject lawbreakers does *not* rest on the general landowner-based power of exclusion from *tribal* lands, because it expressly extends to "land alienated to non-Indians," including "rights-of-way made part of a state highway." *Strate*, 520 U.S. at 456 & n.11.

Moreover, this "power of the [tribe] to exclude non-Indian *state and federal law violators* from the reservation would be meaningless were the tribal police not empowered to *investigate* such violations," and so "[o]bviously, tribal police must have such power." *Ortiz-*

*Barraza*, 512 F.2d at 1180 (emphasis added). This power to investigate, in turn, embraces the power to temporarily detain a non-Indian based on reasonable suspicion, and to conduct the sort of limited on-the-spot investigation permitted by *Terry v. Ohio*, 392 U.S. at 30. *See also United States v. Terry*, 400 F.3d at 579-80 (holding that "tribal police officers do not lack authority to detain non-Indians whose conduct disturbs the public order on their reservation" and that "[a]t the time that the tribal officers stopped Mr. Terry they clearly had a reasonable and articulable suspicion that 'criminal activity may be afoot'") (quoting *Terry v. Ohio*, 392 U.S. at 30); *Pamperien*, 967 P.2d at 506 & n.4 ("tribal law enforcement officers have the authority to investigate on-reservation violations of state and federal law as part of the tribe's inherent power as sovereign," and this power extends to non-Indians "stopped on a state highway"); *Haskins*, 887 P.2d at 1195 (tribe's power "to restrain non-Indians who commit offenses within the exterior boundaries of the reservation and to eject them by turning such offenders over to the proper authority" includes the ancillary "authority to *investigate* violations of state and federal law") (emphasis added) (citing *Ortiz-Barraza*, 512 F.2d at 1180); *Schmuck*, 850 P.2d at 1341 ("[T]he Tribe's authority to stop and detain is not necessarily based exclusively on the power to exclude non-Indians from tribal lands, but may also be derived from the Tribe's general authority as sovereign.") (emphasis omitted).

In *Ortiz-Barraza*, a tribal police officer on a reservation adjoining the border with Mexico developed a reasonable suspicion that a pickup truck had crossed the

international border and might be engaged in "smuggling of contraband." 512 F.2d at 1180-81. The officer followed the vehicle onto the state highway that ran through the reservation, and he approached the vehicle, which had stopped, to briefly investigate his suspicions. *Id.* at 1178. During the ensuing encounter, the officer frisked Ortiz-Barraza, searched his vehicle, and discovered marijuana. *See id.* at 1178-79. We held that the officer had the authority to conduct this investigation of a non-Indian based on reasonable suspicion, and we specifically rejected the argument that a different conclusion was warranted because the encounter had taken place on a state highway. *Id.* at 1180; *see also Pamperien*, 967 P.2d at 505-06 & n.4; *Schmuck*, 850 P.2d at 1340-41.

**3**

*Third*, we have recognized an additional category of extremely limited investigatory power over non-Indians that is purely ancillary to the tribe's authority to apply *tribal* law to *tribal* members. In *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009), a tribal police department erected a roadblock across a state highway within the reservation in order to "check for sobriety, drivers' licenses, registration, and possession of alcohol." *Id.* at 894. Because the roadblock was on a state highway, which is considered to be equivalent to alienated non-Indian fee land, the tribal officers' detention and investigation of all drivers, including non-Indians, could *not* be justified under the general power to exclude non-Indians from tribal lands. *Id.* at 895-96. And because the roadblock was "*suspicionless*," and "*[a]ll* vehicles are stopped," *id.* at 896 (emphasis altered), the detention and investigation of all drivers, including non-Indians, could *not* be

justified as an exercise either of "the power to restrain those who disturb public order on the reservation," *Duro*, 495 U.S. at 697, or the "power . . . to exclude non-Indian *state and federal law violators* from the reservation," *Ortiz-Barraza*, 512 F.2d at 1180 (emphasis added).

Nonetheless, we stated that an across-the-board roadblock could be upheld as being purely ancillary to the tribe's "full law enforcement authority over *its members and nonmember Indians* on that highway." *Bressi*, 575 F.3d at 896 (emphasis added). Because, however, the tribe's power to enforce tribal law against tribal members does *not* extend to non-Indians, a roadblock "established on tribal authority" would be "permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians." *Id.* at 896-97. Consequently, when a detention is based *solely* on such "purely tribal authority," only "apparent" or "obvious violations" of law may prolong the detention of a non-Indian, and *any* "inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are [sic] *not* authorized" in the "case of non-Indians." *Id.* Because, in *Bressi*, the tribal officers "did not confine themselves to inquiring whether [Bressi] was or was not an Indian," their actions fell outside the scope of their authority as tribal officers. *Id.* at 897.[4]

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[4] In *Bressi*, the tribal officers also happened to have been empowered under Arizona law to enforce *state* law within the reservation. 575 F.3d at 894. Accordingly, the specific holding of *Bressi* was that, because the roadblock could not be characterized as "purely a tribal endeavor," the officers' conduct of the roadblock took place under

## III

The panel's decision here mixed up these distinct sources of tribal authority over non-Indians and thereby erroneously held that the second power described above —the power to detain and investigate *reasonably suspected* non-Indian violators of state and federal law— does not exist. Because *Ortiz-Barraza* squarely holds to the contrary, the panel's opinion can *only* be correct if *Ortiz-Barraza* is "clearly irreconcilable" with intervening Supreme Court authority. *Miller v. Gammie*, 335 F.3d at 900. That "high standard" is not met here. *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011). Although the panel did not mention *Ortiz-Barraza* at all, the concurrence now asserts that *Ortiz-Barraza* has been overruled by the Supreme Court's decision in *Strate*. *See* Concurrence at 9-10. That is plainly incorrect.

### A

The panel's confused analysis jumbles together these various distinct tribal powers and ends up generating a convoluted set of rules that will prove difficult for tribal officers to administer and that will leave significant gaps in their practical ability to ensure public safety on Indian reservations.

The panel's critical mistake was that it held that a tribe's power to investigate potential crimes by non-

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color of *state* law and therefore subjected them to suit under § 1983 to the extent that the roadblock did not comply with Fourth Amendment standards. *Id.* at 894, 897; *see also id.* at 895 (noting that § 1983 would not have applied to the tribal officers in that case if they had been acting under color of tribal law).

Indians rests solely on the *general* tribal power to exclude non-Indians from *tribal* lands, *i.e.*, the first power described above. *Cooley*, 919 F.3d at 1141; *see also* Concurrence at 9-10. Because *Strate* holds that a tribe lacks such a general power of exclusion with respect to a "state or federal highway" on a right-of-way through the reservation, the panel reasoned, "[t]ribes also lack the ancillary power to investigate non-Indians who are using such public rights-of-way." *Cooley*, 919 F.3d at 1141. But as explained below, *Strate* coupled its holding that state highways are equivalent to fee lands with an express reaffirmation of the power of tribal officers to conduct traffic stops of non-Indians for violations of state law. *See infra* at 34-35. That is, *Strate* expressly reaffirmed the second power described above and recognized in *Ortiz-Barraza*.

Having already crossed wires between the first two distinct tribal powers discussed above, the panel then crossed wires with the third power as well, by further claiming that the tribe's authority to enforce substantive *tribal* law against *tribal* members (the distinct power discussed in *Bressi*) is the sole source for a tribal officer's authority over non-Indians suspected of violating *state or federal* law on public highways. *Cooley*, 919 F.3d at 1142; *see also* Concurrence at 8-9. According to the panel, a tribal officer may only conduct stops for suspected violations of "*tribal* law," but since the tribal status of most violators will not be known until the driver is pulled over, the officer may stop *any* driver "as long as the suspect's Indian status is unknown." *Cooley*, 919 F.3d at 1142 (emphasis added); *see also* Concurrence at 8-9. When a tribal officer thus stops a person

*without* knowing whether he or she is an Indian, the officer's "initial authority is limited to ascertaining whether the person is an Indian," and if the person is not, then the officer lacks any investigative authority and can only continue to detain the non-Indian if it is "'*apparent*' or '*obvious*' that state or federal law is being or has been violated." *Cooley*, 919 F.3d at 1142 (emphasis added) (quoting *Bressi*, 575 F.3d at 896-97). Thus, if a tribal officer pulls over a vehicle based merely upon *reasonable suspicion* of drunk driving, then once the officer has determined that the driver is not an Indian, the officer may conduct *no* investigation to dispel the suspicion or to ripen it into probable cause—no questions, no breathalyzer, no walking in line, etc. *See* Concurrence at 4 (if a suspected drunk driver turns out to be a non-Indian, the driver may be detained only if he or she was "obviously—apparently—violating state of federal law *when stopped*") (emphasis added).

As noted above, the panel held that this *Bressi* power to detain suspected *tribal* law violators exists only "as long as the suspect's Indian status is *unknown*." *Cooley*, 919 F.3d at 1142 (emphasis added); *see also* Concurrence at 8-9. In the panel's view, when a tribal officer proceeds to detain and investigate a person that he or she *knows* to be a non-Indian, the tribal officer's actions are analogous to those of an officer acting outside of his or her *geographic* jurisdiction. *Cooley*, 919 F.3d at 1145-48. Because the "common law of the founding era often deemed searches and seizures unreasonable when police officers acted outside the bounds of their sovereign's jurisdiction," the panel reasoned, such an extra-jurisdictional search or seizure would violate Fourth Amendment principles (made applicable to Indian tribes

by ICRA, 25 U.S.C. § 1302(a)(2)) unless the officer's actions fall within the citizen's-arrest authority of private citizens under the "common law of the founding era." *Id.* at 1146. Under those common law principles, the panel held, a tribal officer in such circumstances could only detain a non-Indian whom the officer has "personally observed" to have committed a "*felony*." *Id.* (emphasis added). Although the panel suggests that this citizen's-arrest power to stop and detain *known* non-Indians "roughly comports with" the *Bressi* power to *continue* to detain those who, *after* being stopped, are discovered to be non-Indians who have committed an "obvious" state or federal law violation, *id.* at 1147, that suggestion is wrong. Given that, according to the panel, the citizen's-arrest power to stop and detain a *known* non-Indian extends only to *felonies*, it will not extend to a wide array of serious and dangerous traffic offenses that are only misdemeanors. Because, for example, a first-time DUI in Montana is generally only a misdemeanor punishable by not "more than 6 months" in prison, *see* Mont. Code Ann. § 61-8-714(1)(a), the panel's reasoning presumably means that a tribal officer cannot *stop* a drunk driver on a state highway if the officer *knows* the driver is a non-Indian.

Moreover, by holding that a tribal officer's on-the-spot authority thus differs dramatically depending upon the officer's knowledge of Indian status (both before a stop, as well as after a stop), the panel's decision creates a further practical problem by placing enormous weight on a factor that will often be ill-suited for such on-the-spot resolution. Because the panel does *not* allow a tribal officer to rely on a "person's physical appearance," officers will likely have to "rely on a detainee's

response when asked about Indian status." 919 F.3d at 1142-43. The incentive to lie, of course, will be significant, and because (according to the panel) there is no authority to investigate or search a non-Indian, the officer presumably cannot search (for example) for a tribal identification card (if the person happens to have one). And even if the person claims to be an Indian, the panel ominously suggests that the officer may not be in the clear even then: the panel expressly reserves the question of what authority a tribal officer has when he or she "asks whether the individual is an Indian and is told, incorrectly, that he is." *Id.* at 1147 n.10.

Considering all of these practical difficulties and issues raised by the panel's opinion here, I am reminded of Justice Scalia's remark: "There are many questions here, and the answers to all of them are ridiculous." *Grady v. Corbin*, 495 U.S. 508, 542 (1990) (Scalia, J., dissenting). But all of these intractable practical issues evaporate if we adhere—as we must—to our decision in *Ortiz-Barraza*, because it correctly holds that a tribal officer has the on-the-spot power to briefly detain and investigate a reasonably suspected lawbreaker *regardless* of whether he or she is known to be a non-Indian. Under *Ortiz-Barraza*, issues over tribal status only affect who ultimately can *charge and prosecute* the person and not the *Terry v. Ohio* authority to temporarily detain and investigate the person. If a detainee's tribal status cannot be satisfactorily resolved on the spot, the officer can nonetheless continue with the *Terry* investigation and, if the officer's reasonable suspicion ripens into probable cause, the tribal status of the *arrestee* can then be sorted out as soon as practicable (at the stationhouse, if necessary).

Of course, if the Supreme Court in *Strate* truly foisted upon us the byzantine regime described in the panel's opinion, then we are bound to implement it, regardless of what *Ortiz-Barraza* held. But Cooley's suggestion that *Strate* overruled *Ortiz-Barraza* does not survive even casual scrutiny. On the contrary, *Strate* reinforces the correctness of *Ortiz-Barraza*.

**B**

Three observations about *Strate* suffice to make clear that the panel's rejection of tribal investigative authority over non-Indians on state and federal highways is wrong.

**1**

*First*, *Strate* itself refutes the panel's assumptions that (1) an across-the-board tribal power to conduct *Terry*-style investigations of non-Indians for violations of state or federal law can *only* rest on the general power to exclude non-Indians from *tribal lands*, and (2) any such power is therefore inapplicable to state or federal highways within reservations. After concluding that a state highway running through a reservation is more akin to alienated, non-Indian land than to tribal land, the *Strate* Court immediately added the following observation in a footnote:

> We do not here question 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 nonmembers stopped on the highway for conduct violating state law. Cf. State v. Schmuck, 121 Wash. 2d 373, 390, 850 P.2d 1332, 1341 (en banc) (recognizing that a limited tribal power "to stop and detain alleged offenders in no way

> confers an unlimited authority to regulate the right of the public to travel on the Reservation's roads"), cert. denied, 510 U.S. 931 (1993).

*Strate*, 520 U.S. at 456 n.11 (emphasis added). The power thus expressly reaffirmed by the Supreme Court—namely, a tribal officer's affirmative power to "stop[]" a "nonmember" on a state "highway for conduct violating state law"—cannot have been based on the general power to exclude from *tribal lands* (the first power described above), because the highway is not considered to be equivalent to tribal lands, but rather to reservation land that has been alienated to non-Indians. *Id.* at 456. Nor does it rest on the authority to enforce *tribal law* against tribal members (the third power described above, which was addressed in *Bressi*), because the Court explicitly described it as a power to conduct traffic "*stop[s]*" of "*nonmembers*" for violations of "*state* law." *Id.* at 456 n.11 (emphasis added).[5] This is precisely the *additional* category of authority recognized in *Ortiz-Barraza*, and it is expressly affirmed by the Supreme Court in *Strate*.

**2**

*Second*, the Court's explicit recognition that tribal officers may conduct *traffic stops* of non-Indians for violations of state law on state highways within reservations

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[5] The concurrence is therefore wrong in positing that the power reaffirmed in *Strate* is the one recognized in *Bressi* rather than the one addressed in *Ortiz-Barraza*. *See* Concurrence at 8-9. Nothing in *Strate*'s straightforward and express recognition of tribal traffic stop authority over non-Indians for violations of state law can be said to adopt the bizarre and complex collection of rules that the panel purports to derive from the very limited *Bressi* power. *See supra* at 12-14.

can only be understood against the familiar backdrop of the settled law governing such stops. The predicate necessary to conduct a traffic stop and to temporarily detain the driver is not, as the panel would have it here, an "obvious" violation of state law (much less a felony committed in the officer's presence), *see* 919 F.3d at 1146-47; rather, "officers need only '*reasonable suspicion*'—that is, 'a particularized and objective basis for suspecting the particular person stopped' of breaking the law." *Heien*, 574 U.S. at 60 (emphasis added) (citation omitted). Moreover, "[a] seizure for a traffic violation *justifies a police investigation of that violation*. '[A] relatively brief encounter,' a routine traffic stop is 'more analogous to a so-called "*Terry* stop" . . . than to a formal arrest.'" *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (emphasis added) (citation omitted). Thus, by explicitly endorsing traffic stops of non-Indians for violations of state law on state highways within the reservation, the Supreme Court implicitly but unmistakably endorsed the concomitant power to conduct an on-the-spot *investigation* of a reasonably suspected state-law violation.

**3**

*Third*, *Strate*'s citation of *Schmuck* further confirms both of these observations and puts definitively to rest any suggestion that *Strate* overruled *Ortiz-Barraza*. *Schmuck* refutes the panel decision's core premises, which are that (1) the *Terry*-style investigative authority recognized in *Ortiz-Barraza* can *only* be justified as an exercise of the tribe's plenary power to exclude non-Indians from *tribal* lands, and (2) therefore (after *Strate*) that authority does not extend to state highways and

other non-tribal lands within the reservation. 919 F.3d at 1141-42.

As *Schmuck* explained, "the Tribe's authority to stop and detain is not necessarily based *exclusively* on the power to exclude non-Indians from tribal lands, but may also be derived from the Tribe's general authority as sovereign." 850 P.2d at 1341. Noting that the standards set forth in *Montana*, 450 U.S. at 563-66, define a tribe's authority over non-Indians on fee land within the reservation, the *Schmuck* court held that the on-the-spot power to stop and detain non-Indian violators of state law rested on the tribe's power" 'over the *conduct of non-Indians on fee lands within its reservation when that conduct threatens* or has some direct effect on the political integrity, the economic security, or the *health or welfare* of the tribe.'" 850 P.2d at 1341 (emphasis in original) (quoting *Montana*, 450 U.S. at 566) (relying on the "second" *Montana* exception to the general rule against asserting regulatory jurisdiction over non-Indians on fee land); *see also Duro v. Reina*, 495 U.S. at 697 ("Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them" by transporting them, if non-Indians, "to the proper authorities"). On that basis, *Schmuck* expressly" agree[d] with the Ninth Circuit" when we held in *Ortiz-Barraza* that a tribe has "the power to detain when a non-Indian is traveling on a public road." 850 P.2d at 1340-41. The "public roads remain part of the Reservation and are within the territorial jurisdiction of the Suquamish tribal police, *at least*

*for the limited purpose of asserting the Tribe's authority to detain and deliver alleged offenders*." *Id.* at 1341 (emphasis added).[6]

The sole authority cited by the *Strate* Court on the issue of tribal traffic stops of non-Indians on state highways—namely, *Schmuck*—was thus one that (1) expressly endorsed *Ortiz-Barraza*; (2) explained that the tribal power to stop non-Indians on state highways rested, not just on the power to exclude (as the panel would have it), but also on the tribe's sovereign power to protect its members; and (3) expressly rejected the view that this "limited" authority did not apply to non-Indians on state highways. The concurrence buries its response to *Schmuck* in a footnote, claiming that the Supreme Court cited *Schmuck* merely "to emphasize the *limits*" of tribal detention authority. *See* Concurrence at 9 n.1. This argument is non-responsive, because it ignores *Schmuck*'s description of the power that is included *within* those limits—namely, the *Ortiz-Barraza* power to detain and investigate non-Indians based on reasonable suspicion. Far from indicating a rejection

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[6] Earlier in its opinion, the *Schmuck* Court noted that, in the circumstances of that case, in which the officer did not know whether the person he was stopping was an Indian or a non-Indian, the power to pull over any suspected violator could also be viewed as a necessary ancillary power to the tribe's authority to enforce *tribal* law against *tribal* members (*i.e.*, the third power described above, which was addressed in *Bressi*). 850 P.2d at 1336-37. But *Schmuck* does not state that a tribal officer lacks the power to stop and detain reasonably suspected lawbreakers *known* to be non-Indian. On the contrary, as explained, *Schmuck* states that "the Tribe's authority to stop and detain" non-Indians fits comfortably within the tribe's general sovereign authority to protect the tribal community from criminal and dangerous behavior. *Id.* at 1341.

of *Ortiz-Barraza*, the Supreme Court's citation of *Schmuck* can only be viewed as an *endorsement* of our decision in *Ortiz-Barraza*.

**C**

The standard for a three-judge panel to find that intervening higher authority has overruled one of our precedents is high—*Ortiz-Barraza* must be "clearly irreconcilable" with *Strate*. *Miller v. Gammie*, 335 F.3d at 900. Here, for the reasons set forth above, there is no conflict between *Strate* and *Ortiz-Barraza* at all. On the contrary, *Strate* affirmatively supports *Ortiz-Barraza*. But at a minimum, the above analysis of *Strate* shows that it *can* easily be reconciled with *Ortiz-Barraza*, and under *Miller v. Gammie*, the panel was bound to read the cases consistently, if possible, rather than to adopt a reading that purports to overrule a prior three-judge panel decision.[7]

In the proceedings below, the district court granted Cooley's motion to suppress based solely on the ground that Officer Saylor lacked the authority to detain and investigate a non-Indian for a suspected violation of state

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[7] The concurrence's heavy reliance on *Bressi* seems almost to suggest that *Ortiz-Barraza* should no longer be considered good law because (in the concurrence's view) it is inconsistent with *Bressi*. But, of course, *Bressi* had no authority to overrule *Ortiz-Barraza* and did not purport to do so. And if the concurrence were right in insinuating that there is a conflict between *Ortiz-Barraza* and *Bressi*, that would be yet another reason why we should have reheard this case en banc. In any event, *Bressi* is distinguishable from *Ortiz-Barraza* because *Bressi* addressed the scope of tribal power to conduct" *suspicion less* stop[s] of non-Indians" on public roads. 575 F.3d at 896 (emphasis added).

or federal law on a state highway.[8] Because, under *Ortiz-Barraza*, Officer Saylor clearly had such authority, the district court's order should have been reversed.

**IV**

Even if the panel were correct in concluding that, as a matter of federal Indian law, Officer Saylor lacked authority to conduct an on-the-spot investigation of a non-Indian motorist on a state highway within the reservation, the panel separately erred in further holding that this absence of authority violated Fourth Amendment principles applicable to Indian tribes under ICRA, 25 U.S.C. § 1302(a)(2).

After concluding that Saylor exceeded the scope of his authority as a tribal officer, the panel analogized this case to that of an officer executing a warrant, or conducting an arrest, outside the officer's *geographic* jurisdiction. 919 F.3d at 1145-48. Such a search or seizure, the panel held, would presumptively violate Fourth Amendment principles "even if the officer had sufficient substantive grounds to conduct it." *Id.* at 1145. Accordingly, the panel concluded, Saylor's actions were consistent with "ICRA's Fourth Amendment parallel *only* if, under the law of the founding era, a *private citizen* could lawfully take those actions." *Id.* at 1148 (emphasis added). Because Saylor exceeded that private-citizen authority, his eventual seizure of Cooley during the encounter violated Fourth Amendment principles.

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[8] Although the encounter here began, not as a *Terry*-stop, but as a "welfare check" of the occupants of a vehicle sitting by the side of the highway, Saylor's subsequent actions during that encounter rested upon the sort of detention and investigatory authority covered by *Terry*.

*Id.* And because private citizens had no power *at all* to search under the common law of the founding era, Saylor's searches also necessarily violated ICRA's Fourth Amendment parallel. *Id.*

The panel's reasoning fails at the very first step, because its analogy to a geographically extra-territorial arrest is wrong. Here, Saylor did *not* act outside his *territorial* jurisdiction, because all of his actions took place *within* the reservation and in Indian country. The concurrence suggests that Saylor *did* act outside his territorial jurisdiction because his actions took place on a highway that, under *Strate*, is "'equivalent, for [non-Indian] governance purposes, to alienated, non-Indian land.'" Concurrence at 10 (quoting *Strate*, 520 U.S. at 454) (footnote omitted) (alteration made by concurrence). But alienated, non-Indian land is still land *within* the reservation. *See* 520 U.S. at 446 ("'non-Indian fee lands' . . . refers to *reservation land* acquired in fee simple by non-Indian owners") (emphasis added). As a result, the tribe's "power over nonmembers on non-Indian fee land is sharply circumscribed," *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001), but it is *not* non-existent. Instead, the tribe may only exercise the limited powers set forth in *Montana*'s two exceptions. *Strate*, 520 U.S. at 456. Thus, the problem here (if any) is *not* that Saylor acted outside his territorial jurisdiction—he did not do so—but rather that his actions were not within the scope of his authority to perform under the applicable law *within* his geographic jurisdiction. Saylor would have had such authority had he been "deputized" under Montana law to enforce Montana criminal law against non-Indians within the reservation, but as the panel noted, no such cross-

designation agreement exists between the Crow Tribe and any state or local law enforcement agency. *See* 919 F.3d at 1141 & n.2; *cf.* Mont. Code Ann. §§ 18-11-101 *et seq.* (authorizing such "state-tribal cooperative agreements").

The proper analogy is thus not to an official acting outside his or her territorial jurisdiction. *See United States v. Henderson*, 906 F.3d 1109, 1117 (9th Cir. 2018) (magistrate judge's issuance of warrant to be executed outside the geographic bounds of the judge's district violated the Fourth Amendment); *see also State v. Eriksen*, 259 P.3d 1079, 1083-84 (Wash. 2011) (tribal officer had no authority to arrest non-Indian outside reservation, even though he had pursued her from inside the reservation; limited *Montana* authority over non-Indians was unavailable outside reservation boundaries). Rather, the proper analogy is to an officer acting without the necessary *state-law authorization* to take certain investigatory actions *within* that officer's geographic jurisdiction. And under settled Supreme Court and Ninth Circuit precedent, an officer's lack of authorization under state law to conduct an otherwise reasonable search and seizure within that officer's territorial jurisdiction does not violate the Fourth Amendment. *See*, *e.g.*, *Moore*, 553 U.S. at 176 (fact that Virginia law prohibited arresting defendant for driving on a suspended license was immaterial to the Fourth Amendment analysis; "while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections"); *Martinez-Medina*, 673 F.3d at 1037 (although "deputy sheriff lacked the authority under Oregon law to apprehend Pe-

titioners based solely on a violation of federal immigration law," under "*Moore*, the deputy sheriff's violation of Oregon law does not constitute a Fourth Amendment violation"); *Saunders*, 473 Fed. App'x at 770 (although "Silva, as a Deputy Animal Control Officer within the Yavapai County Sheriff's Office, lacked the authority to conduct an arrest," such "'state restrictions [on arrest authority] do not alter the Fourth Amendment's protections'") (alterations in original) (quoting *Moore*, 553 U.S. at 176); *see also Johnson v. Phillips*, 664 F.3d at 235, 238 (although arresting officer, as "an Auxiliary Reserve Police Officer, . . . lacked authority under state law to conduct a traffic stop or arrest," that did "not establish that his conduct violated the Fourth Amendment").

The panel purported to distinguish *Moore* on the grounds that there is no contention here that Saylor "act[ed] in *violation* of state (or federal) law," and that the defect instead is that Saylor exceeded the sovereign powers of a tribe by investigating Cooley. 919 F.3d at 1147-48 (emphasis added); *see also* Concurrence at 10 (contending that *Moore* only applies when state "restrictions" are violated). But as the cases cited above show, *Moore* also applies when (as here) the asserted defect is that the officer lacks the necessary *authorization* under state law to conduct a particular search or seizure within that officer's territorial jurisdiction. *See supra* at 41-42; *see also Moore*, 553 U.S. at 171 ("In *Cooper v. California*, 386 U.S. 58 (1967), we reversed a state court that had held the search of a seized vehicle to be in violation of the Fourth Amendment because state law did not explicitly *authorize* the search. We concluded that whether state law *authorized* the search was irrelevant.") (emphasis added). Here, Saylor

could have seized Cooley, and searched his vehicle, had he been deputized to do so under Montana law, but this purely state-law deficiency is irrelevant under *Moore*. The historical authorities on which the panel relies, which address searches and seizures outside an officer's geographic territorial jurisdiction, *see Cooley*, 919 F.3d at 1145-47, bear no resemblance to the issue in this case.

The concurrence suggests that the distinction between lack of authorization and lack of territorial jurisdiction makes no sense, because even the defect in *Henderson* could be recast as a lack of authorization. *See* Concurrence at 10. The point is a bit ironic, because (as the panel notes in its opinion) that is essentially the reason that the Third and Tenth Circuits gave for *declining* to find that extraterritorial arrests in another state violate the Fourth Amendment. 919 F.3d at 1147.[9] For the panel to suggest a converse rule—that every lack of authorization should be treated as equivalent to acting outside one's territorial jurisdiction—would be flatly contrary to *Moore*.

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[9] Thus, for example, the Tenth Circuit held that even geographically extraterritorial arrests by an officer do not violate the Fourth Amendment under *Moore* because the defect is merely the absence of authorization under the law of the neighboring state. *See United States v. Jones*, 701 F.3d 1300, 1312 (10th Cir. 2012) ("In particular, we specifically reject Mr. Jones's assertion that . . . '[w]hen a person is seized outside the state jurisdictional limit of a law enforcement officer who is acting without a warrant, that person's Fourth Amendment constitutional right to be free from unreasonable seizures has been violated.'"). That broader question is not presented here, because Saylor did not act outside the geographic boundaries of the reservation. But the Tenth Circuit's decision in *Jones* underscores that the panel's analysis reflects a circuit split on this point.

## V

The fact that the panel's decision conflicts with controlling Supreme Court and Ninth Circuit precedent, and with decisions of other appellate courts, is alone enough to warrant our rehearing this case en banc. *See* Fed. R. App. P. 35(b)(1)(A). But the "exceptional importance" of the questions presented in this case provides yet an additional reason. *See* Fed. R. App. P. 35(b)(1)(B). Raising the bar for tribal investigations of non-Indian misconduct on fee lands from reasonable suspicion to "probable-cause-plus" is a very big deal, and one that literally may have life-or-death consequences for many of the hundreds of thousands of persons who live on Indian reservations located within this circuit. In particular, three factors underscore the significant practical importance of the issues raised by this case.

*First*, in many cases, the amount of reservation land that is held in fee by non-Indians (and thus covered by the panel's rule) is high. For example, in *Oliphant*, the Court noted that, for the reservation at issue there, "approximately 63%" of the total acreage was "owned in fee simple absolute by non-Indians." 435 U.S. at 193 n.1. The Court likewise noted in *Montana* that 28% of the land in the Crow Indian reservation—the one at issue in this case—was "held in fee by non-Indians." *Montana*, 450 U.S. at 548.

*Second*, the number of non-Indians on reservations is also significant. According to the most recent census report, roughly 77 percent of the 4.6 million people who live in "American Indian areas" (which includes reservations, off-reservation trust areas, and other tribal areas) are non-Indian. Tina Morris, Paula L. Vines, & Elizabeth M. Hoeffel, *The American Indian and Alaska*

*Native Population: 2010*, U.S. Census Bureau 13-14 (2012), https://www.census.gov/history/pdf/c2010br-10.pdf (last visited Jan. 13, 2020). Although the inclusion of non-reservation tribal areas in this statistic precludes directly extrapolating from that statistic the exact overall percentage of non-Indians on *reservations*, it nonetheless suggests that the number is not insignificant. Reservations appear to vary widely on this score: for the reservations in this circuit with the largest Indian populations, the percentage of non-Indians residing on the reservation ranges from a high of 68% on the Flathead Reservation in Montana to 1.2% on the Blackfeet Reservation in Montana. *See id.* at 14.

*Third*, the volume of criminal activity within reservation boundaries is in many cases higher than in other parts of the country. Indian reservations "experience violent crime rates two and a half times higher than the national average." Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. Rev. 65, 68 (2019). Traffic offenses are a serious issue, with the Centers for Disease Control and Prevention concluding that adult "motor vehicle-related death rates" for American Indians and Alaska Natives "are more than twice that of non-Hispanic whites or blacks." *Tribal Road Safety: Get the Facts*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/motorvehiclesafety/native/factsheet.html (last visited Jan. 12, 2020). "Alcohol-related offenses are exceptionally problematic on tribal lands." *Fresh Pursuit from Indian Country: Tribal Authority to Pursue Suspects onto State Land*, 129 Harv. L. Rev. 1685, 1690 (2016).

In light of these factors, the troubling consequence of the panel's opinion will be that tribal law enforcement will be stripped of *Terry*-stop investigative authority with respect to a significant percentage (and in some cases a majority) of the people and land within their borders.[10] Instead, tribal officers responding to disturbances on fee lands will be limited, in the case of non-Indians, to intervening only with respect to "obvious" or "apparent" crimes, or perhaps only with respect to felonies committed within the officer's presence. Given the resulting practical significance to day-to-day maintenance of public order within this circuit's many Indian reservations, the panel's opinion in this case is as disturbing as it is mistaken.

Further, the practical problems created by the panel's decision are unlikely to be resolved by other sources of law enforcement authority. In particular, states may not have the resources to adequately monitor, on their own, the state and federal highways that traverse Indian land. Montana's eighth highway patrol district, for example, encompasses three of the state's seven tribal reservations (the Blackfeet, Rocky Boy's, and Fort Belknap Reservations), but is only policed by 17 full-time highway patrol officers as of 2018. *See* Mont. Highway Patrol, *2018 Annual Report* 8, https://dojmt.gov/wp-

[10] The concurrence uses three emphases to express its astonishment at the notion that "tribal police could stop, investigate, and detain *known* non-Indians *anywhere* within the boundaries of a reservation for *any* reasonably suspected crime." Concurrence at 7-8. Of course, that is precisely what *Ortiz-Barraza* held and what has been the law in this circuit for more than four decades. The only thing that is astonishing is that the concurrence finds this astonishing.

content/uploads/2018-MHP-AR-for-web.pdf (last visited Jan. 12, 2020); Mont. Governor's Off. of Indian Aff., *Tribal Nations*, Montana.gov, https://tribalnations.mt.gov/tribalnations (last visited Jan. 12, 2020). Unsurprisingly, it has been observed that "Tribal officers"—not state or county officers—"are often the first responders to investigate offenses that occur on the reservation, even if it is ultimately determined that jurisdiction lies in state or federal court." *State v. Kurtz*, 249 P.3d 1271, 1279 (Or. 2011).

Nor is cross-deputization a panacea to the problems wrongly created by the panel's decision, because many tribes seem unwilling to make the trade-off inherent in such a relationship. For example, of the three Montana Indian reservations that rely predominantly on their own tribal law enforcement, apparently only one has a cross-deputization agreement. *See District of Montana Indian Country Law Enforcement Initiative Operational Plan*, The U.S. Attorney's Office, District of Mont. 1, 7 (2016), https://www.justice.gov/usao-mt/page/file/934476/download (last visited Jan. 12, 2020). More generally, "fifty-two tribes in the continental United States are unable to enforce state laws on their reservations without a specific local agreement." Morrow, *supra*, 94 N.D. L. Rev. at 77. BIA law enforcement is likewise apparently not a cure-all: the Crow Tribe, which currently has a contract for law-enforcement services with the BIA, recently announced that, due to the perceived "ineffective police services" of the BIA, it is in the process of "transitioning" that contract "to the Crow Tribe Law Enforcement Department." Crow Tribe of Indians, *Press Release*, Facebook (Nov. 20, 2019, 5:18 PM), https://www.facebook.com/OfficialCTINews/posts/

for-immediate-releasenovember-20-2019press-release-crow-agency-mt-the-crow-tribe/736936106823458/ (last visited, Jan. 12, 2020).

By any definition, a legal issue of such potential practical significance to the safety and welfare of hundreds of thousands of our fellow citizens is exceptionally important.

I respectfully dissent from the denial of rehearing en banc.

## APPENDIX D

25 U.S.C. 1302 provides:

**Constitutional rights**

**(a) In general**

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor,

and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

**(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000**

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but

not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

**(c) Rights of defendants**

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

**(d) Sentences**

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an

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[1] See Reference in Text note below.

agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

**(e) Definition of offense**

In this section, the term "offense" means a violation of a criminal law.

**(f) Effect of section**

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

**APPENDIX E**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

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Criminal Docket No. 16-42-BLG-SPW
Court of Appeals No. 17-30022

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JOSHUA JAMES COOLEY, DEFENDANT

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Jan. 6, 2017
1:34 p.m.

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**TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS PROCEEDINGS**

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APPEARANCES:

PRESENT ON BEHALF OF THE PLAINTIFF, THE UNITED STATES OF AMERICA:

MS. LORI A. HARPER SUEK
Assistant U.S. Attorney
Office of the U.S. Attorney
2601 2nd Avenue North, Suite 3200
Billings, Montana 59101

PRESENT ON BEHALF OF THE DEFENDANT, JOSHUA JAMES COOLEY:

MS. ASHLEY A. HARADA
Attorney at Law
Harada Law Firm, PLLC
G.W. Building
2722 3rd Avenue North, Suite 400
P.O. Box 445
Billings, Montana 59103

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[3]

The following proceedings were had:

THE COURT: Please be seated.

Emily, would you please call the next matter on the calendar.

CLERK OF COURT: Yes, Your Honor.

The court has set aside this time to hear the matter of CR-16-42-BLG-SPW, United States versus Joshua James Cooley. This is the time set aside for a motion hearing.

THE COURT: For the record, Lori Suek appears on behalf of the government. Ashley Harada appears on behalf of the defendant. And the defendant is present.

This is the time set for hearing on the defendant's motion to suppress.

Ms. Suek, you may proceed.

MS. SUEK: The United States calls Officer James Saylor.

JAMES DAVID SAYLOR, having been called as a witness on behalf of the United States of America, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please take a seat on the witness stand.

[4]

BY MS. SUEK:

Q Sir, please introduce yourself to the court by stating your name and spelling your last name.

A James David Saylor. S-A-Y-L-O-R.

Q How are you currently employed?

A As a police officer for the Bureau of Indian Affairs.

Q Where are you located currently?

A I'm currently stationed at the Skull Valley Indian Reservation in Utah.

Q How were you employed on February 26th of 2016?

A I was a tribal highway safety officer for the Crow Indian Reservation.

Q Prior to February 26th, 2016, did you have law enforcement experience?

A I began my law enforcement career in 2003 as a military police and had held several positions from that time forward to February, 2016.

Q Can you give us just a brief description of those various positions from 2003 until 2016. Specifically, February 26th, 2016.

A That time frame I covered positions as a military police patrolman, investigator, a city officer for a city in Kansas, a police officer for the Department of Defense, a traffic sergeant for the Department of Defense, and a Bureau of Indian [5] Affairs Police Officer for the Northern Cheyenne Indian Reservation.

Q It seems to me that your career with the Bureau of Indian Affairs was broken up by your time on Crow. You were a Bureau of Indian Affairs' officer and you are currently, but you weren't on February 26th, 2016. Is that correct?

A That is correct.

Q Why is that the case?

A I left the Northern Cheyenne Indian Reservation employment with the BIA for personal reasons, and was hired as a tribal officer for Crow.

Q But currently, you are again a Bureau of Indian Affairs police officer?

A Yes, I am. I stepped out of the federal service for a short time.

Q Officer Saylor, do you have any specific training other than the general police officer training—academy training that I assume that you've completed?

A Yes, I do.

Q What is that?

A I've had courses over the years with investigations, child forensic interviewing, drug recognition, advanced roadside impairment courses, the tactical courses, traffic investigation courses, that—that focus on detention of impaired drivers. I've maintained certifications, and training 40 hours as a [6] minimum for different certifications that I hold.

Q Are you a trainer in any specific area of law enforcement?

A A use-of-force instructor, trained at FLETC in Artesia, Federal Law Enforcement Training Center there.

Q Use of force. I don't want you to get too specific, but in general terms, can you tell us what that entails and what you train people to do?

A Use of force—as a use-of-force instructor, it is my duties to train officers when to recognize possible threats to their safety and how to handle those threats in an appropriate, reasonable manner.

Q Sir, in listening to your law enforcement career, is it fair to say that you have extensive experience regarding investigating traffic-related issues?

A Yes.

Q How many traffic stops, if you could estimate, would you have been involved in in your career to date? Well, let's not say "to date," up to February 26th, 2016?

A It would be hard for me to put a figure on it, because of the sheer amount of traffic stops that I've had in that span of time. I would say, easily over a thousand.

Q When we're talking about the area of traffic stops and recognizing impairment and the experience that you've had, sir, how would you describe what your experience and your training gives you, versus the normal driver on the road, such as me, [7] for example?

A So, through my training and experience, it becomes easy for me to recognize certain indicators of impaired drivers. Such as—that other individuals might not recognize as a sign of impaired driving.

Would you like me to list examples, or can you restate your question.

Q Well—is that because of the experience that you've had?

A The combination of experience and training, yes.

Q Let's turn to February 26th, 2016, about one o'clock in the morning. Where were you?

A On that date, I was driving my patrol unit on Highway 212. I was eastbound. I was actually going home.

Q Why were you going home?

A My shift ended at one o'clock in the morning that day.

Q Did you end up making it home directly?

A Not directly, no.

On my way home, while still within the boundaries of my physical jurisdiction there, I noticed a vehicle stopped along the highway on the westbound side. Stopped—

Q And when you—excuse me.

A —at about the 16 mile marker.

Q And when you say within your physical jurisdiction, are you talking about the Crow Indian Reservation?

A Yes, I am.

[8]

Q This stretch of road, I believe you testified that it was Highway 212?

A Yes, ma'am.

Q And you said around mile marker 16?

A Yes, ma'am.

Q Can you explain it to us in terms of what's that stretch of road like?

A That stretch of road—well, all of Highway 212 is, in my opinion, a very dangerous stretch of road. There are oftentimes poor conditions in the winter, bad roads, bad cell service in that particular area, you have bad radio service for police radios, there's a high—in my opinion, a high number of fatalities and traffic accidents along that road that I've responded to both on the Northern Cheyenne side and the Crow Agency side.

Q So, you said that you saw a vehicle parked along side of the road?

A Uh-huh.

Q What did you do?

A Well, initially, because I was eastbound still, I passed the vehicle, maybe traveled a half-a-mile or so, and then turned around to return to the vehicle to check on the status, welfare of the occupants.

Q What was your specific purpose?

A Just to check on the welfare of the occupants of that [9] vehicle.

Q When you approached this vehicle, what do you remember that you observed about the vehicle?

A I remember that the vehicle was a white Dodge pickup or a Ram pickup, I think they've changed their names, but a white four-door pickup. It had a 3-county Wyoming license plates on it. It appeared to be lifted with some kind of lift or leveling kit. It had oversized tires and dark windows. There was a lot of stuff in the bed of the truck. And the headlights were on.

Q Was the truck running?

A I determined that the truck was running after I'd exited my patrol vehicle.

Q Now, Officer Saylor, to be clear, I think I asked you from your memory what you remembered about the truck. You watched your dash-cam video, at least a portion of it, before coming here today; didn't you?

A Yes, I did.

Q So is part of your memory on the basis of what you observed on that dash-cam video?

A Well, I remember all the specific things that I stated from memory, not simply because I watched the dash-cam video.

Q I just wanted to make that clear.

A Okay.

Q You also reviewed your report prior to coming here today, [10] too; didn't you?

A Yes, I have.

Q Officer Saylor, so after you said that you pulled up, changing directions, and pulled up behind the vehicle; is that correct?

A Yes, ma'am.

Q Did you activate your overhead lights?

A I activated my rear emergency lights only.

Q Why?

A I didn't want the occupants of the vehicle to feel as though I was detaining them. But I wanted to offer fair warning to oncoming traffic that would have been approaching from the rear in the closest lane of travel.

Q What did you do next, sir?

A After I stopped, I exited my patrol vehicle and approached cautiously to the truck. Typically, I find during traffic stops, that as I approach, windows are down.

In this instance, no windows had been rolled down. I knocked on the side of the truck, which prompted the rear driver window to roll down and then back up. I expected the front driver's side window to roll down after that, as if maybe somebody had hit the wrong button on the control panel. It did not. I continued to approach cautiously. Shining my flashlight in through the tinted windows the best I could.

I observed shadows of objects in the back. I couldn't [11] really tell exactly what was in the back of the truck. When that rear window did come down, I thought I saw a small child for a moment crawling around in the back. But I really couldn't tell what exactly was going on.

I approached closer to the front driver window, and I could see a man who was holding his right hand out in front of him in a thumb's down fashion (witness indicating). I didn't know what he was trying to convey, if his window wouldn't go down, or if he wasn't okay.

I asked if he could get his window down. He rolled his window down partially, maybe four to six inches.

Q What could you see through the partially rolled-down window?

A I could see that there was, in fact, a child crawling from the back passenger compartment into the front with the man. And ended up in the man's lap. I could see that the man appeared to be non-native. And had watery, bloodshot eyes. And that's really about all that I could discern. The windows were still tinted. I still couldn't tell exactly what else may have been in the vehicle.

Q Before we continue on, I'd like to ask you if you noticed anything about the bed of the truck that—I'm trying to get all of your observations of the vehicle.

So, did you notice anything about the bed of the truck?

A I did. When I approached the vehicle, I noticed that the [12] bed appeared full of items. I couldn't tell you what everything was in the bed. But the few things I remember standing out, such as what I recognized as a transmission to a vehicle, some tools, there was a truck toolbox. What else was in there, I couldn't tell you. But it seemed really full, almost to the bed rails with different items.

Q So, to be clear, Officer Saylor, you said that immediately you saw an individual sitting in the driver's seat with—did you say watery, bloodshot eyes?

A Yes. Watery, bloodshot eyes.

Q Do you see that individual in the courtroom here today?

A Yes, I do.

Q And could you describe something about the individual with the watery, bloodshot eyes today, so we would know who you're talking about?

A Ah—

Q Something distinctive, so that we know which individual in the courtroom here you're talking about?

A Well, the individual that I see in the courtroom here is the same individual I was in contact with on the 26th. However, he appears to be fuller-bodied and without a beard.

Q What is the individual that you're referring to wearing?

A Currently?

Q Yes.

A It appears to be a jail jumpsuit, blue in color.

[13]

MS. SUEK: I'd move for—move—Your Honor, I'd ask that the record reflect that the witness has been able to identify the defendant.

THE COURT: The record will so reflect.

Q (BY MS. SUEK) What happened next, Officer Saylor?

A From that point forward, he did roll down his window, and I was able to speak with the defendant.

Q So did the window go down further at this point?

A No. It had not come down any further, just enough to see about the top of his face.

And I asked if everything was okay.

The individual stated that he had pulled over because he was tired, which isn't uncommon. A lot of travellers go through that particular stretch of highway, and they will pull over because of various reasons, tired, bathroom, et cetera.

Q So, at that point, with that response, did you turn around and walk back to your patrol car and leave?

A No, I didn't.

Q Why?

A Well, as I stated, I immediately recognized watery, bloodshot eyes, which in and of itself isn't enough to determine whether or not somebody is impaired or not. But I wanted to make sure that the welfare of that occupant and the child in the vehicle—that they were both safe and secure along side of the road.

[14]

It's not uncommon to come across a motorist that is impaired and has pulled over because of that impairment.

And there's just not enough to determine simply off the eyes. So, as long as he was willing to talk with me,

I was willing to talk with him to make sure of the welfare of him and the child.

Q So, after the answer that he had pulled off the road because he was tired, what happened next?

A Well, I'd asked where he had come from. It's been my experience folks traveling through are usually —or on that road are usually coming through the area, maybe been on a long drive, especially that late at night. Perhaps on the road longer than expected. But he told me he was coming from Lame Deer, which was about 26 miles away.

He hadn't been traveling as far as what I would suspect—our would have imagined somebody pulling over because they were tired to have been traveling.

Q Where did the conversation go from there, if anywhere?

A Well, I asked what he was up to in Lame Deer. What his business was there. He related to me that he had come up to purchase a vehicle. And he mentioned a couple of names of people that he was visiting with in regards to the purchase of that vehicle. Thomas—

Q Do you remember those names?

A I do. Thomas Spang and Thomas Shoulder Blade were the [15] names that he mentioned.

Q Did those names mean anything to you?

A They did. I recognized both of the names. One of the names, Thomas Shoulder Blade, I recognized as a prior BIA employee at Northern Cheyenne from the time that I spent there. Thomas Spang I had recognized through previous dealings in Northern Cheyenne.

And that name was associated to criminal activity. Drug trafficking, to be specific.

Q And to—although, I know you testified about this, to be clear, you worked as a police officer on Northern Cheyenne?

A Yes, ma'am.

Q How long?

A Total, about two-and-a-half years.

Q So, at this point, you have information from the defendant that he's come from Lame Deer. And this truck belongs to either Thomas Shoulder Blade or Thomas Spang; is that a correct summary of what you know so far?

A No. He—he mentioned that's where he had come from and had—was there to purchase a vehicle.

Q I understand.

A At that point, I asked—or conveyed that what he was telling me didn't make a lot of sense in my mind.

Q Why?

A Well, for one, he didn't have the vehicle that he was there to purchase. It was awfully late at night to be [16] purchasing a vehicle. I've purchased a lot of vehicles through my life, or what I think to be a lot. And I've never done it in the middle of the night. I've always had another passenger with me to drive my new purchase, especially if I'm going in a vehicle that I already own, unless I'm trading it in. It sounded like a private transaction.

I didn't understand—there wasn't enough information to know exactly what the circumstances were, but it didn't seem to line up with my experience of purchasing a vehicle. Why it would be in the middle of the night. I questioned him. Asked him about that. And he said that the vehicle had broken down and that Thomas had allowed him to use the vehicle that he was in.

So he had indicated that the vehicle that he had and that he was in at that time was not his.

Q Did that clear up some of your suspicion?

A No. That made me even more suspect of what was going on. I didn't understand why somebody would allow the use of a vehicle with all the personal belongings that I'd seen in the bed. And I didn't understand why Thomas Spang or Shoulder Blade, which—whomever he was referring, would have a vehicle registered out of the State of Wyoming.

From my time at Northern Cheyenne, most people, if they had registration, it was registered as a Northern Cheyenne license plate through the State of Montana, or they wouldn't [17] have any registration at all.

Q So what did you do next, sir?

A Well, as I was having this exchange with him, I was really having a hard time hearing him, between the window being up and engine of the vehicle was still running. And I asked if he would roll down his window, so that I could hear his responses more clearly. And he was even sounding as though he had some slurred words. But again, with the engine noise, I wanted to have better discernment on that.

He complied and he rolled down his window.

At which point, I observed the butt stock area of what appeared to be two semiautomatic rifles on the front passenger's seat of the vehicle.

Q When you saw the butts of two semiautomatic rifles, how did that affect this contact with the defendant, in your mind, if in any way?

A Well, just having weapons in a vehicle, especially in Montana, isn't cause for too much alarm, in my mind.

However, in this particular instance, he said that the weapons belonged to Thomas, as well as the truck and all the belongings. And that furthered my suspicions that what I was being told wasn't the truth. I have never known an instance, personally or on the job that I can think of, where somebody has lent somebody else their vehicle with all their property to include firearms.

[18]

So, it was an officer safety issue to know that there was guns present in the vehicle. There was a welfare issue to know that the child was climbing around with these weapons in the vehicle, unbeknownst to me if they were loaded or not. I assume at that point in my mind that they are for my safety.

And it was a concern to me that there was all this property that doesn't belong to the driver, according to what he's telling me, in this vehicle, that he went and borrowed during a vehicle transaction. That just didn't add up in my mind.

Q So, what did you do?

A I asked the individual for some identification. I had not had any return yet on the registration. And I felt that there was more there than met the eye. And I asked to see his driver's license or some form of identification. He reached to his right front pant pocket to retrieve his ID.

Rather than retrieve ID, he retrieved a—an amount of small denomination bills. I'm not sure quite the amount, but I could see fives, tens, twenties, such as that. And he put it into a compartment on the console area of his truck. And he did this a couple of times, rather than hand me the ID.

Q And Officer Saylor, in terms of what you can see at this point, you're obviously describing that you can see him reaching his hand and retrieving bills.

Did you have a clear view of the defendant's hands and his [19] movements?

A No, I didn't.

Q Why?

A The truck—like I said, in my opinion, appeared lifted as opposed to similar vehicles of that model. It was dark. And his child at this point was sitting on his lap, kind of straddling around his waist. He was holding the child with his left arms—or left arm. So, I didn't have a clear view to where he was reaching, no.

Q So, what you're telling us is you believe that he was reaching in his pocket and pulling out this money?

A Correct.

Q And that happened how many times?

A So I—I'm confident that it happened two times. And possibly three. But I do know that on the last time that he had reached, whether that had been the third or the fourth time he had reached, I noticed a change in his demeanor.

Q Tell us about that change in demeanor.

A So, the first times that he had reached to his pocket area to retrieve the ID and pulled cash out instead, he had glanced my direction, as if to gauge where I was standing. The last time that he reached, he started staring straight forward out of the windshield of his truck, as if he was looking through his son.

His breathing really became shallow and rapid, and he had [20] a moment where he just wasn't doing anything, wasn't moving.

My training and experience is, that's called a thousand-yard stare. And it's something that I teach as a use-of-force instructor to be aware of as a possible indicator—a pre-assault indicator. A change in behavior and this particular thousand-yard stare. With his hand down around his pocket area, not exactly sure what it was doing, and with picking up on these indicators. At that point, I drew my service pistol and held it to my side.

Q Is that the first time that you drew your weapon, sir?

A Yes, it is.

Q Up to that point it was holstered?

A Yes, it was.

Q And you did not point it at him?

A No. I kept it to my side.

Q And then what did you do?

A I ordered him to stop what he was doing. He wasn't moving, but whatever it was that I couldn't see, I ordered stop and to show me his hands.

Q Did he comply?

A He complied. And he looked back at me and he raised both of his hands in front of him, while still trying to hold onto his son with his left and holding his right somewhere in front of his son to where I could see it (witness indicating). And I told him he was no longer allowed to move his hands unless [21] directly instructed to do so. And this was based on the observations that I saw, pre-assault indicators. I knew that there was weapons in the vehicle. I couldn't see clearly; he had not produced an ID when I asked him to. And there was this change of demeanor.

Q What did you do or instruct next, if anything?

A I instructed him that he was to reach to his ID, slowly. And remove his ID and only his ID. And hand it to me. And he complied.

And he slowly reached to his front pocket area again, right pocket. And with—and developed a Wyoming ID card.

Q What did you do at that point?

A At that point, I took the ID, and I stepped back away from the driver area of the vehicle. And attempted to reach my dispatch to run the number on that ID.

Q Were you able to?

A No, I was not.

Q Why?

A The radio service was such that I couldn't reach out on my portable.

Q So, what were you going to have to do, Officer Saylor, in order to run any check on this identification?

A At that point, I was left with the choice to return to my unit to try to run it from my patrol unit radio, which is more powerful than my hand-held, or to stay close to the individual [22] in case the pre-assault indicators developed into something more.

I didn't fell comfortable returning to my unit and allowing an opportunity to be assaulted by not having my focus on the truck and the occupants at that time.

Q So, what did you decide to do, sir?

A I decided to gain some distance and place a barrier between myself and the driver. I went to the back of his truck and used the lighting available to me from my patrol unit and the shadows that they cast to move around to the passenger side of his truck. To get into a position that was more tactically advantageous in case I was to have to use force.

Q Why did you believe that you had to gain a tactical advantage?

A The position that I was in left me little choice. He had a height advantage from where he was sitting in the truck. There was his child between—effectively, between he and I, being in his lap. And I really didn't have a clear view of what he was doing with his right

hand, knowing that there was weapons inside the vehicle, knowing that I didn't have a clear view of the individual, I felt that I would—it would be more tactically sound to place a barrier between me and to try to get into a position where I could see more clearly.

Q The conduct that you've talked about here, you drawing your weapon, you gaining this, as you've described it, tactical [23] advantage, was this for any particular purpose?

A (No response.)

Q Why did you do these things?

A So that I would leave that night and go home to my family.

Q So what you're telling us is you acted this way because of officer safety concerns?

A Yes.

Q Any concerns for anybody else?

A At that point, I was, obviously, concerned for the child. That—if use of force either way were to occur, the child was in the middle of that.

Q So, you said you walked behind the truck and around to the side of the truck?

A Yes, I did. Around to the passenger's side.

Q Around to the passenger's side.

What did you do next, if anything?

A Opened the passenger door—front passenger door, made further—

Q Did you ask permission to do that?

A No, I did not.

Q Why?

A Well, there was—if I'm moving around to create tactical advantage, it doesn't hold sound practice to announce my position after making that move. It wouldn't have been tactically sound to announce where I was at.

[24]

Q So, you opened the door?

A Yes, I did.

Q And what happened next?

A When I opened the passenger door, I had a much better view of the driver, as well as the rear passenger compartment, which up until that point, I wasn't sure if there was anybody else in the vehicle. Or if it was just objects in the back. I could see the assault rifles in the passenger—front passenger side, appeared to be unloaded. And in the area where he had been reaching his hand while I was on the driver's side, I observed what appeared to be a loaded—or semiautomatic pistol.

Q Had you asked the defendant if there were any other weapons in the vehicle when you first observed the two assault weapons?

A I had asked prior. And he didn't give a direct answer. It was Thomas's truck. So, he left it open to that being possible. But wouldn't say no or yea either way. It wasn't his truck, it wasn't his stuff.

Q Did you ask him about the pistol when you saw it?

A I asked why he hadn't said anything about the pistol, and it was—he claimed that he had not known that it was there.

Q What happened next?

A I reached into the vehicle and took possession of the pistol and made it safe by dropping the magazine, which was [25] loaded, out of the magazine well. Being familiar with semiautomatic pistols, I also checked the chamber and removed a round from the chamber of the pistol.

I do not remember what make, model of pistol it was, other than to say that it was a semiautomatic pistol.

Q So, sir, we've gone from you learning that the defendant had pulled over because he was tired—

A Uhm-hum.

Q —through what you've described, seeing the weapons and the change in behavior of the defendant. But I think the question bears answering by you, why are you still there with him? What is making you continue on with this officer safety situation going on?

A Well, if you look at the totality of these circumstances, yes, you're right, I was there for the check of the welfare of an unknown amount of occupants of a vehicle. It turned into an adult and a small child in February, cold weather, along side the road. A portion of road that I know to not have great cell service, to be a dangerous portion of the road. To an individual that couldn't answer simple questions, that, you know, in previous encounters that I've had with the public, generally come fairly easily. Leading me to believe that maybe

the circumstances weren't such that it was safe for the child or even the driver.

Q And you certainly, as you've testified previously, saw [26] what could be evidence of impairment?

A Correct. And had not quite had that opportunity to discern: Is this person just tired or impaired?

And it's not only his welfare I'm looking out for, but that child's and other motorists. And I'm seeing two indicators at that point, watery, bloodshot eyes and some slurry speech, but now I've got officer safety concerns. I can't fully develop or go— investigate that course without first knowing that I'm safe to do so.

So that is what led me in that direction. At a minimum, I wanted to check the—get a return on the registration and the driver's license that I had been provided but had not been able to check due to the unsafe circumstances.

Q And you've previously told us that the only way you were going to be able to do that was to get back to your patrol unit because of the poor radio coverage; correct?

A That is correct.

Q So, what did you do next?

A So, at that point, I had ordered the individual out of the driver's compartment. Being near that vehicle with an unknown number of weapons, with an individual that had shown pre-assault indicators, was enough for me to want to change the circumstances even further to continue the investigation at that point.

I asked him to step out. He complied and stepped out of [27] the driver's side. I met him around towards

the rear of his truck. I noticed a bulge in his front right pocket. Inquired as to what that was to ensure it wasn't a weapon—another weapon. He commented that it was money and credit cards. I conducted a pat-down of his person, of outer garments, his clothing, and was satisfied that what I had observed was not something that could hurt me. And then I escorted him toward my unit.

THE COURT: I'm going to interrupt you.

So, you asked the defendant to—or ordered him to get out of the vehicle, you said to further continue your investigation at that point.

What was it—what crime did you suspect that the defendant was committing that you were investigating? Articulate the facts.

THE WITNESS: At that point, I suspected, at a minimum, an impaired driver.

THE COURT: And the facts supporting that suspicion are what?

THE WITNESS: The watery, bloodshot eyes, and slurred speech that I had heard during my initial contact with him.

THE COURT: Did you smell any alcohol on his breath?

THE WITNESS: Your Honor, there's much more than alcohol that can—

THE COURT: I'm just asking that question. I have [28] been around a long time.

THE WITNESS: No, Your Honor.

THE COURT: That's the question I'm asking.

THE WITNESS: No offense intended.

No, Your Honor, I did not.

THE COURT: Okay.

THE WITNESS: Also, there was the inability to communicate, which is also an indicator of impairment.

THE COURT: Okay.

Describe the inability to communicate. What do you mean by that?

THE WITNESS: So, a simple question asked and answer response, it was more of a—we got kind of caught in a loop when asking about where he had gone, what he had done, where he was coming from. And trying to get the events in a structured order that I would understand, was difficult.

I wasn't getting those structured responses: "I came from here, I went there. This is what I was doing."

It wasn't the type of a response that I would expect from a person who wasn't impaired. The . . .

THE COURT: All right.

Go ahead.

Q (BY MS. SUEK) You also suspected—

THE COURT: Don't lead your witness.

MS. SUEK: Okay.

[29]

Q (BY MS. SUEK) Did you also suspect—

THE COURT: You're still leading.

What else did you suspect?

Q (BY MS. SUEK) What else did you suspect?

A At that point, knowing that there was mention of a known drug dealer from the Lame Deer area, I suspected that possibly drug-trafficking was occurring.

A vehicle late at night, in a remote area, coming from an individual known to me as a drug dealer, certainly would lead to suspicion that drug activity was afoot.

Q What else had you observed that would support that conclusion?

A At which point? Where are we at, if you don't mind me asking.

Q So, you were further investigating when the defendant was out of the truck. Prior to that time, was there any other conduct by the defendant or anything you observed that supported your suspicions of drug trafficking?

A For clarification, prior to him exiting the vehicle?

Q Yes.

A The fact that there was semiautomatic, assault-type rifles, I feel supports that suspicion. Often drug traffickers will protect their drugs, and they will use assault weapons to do so.

THE COURT: What kind of rifles were they?

[30]

THE WITNESS: The exact make and models of the two that I had discovered at that time, I am not sure of.

THE COURT: So what makes you say they're assault rifles?

THE WITNESS: My familiarity with rifles.

THE COURT: I mean, what about the rifles makes you say that they are assault rifles?

THE WITNESS: That, in my military experience, semiautomatic rifles are used for assaulting.

THE COURT: Okay.

So, if you don't know what kind of rifle they are, how is it that you know they're semiautomatic? Or I know they're semiautomatic.

How do you know they're assault rifles?

THE WITNESS: I recognized them as assault rifles because of what I'd been trained an assault rifle looks like through my military experience.

THE COURT: Okay.

And what does one look like, and how did that match what you observed about these rifles?

THE WITNESS: Military-style assault rifle will have semiautomatic feature, they will have—

Q (BY MS. SUEK) Can you be specific is what Judge Watters is asking you. Describe the rifles to us.

THE COURT: Right. You're telling me you concluded [31] that these rifles were assault rifles. I

want to know why it is you concluded that. Somehow, then, that also became a fact that's—that caused you to suspect drug dealing.

THE WITNESS: They're immediately apparent to be a semiautomatic and have the ability for large capacity and rapid fire, which in my mind, constitutes an assault weapon.

Q (BY MS. SUEK) Is it the size that makes it that way?

A It's their capacity.

Q What is a capacity?

A And their ability to fire rapidly.

Q Is the capacity something that you can describe in words like a color or a shape?

A A capacity—

THE COURT: You're talking about the magazine; right?

THE WITNESS: Yes.

THE COURT: Okay.

So, what was it about these rifles that caused you to conclude they were large capacity? How many rounds did they hold?

THE WITNESS: Magazines from one semiautomatic rifle to the next can vary in capacity.

THE COURT: Okay.

What was about these rifles, then, that caused you to conclude that they were large capacity?

THE WITNESS: That I recognized that they could—[32] that a large-capacity magazine could be used in this style of rifle.

THE COURT: Did you observe the magazine that was in there?

THE WITNESS: I observed magazines throughout the vehicle. Not at that time.

Q (BY MS. SUEK) Did you see anything else that made you suspect that there was potential drug-trafficking going on?

A There was cell phones on the dash.

Q Well, that's after; isn't that correct? That's not at this point when you were continuing to investigate?

A Correct.

Q Okay.

MS. HARADA: Objection, Your Honor.

I feel like Ms. Suek might be answering the question for the officer. So—and she's definitely leading.

THE COURT: Well, I think she was trying to get him focused on we're talking about what he knew prior to ordering Mr. Cooley out of the vehicle.

Isn't that—that's where I started my questioning.

So, I'm going to overrule the objection at this point. If you think she's leading, you can make your objection. Okay?

Q (BY MS. SUEK) Did you observe anything else that would support drug trafficking?

A Prior to exiting the vehicle, the fact that I was [33] detecting indicators of impairment, drug traffickers will use the drugs that they traffic.

Q Was there anything on the defendant's person that made you think that there was— made you suspect drug trafficking?

A Yes, there was.

Q What?

A There was a plastic baggie that was—

Q I'm sorry. I mean, right when you get out of the vehicle before anything else, so he's still sitting in the vehicle before you get out. That's where we're focused on right now.

Anything on the defendant's person that made you suspect drug-trafficking?

A Not that I recall.

Q So, you have the defendant out of the vehicle headed towards your patrol unit?

A Yes, I do.

Q Okay.

What happened next?

A I asked about the bulge in his pocket. I checked him for weapons. And I began to—once satisfied that he had no weapons on his person, moved to place him in my patrol unit. He stopped me and asked if he could take his belongings out of his pocket.

Q And what did you say?

A I said that he could. To place anything he wanted to on [34] the hood of my unit.

Q And did he do that?

A He did.

Q When he was doing that, did you observe anything that became relevant to your investigation?

A I did.

Q What?

A During that time, I observed a plastic bag which was tied in a knot, the opening was tied in a knot, the corner was cut as if for emptying the contents from the corner.

I recognized that as paraphernalia of how marijuana packaging—or how marijuana is commonly packaged.

Also, within the folds of the bills that he removed from his pocket, there were small Ziploc bags, which I commonly refer to as bindles, and they're for the packaging and sale of narcotics, specifically, in my experience, methamphetamines.

Q Did you question him about those?

A I asked him about the bag. And he said it was just a bag.

Q At some point, did the defendant—was he seated in the back of your patrol unit?

A He was. After he had emptied his pockets, I'd placed him in the back of my patrol unit.

Q And what did you do then?

A While he was in the back, he had boots on, I double-checked his boots that they had no weapons. And [35] enclosed him in the back of my unit.

I requested on my patrol radio an additional unit, both backup and a county unit, as the individual seemed to be non-Native.

Q Did you do your records check at that point?

A I did not.

Q Why?

A There was a concern I had developed through talking to him, that somebody else might be coming to that scene. He had made a comment of—that the vehicle may have already passed, someone that he was supposed to meet—along these lines that there to purchase a vehicle.

And I was concerned that somebody else might be coming to that location. And now, I've got suspicions, evidence that there's drug-trafficking, that there's weapons, and somebody else might be coming. I secured the scene the best I could by removing the weapons from within the vehicle.

Q So, what was your purpose of not doing the record check immediately?

A To secure my scene.

Q And how did you go about securing your scene?

A I retrieved the rifles from the front passenger area, as well as the pistol. I turned the truck off, and retained the keys to the vehicle. And I moved those items to the hood of my patrol area.

[36]

Q During the retrieval of the rifles, were you able to determine whether they were loaded?

A Yes. And the rifles were unloaded.

Q During the retrieval of the pistol, were you able to determine whether the pistol was loaded?

A I had unloaded the pistol and knew it to be unloaded at that point.

Q Did you—during the time that you were turning off the truck, why don't you describe how you did that.

A Okay.

I reached into where the ignition was on the steering column of the vehicle and removed the keys from the vehicle. At that point, I observed what appeared to be a methamphetamine, glass, smoking pipe and plastic baggie containing what appeared to be methamphetamine beside the—or in between the driver's seat and center passenger's seat of the vehicle, wedged in between those two seats.

Q Did you have to move anything in order to observe that?

A No, I did not.

Q Was it immediately apparent to you what it was?

A It was.

Q What else did you observe, if anything, that you believe relevant to your investigation?

A At that point, I observed cell phones on the dash, ammunition in the pockets of the doors, had had some—

pockets [37] where you could stow personal items, there was ammunition there.

Q How many cell phones, if you recall?

A I believe there was five.

Q What did you do next, sir?

A It was a—while I was in the process of securing the scene, other officers began to arrive.

Q Which officers?

A I specifically recall Lieutenant Sharon Brown arriving. And I believe that she was the first to arrive.

Q And which agency is she with?

A She's a supervisor/police officer with the Bureau of Indian Affairs.

Q What, if anything, did you do next?

A I took guidance from Lieutenant Sharon Brown, who advised to secure what was in plain view of the vehicle that I felt was evidence of crime.

Q Prior to her giving you instruction, did you tell her anything about what you had found?

A I had mentioned that there was a quantity of what I thought were methamphetamines and rifles in the vehicle—weapons in the vehicle.

Q Did any officers from any other jurisdiction come to the scene?

A Yes. At my request for a county deputy, one responded to [38] the scene. I believe his name was Gibbs.

Q From Big Horn County?

A From Big Horn County, yes, ma'am.

Q Do you know if at any point a records check was done?

A Yes. At some point, a records check was done. I was not the one that conducted that records check.

MS. SUEK: May I have a moment, Your Honor?

THE COURT: You may.

(A brief off-the-record discussion was had between Ms. Suek and a member of the audience.)

MS. SUEK: I have no further questions, Your Honor.

THE COURT: Thank you.

Cross-exam.

CROSS-EXAMINATION

BY MS. HARADA:

Q Good afternoon, Officer Saylor.

A Good afternoon.

Q Your description of the timing of events is also quite confusing, so we're going to run through some of these things again.

A Yes, ma'am.

Q Do you have a copy of your report in front of you?

A No, ma'am.

Q If I provided you a copy, would that assist with refreshing your recollection?

[39]

A I'm sure that it would, ma'am.

MS. HARADA: May I approach, Your Honor?

THE COURT: You may.

(Ms. Harada approaching witness and handing him a document.)

THE WITNESS: Thank you.

Q (BY MS. HARADA) Is that your report, Officer Saylor?

A It does appear to be a copy of it.

Q And you've reviewed that prior to your testimony today?

A Yes, ma'am.

Q Now, was it just your testimony right before I got up here that you didn't run a records check on Mr. Cooley?

A I don't recall running the check myself, ma'am.

Q I have a copy here of a supplementary incident report—

MS. HARADA: If I might approach.

THE COURT: You may.

(Ms. Harada approaching the witness and handing him a document.)

Q (BY MS. HARADA) Could you describe that document.

A This appears to be a dispatch log entered as a supplementary report into a system I know as IMARS.

Q And does that include a recording of, essentially, in writing, calls that were made into dispatch during this stop?

A It would appear to.

Q And does that reflect you calling in to run a background [40] check on Mr. Cooley?

A If you'd allow me a moment to review it.

Q Thank you.

A (Witness reviewing document.)

It appears to reflect that I tried to run a background —or records check with the OLN, but was not successful.

Q And isn't it true that you also tried to run a background check on Mr. Cooley, which you just testified you actually didn't do?

A I tried to run a check of his OLN.

I'm sorry. His operator license number.

Q And you just testified you hadn't done that?

A It was not successful.

Q And why wasn't that successful?

A I don't know why it wouldn't return.

Q Well, can I refer you to the line the second from the bottom, where it states: "OLN 107201725"; correct?

A Yes.

Q And then if you refer up approximately one, two, three, four, five, six, seven, eight, nine, ten lines, you called in "OLN, 017201725"?

A I may have called the number in correctly, and it was recorded incorrectly, or I may have called it in incorrectly and it was recorded correctly. I do not know based off of this information, if the dispatcher heard me correctly or entered it [41] correctly. If the mistake was on the part of dispatch or myself.

Q So again, you just testified that you hadn't run a background check, but in fact you did?

A I don't believe that's consistent with running a background check.

Q What would you consider running a check on Mr. Cooley?

A Successful return of the information I was trying to check.

Q And, in fact, you didn't get a successful return; did you?

A No, I did not.

Q Because you gave the wrong number; didn't you?

A I can't say that I did.

Q Did Mr. Cooley attempt to give you the right number?

A He provided me his license.

Q And you didn't read it correctly?

A I can't say that.

MS. SUEK: Objection, Your Honor.

Asked and answered.

THE COURT: Sustained.

Q (BY MS. HARADA) And with regard to running a plate check—

A Yes.

Q —on the top line it states: "Plate is WY23876"?

A It does say that, yes.

[42]

Q And isn't it true that that's not the accurate license plate number that's reflected later in your report?

A Correct. I don't believe that to be accurate.

Q So again, that was a mistake that was stated?

A Correct. But I don't know on whose part.

MS. HARADA: May I approach Your Honor?

THE COURT: You may.

(Ms. Harada approaching witness and retrieving documents.)

THE WITNESS: Yes, ma'am.

Q (BY MS. HARADA) Were you off duty at the time you stopped behind Mr. Cooley's vehicle?

A I was past my shift. I do not recall if I had checked off duty at that point or not.

Q And when you drafted your report regarding this incident, did you review the video of this stop?

A I do not recall if I did or not.

Q There is some confusion about the dash-cam and its availability.

So let's go over that briefly.

Your dash-cam is continuously recording throughout your shift; correct?

A To my understanding.

Q And the audio initiates upon your command for it to do so; correct?

[43]

A There's several ways audio can initiate, depending on how the system is set up.

Q Could you tell the court what causes audio to initiate, please.

A Certain units can be set up to activate audio during a manual activation from within the unit by the officer.

THE COURT: Well, why don't you just tell me how your unit was set up.

THE WITNESS: That unit was set up to activate by manually activating the camera system.

Q (BY MS. HARADA) The camera system, or the audio system?

A I believe they're one and the same.

Q So when the camera starts, the audio starts?

A Not necessarily.

Q Well, that's what I'm asking you.

A I'm not an expert on those systems.

They can be set up various types of ways, to answer your question, Your Honor.

That system, I believe, was set up to record everything as you had indicated throughout the shift. And

when you manually activate a record event to start the audio portion, so video all the time, and audio activated upon the manual activation by the officer.

Q Then why don't we have the entire video?

A I—I don't know that you don't have the entire video. [44] What's there is what was available to me to place on the DVD.

Q If you had a video of this entire interaction, did you provide a DVD to the U.S. Attorney's Office?

A There should have been video evidence with what I provided and my case report.

Q And would that DVD show you pulling in behind Mr. Cooley and initiating contact with Mr. Cooley?

A It could.

Q Well, if it's running all the time, why wouldn't it?

A Again, I'm not an expert on the system. And I'm sure that they're not infallible.

Q So, is it your testimony today that your video wasn't working during the time of this stop?

A No. I activated the camera as early as I could.

Q No. You said it was running the entire time?

A The—

MS. SUEK: Your Honor, so that we don't confuse the record, the United States will call Special Agent Kevin Proctor to explain exactly how this camera operated.

Officer Saylor is not a person—we can continue on this path, but we're just going to confuse the record.

To follow up, the United States has explained exactly what happened here in a footnote in our brief. And we believed that the defense had withdrawn this objection, but we can certainly call Agent—Special Agent Kevin Proctor to describe what is [45] in that footnote as to what occurred with the video in this case.

THE COURT: Well, I guess I'm curious as to why Officer Saylor wouldn't know how to operate his camera and his audio. Wouldn't that be part—isn't that part of your job?

THE WITNESS: Well, I believe I'm being asked more intricate details than that.

THE COURT: Okay.

Well, how do you—

THE WITNESS: As to video isn't there, I can't explain.

THE COURT: How do you start your audio? We established that you have to turn it on with a manual switch.

THE WITNESS: In that particular instance, with that particular unit, I had to manually push the button, yes, Your Honor.

THE COURT: Okay.

Because at some point in time, we have audio on the—

THE WITNESS: Yes, Your Honor.

THE COURT: —on the DVD.

But we don't have any video of you pulling up and—for a certain period of time on that same DVD. So, if

it's running continually, do you know why there isn't video from the camera from the minute that you pulled up behind the defendant?

THE WITNESS: That is where my knowledge of that [46] system is limited to not be able to offer you the answer that you're seeking.

THE COURT: Okay. So . . .

MS. HARADA: Thank you.

THE COURT: That is what it is.

MS. HARADA: Thank you, Your Honor.

Q (BY MS. HARADA) At the end of your stop, what is your responsibility with regard to downloading that video?

A My responsibility is to burn that event to a disc.

Q And did you do that?

A Yes, I did.

Q And after you did that, did you check the disc to ensure that it was the entire stop?

A I don't recall that I did.

Q Okay.

Now, you indicated that you had more than a thousand traffic stops?

A Yes.

Q So, you're pretty experienced with downloading audio and video from those stops; correct?

A Not necessarily. I've worked with different law enforcement agencies that use different cameras, that

use different systems, some were even automatic to the point that I had no control over downloading anything. Simply pulling into a police station—

[47]

Q But in this case, you had control over that?

A In this case, I could burn that event from the camera system to a DVD. That was the extent of my control over it.

Q And you did that for this case?

A I did.

Q Now, how do you activate the audio manually? Is there a button somewhere on your person?

A If you're carrying the microphone with you and the microphone is synced to the audio/video recording equipment, then that button will work. Or you can manually press the button on the device yourself in the unit.

Q And what did you do?

A I pressed a button from within the unit.

Q From within the unit?

A From within my patrol unit on the camera system itself.

Q So, prior to exiting the vehicle to interact with Mr. Cooley, you pressed the audio button?

A Negative. This was after I had brought Mr. Cooley to my unit, and he began to take stuff out of his pockets to place on the hood of my vehicle. I reached in and pushed the button.

Q Then why does the audio start when you're still speaking with Mr. Cooley next to his vehicle?

A Again, I'm not an expert on that system. But it's my understanding it has the ability to go capture more than from that moment forward.

[48]

You're asking me a question to which I don't have the expertise to answer.

MS. SUEK: And actually, Your Honor, that is not correct. And I don't want to confuse the record. The audio starts when Mr. Cooley is standing at the hood of the patrol vehicle. It does not start when they are back before he approaches and puts the items on the hood of the car. I just don't want to confuse the record any more. That is—the video is with the court.

MS. HARADA: And Your Honor, I will defer to Ms. Suek on that. I might have misspoken, so my apologies if the video—the audio, excuse me, only starts when he approaches the vehicle.

THE COURT: We would agree that the DVD that has been provided to the court will show where everybody was when the audio started; correct?

MS. SUEK: Yes, Your Honor.

THE COURT: Okay. All right.

Q (BY MS. HARADA) When you stopped behind Mr. Cooley's vehicle at mile marker 16, did you have your headlights on?

A Yes, I did.

Q But you didn't have your front emergency lights on; correct?

A That is correct, ma'am.

Q And based upon that, how would Mr. Cooley have known that [49] you were law enforcement?

A When I identified myself to him as such.

Q At what point did that occur?

A That occurred—I would imagine, when he saw the uniform and badge, but even more so when I introduced myself at the driver window of his vehicle.

Q During your previous testimony, you indicated that Mr. Cooley didn't have his window down when you approached, and you thought that was unusual?

A I did.

Q How would he have known to have his window down if he didn't know you were law enforcement?

A I'm—just testified that it's unusual. I can't testify whether or not he would know at that point that I was law enforcement or not.

Q When you approached Mr. Cooley's vehicle, it was running and fully operational; correct?

A I can testify that it was running. As far as fully operational, I do not know.

Q Did you see any signs of an accident or mechanical difficulty or a flat tire?

A Not at that point.

Q And did you ask Mr. Cooley if he was having vehicle problems?

A I don't recall.

[50]

Q But the purpose of your stop was a welfare check?

A Yes, ma'am.

Q You indicated that Mr. Cooley initially rolled down the rear window, and then reached over and supposedly made a thumb's down motion?

A The rear window went down, then back up. And then while both windows were still up, we were looking at each other through the driver window, and he was motioning with his right hand (witness indicating) in a thumb's down fashion. Which I could discern at least that much through the tint of the closed window.

Q But again, these were heavily tinted?

A Yeah. They seemed pretty dark, yes, ma'am.

Q And at that point in time, was when he rolled down the front window; correct?

A Yes, ma'am.

Q So was he just reaching in a movement with his thumb to roll—to hit the window button to roll it down?

A No, ma'am.

Q But it's hard to see, because it's dark and it's tinted; correct?

A Well, I could still see his right hand by the time the window had come down. So, I assume he couldn't have used it to roll down the window.

Q What was he doing with his other hand?

[51]

A I couldn't tell you for sure. It was along the inside of the driver door, below my vantage point to see his left hand.

Q So, how was he holding his son, if neither hand was on his son?

A His son climbed up after the window had rolled down some.

Q Now, I just want to be clear here, because you testified that prior to rolling—him rolling the window down, you observed bloodshot and watery eyes?

A Not prior to the window being down. Prior to it being down fully.

Q Okay.

That was actually the way you described it in the timeline of events. So I just want to be clear. The window was down?

A Partially.

Q And then you observed the bloodshot, watery eyes?

A Yes.

Q And you had a visual on the child in the vehicle, correct?

A Yes.

Q So, what was the child doing during this interaction?

A The child spent most of his time in the lap of the driver.

Q And was Mr. Cooley providing care for this child?

A He just was holding the child in his lap.

Q Was the child in duress?

A Not at that point. It didn't appear. He wasn't crying.

Q And again, you're concerned about the welfare of the [52] child, so essentially, we're trying to determine was there a realistic concern about the welfare of the child?

A Once I observed weapons in the front seat, yes.

Q And the child wasn't in the passenger seat; correct?

A Not at that point, no.

Q Ever?

A He was in the rear passenger compartment at one point.

Q He wasn't in the front passenger seat; was he?

A Not that I saw.

Q Did you observe a child safety seat in the rear of the vehicle?

A Yes, ma'am.

Q Now, after Mr. Cooley advised that he had pulled over because he was tired, you observed the vehicle running in safe condition, the child is safe. Why wasn't your welfare check complete?

A Well, I was also seeing indicators of possible impairment.

Q Wasn't it true that he told you he was fatigued?

A Yes, he did.

Q And Mr. Cooley, at no time, indicated he needed your assistance; correct?

A No, he did not.

Q And you were able to observe that Mr. Cooley was not Native American; isn't that correct?

A It appeared that he was not. I would not say I [53] determined, but it did appear that he was not.

Q You inquired of Mr. Cooley why he had been in Lame Deer, and he advised that he was up from Wyoming to purchase a vehicle; correct?

A Yes, ma'am.

Q And is it unusual for people to come from Wyoming to Montana to purchase a vehicle?

A I can't imagine that it is, no.

Q So, what does Mr. Cooley's travel plans that evening have, as far as a concern regarding his safety and welfare?

A Well, asking questions about where he's trying to get to or come from, might help me assist him. If he's just trying to go a few more miles down the road, maybe I can help him get there safely.

Q But again, he didn't ask for help; did he?

A I don't think that he had to, for me to offer it, but no, he didn't.

Q Were you going to drive him?

A There's been occasions where folks have been out of cell service, out of gas, whatever the situation may be, and I have offered to drive them.

Q Was Mr. Cooley out of cell service or gas?

A He was probably out of cell service at that point, yes. Out of gas, it didn't appear to be. His vehicle was running.

Q You're speculating about the cell phone service, though; [54] correct?

A I don't recall if there was service there or not.

Q So again, you're just—

A Just being familiar with that area, I know that cell phone service is very spotty.

Q And you asked Mr. Cooley what vehicle he was going to purchase; correct?

A Yes.

Q And he related it was a Ford Explorer?

A Towards the end of our interaction, yes.

Q So, at this point, your report indicates that you became confused about the ownership of the truck?

A Yes.

Q However, had you run the plates correctly, and obtained Mr. Cooley's registration and insurance card, you would have known who owned the pickup; correct?

A Correct. That, had the return come back, I would have known that, yes.

Q Did you ask for his insurance and registration?

A No, I did not.

Q Well, if you were confused about the ownership of the vehicle, why not?

A Insurance and registration—well, insurance, at least, is not something that I typically asked for on the reservation.

Q Registration?

[55]

A I asked dispatch to check the registration. And then I was engaged in conversation. I did not know at that point whether it had returned or returned invalid.

Q Have you seen a proof of registration that people keep in their vehicles?

A Yes, I do—I have.

Q And does that indicate who owns the vehicle?

A Yes, it does.

Q So, had you asked for that, would you know who owned the vehicle?

A Yes. I would have known who was listed on that paper. And it would have been an indication of who owned the vehicle.

Q Your report indicates that Mr. Cooley stated he was buying a vehicle from an individual named Thomas?

A Either Thomas Shoulder Blade or Thomas Spang. He gave two last names.

Q Did you introduce those last names into the conversation, or did Mr. Cooley?

A Mr. Cooley did.

Q And your report indicates that Mr. Cooley talked while answering, and that specifically confused you. What does that mean?

A I have a typo in that particular portion of my statement there, "talked while answering."

Of course, he talked while answering. That is a typo in [56] that report.

He stuttered while answering is how that should have read.

It seemed like he didn't know which last name to give.

Q But again, he had told you he was tired; right?

A Yes, he did.

Q And it's advisable when people are tired that they should pull over and not continue driving?

A In a safe location.

Q Now, you mentioned that you found it concerning that Mr. Cooley was associating with somebody named Thomas Spang; right?

A Yes, ma'am.

Q But isn't it true that he also said that he was associating with Thomas Shoulder Blade, who is a law enforcement officer?

A I don't believe Thomas Shoulder Blade is a law enforcement officer.

Q A former law enforcement officer?

A He was never trained as one. He was a hire on probationary status, and he never made it through training.

That name didn't cause me the concern that the name Thomas Spang had caused me. He had provided both last names.

Q Well, doesn't your report indicate that Thomas Shoulder Blade is a probation officer for the tribe?

A At that time, I believe that's what his occupation was.

[57]

Q Isn't that a form of law enforcement?

A The BIA is law enforcement for northern Cheyenne.

Q Well, you're not with BIA, or you weren't on February 26th; were you?

A No, I was not.

Q So, you aren't law enforcement at the time of this?

A I was law enforcement, yeah.

Q So how is Mr. Shoulder Blade not law enforcement if he's a probation officer for the tribe?

A If that classifies as law enforcement, then he is.

Q So, why is it concerning to you that Mr. Cooley indicates he's interacting with a law enforcement officer named Thomas Shoulder Blade?

A Again, that name didn't concern me. The name that he had mentioned, Thomas Spang, had caused me concern.

Q And you just, because he gave you two names, assumed that it had to be the one that was associated with drugs; correct?

A It wasn't an assumption. It was wanting to know more.

Q Your report indicates that you were confused as to why Mr. Cooley didn't have a second person in the vehicle?

A Yes, ma'am.

Q You didn't ask him to explain that; did you?

A I asked him multiple times to explain the situation. And told him that the way he had explained it, didn't make any sense to me.

[58]

And that—and I asked—I asked questions such as: "Why conduct the business in the middle of the night? How did you plan on getting this vehicle back?"

So maybe not, directly: "Where is your passenger?" But questions that would have led to an answer of—which I felt would have led to an answer of—a better explanation of the scenario.

Q And again, this is a welfare check; right?

A That's the way it started, yes, ma'am.

Q Now, at any point in time, did you determine that Mr. Cooley was not allowed to possess firearms?

A No, ma'am, I did not.

Q And by the time you asked Mr. Cooley for his identification, you'd gone through quite a bit of questioning; correct?

A Yes, ma'am. We had talked—I hesitate to put a time limit. But we had a conversation prior to me asking for his ID.

Q And while he was retrieving his ID from his pocket, he was holding his son; correct?

A Yes, he was. Yes, ma'am.

Q And you stated that he started to go slower while he was removing items from his pocket?

A He—I stated that his—that he was glancing at me while doing so, and that the last time that he had reached his [59] hand towards his pocket, he had kind of stopped what he was doing, his hand was down by his side.

Q And this is the point in time when you decided to unholster your weapon?

A Correct.

Q So you unholstered your weapon, because he was reaching into his pocket to get his driver's license, or because he was doing it too slowly?

A No. Because his demeanor had changed.

Q Okay.

Was he pretty irritated at this point by having to continue interacting with you?

A He—his anxiety level seemed increased. If you mean irritated as in mad, angry, that's not how I'd characterize his behavior.

Q No. I just meant irritated, frustrated by the ongoing nature of this encounter?

A His anxiety seemed up. He seemed agitated, antsy, nervous. I've encountered folks who are irritated by the presence of law enforcement. That wasn't the type of irritation that I would use to describe the driver.

Q You testified that drug dealers have semiautomatic assault rifles?

A I've known drug dealers to keep semiautomatic assault rifles, yes, ma'am.

[60]

Q Isn't it true that other people that aren't drug dealers have semiautomatic assault rifles?

A I'm sure that it is, yes, ma'am.

Q Do you own a semiautomatic assault rifle?

A No, I do not.

Q Now, you mentioned that Mr. Cooley had a height advantage due to the nature of his truck being on bigger tires, or lifted?

A Lifted, yes.

Q But you were still able, even with him having the height advantage, to see weapons on the floor of his vehicle?

A I was at a disadvantage to see as much as I wanted to, but the weapons were further across the vehicle on the passenger's side, so I could see more of that area than I could a closer area, because it was closer to the obstruction—the areas closer to the obstruction were

harder to see than the areas further away from the obstruction, being the side of the truck.

Q You didn't ever find any magazines for these assault rifles; did you?

A I believe there was magazines found in that vehicle, yes, ma'am.

Q For these assault rifles?

A I do not recall.

Q So while Mr. Cooley was still in the vehicle, you went around to the passenger's side and opened the door without [61] asking for permission; correct?

A Correct.

Q And why didn't you ask for permission?

A I was in a position of disadvantage and announcing myself on the passenger's side would have served to continue to be in a position of disadvantage when I was trying to be in a position of advantage.

Q Well, couldn't he see you go over to the passenger's side?

A I don't think that he could have. I used the shadowing from my patrol lights, which were focused mostly on the driver area, and stepped out of the lit area to approach the passenger's side.

Q Did you approach from the rear?

A Yes, I did.

And my vehicle was offset to his truck, so my headlights didn't illuminate the passenger side of his truck as well as it did the driver's side.

Q And your report indicates that created a barrier between you and Mr. Cooley. What kind of barrier are you referring to?

A A barrier for concealment and cover, protection, if I were to be shot at. Something that I could get behind to gain distance and that cover and concealment.

Q Wouldn't it have just been more tactically sound to remove Mr. Cooley from the vehicle at that point?

A It may have been. But I decided to approach from the [62] passenger's side.

Q And you stated you were using a flashlight to see inside Mr. Cooley's vehicle?

A A flashlight, yes, ma'am.

Q Did you have a flashlight on the entire interaction?

A I don't know if it stayed on the entire time.

Q For most of it, do you recall having your flashlight on?

A I do recall having my flashlight on, yes.

Q While you're on the passenger's side looking in, you noticed a pistol?

A Uhm-hum.

Q Now, can you describe where that pistol was located exactly?

A It was located under the center console of the center seat of the truck. To offer a better explanation, the front of the—the front passenger compartment of the truck consists of three sitting areas.

One of which had a folding console, so you could have a center console in the middle, or it could be a seat. And that was folded down with the majority of the pistol tucked underneath of that console, closer to the driver's side. Could see just the butt of the pistol grip.

Q But your report indicates that this was where Mr. Cooley was reaching for his driver's license?

A It was that same area, yes, ma'am.

[63]

THE COURT: I'm going to interrupt for a second.

So, your testimony is, is that you decided to go around the rear of the vehicle over to the passenger's side so you could create a barrier in order to protect yourself if Mr. Cooley was to start shooting at you.

THE WITNESS: Yes.

THE COURT: What was the barrier you were creating?

THE WITNESS: The barrier of the truck itself, Your Honor.

THE COURT: So, when you got to the passenger's side, you had the barrier of the truck?

THE WITNESS: You had additional seats, more distance, truck, and—and darkness, as well, for concealment purposes on the passenger's side, yes, Your Honor.

THE COURT: But didn't you open the passenger door and eliminate the barrier?

THE WITNESS: Well, yes and no.

THE COURT: Well, you did or you didn't? You opened the passenger door?

THE WITNESS: I opened the passenger door for a better view inside the truck, yes, Your Honor.

THE COURT: Okay.

Did not that eliminate the barrier that you had tried to create between you and the defendant?

THE WITNESS: The barrier did not move and was still [64] available for me to hide behind or escape to if need be. It eliminated a portion of the barrier, yes. But it also created a better line of sight for me, and the main body of the truck wasn't moving. There were still positions I could take that were advantageous.

THE COURT: So, what is your training when you stop somebody and you approach them, and you find out that they've got weapons in the vehicle, isn't it your training to—to draw your weapon, do the felony stop procedure, which would mean that you maybe went back to your vehicle, opened up your driver's side door, so you had the cover of your driver's side door, maybe you got behind the rear of your patrol car, and then you order the individual out of the car, as opposed to going around and opening up the passenger door, so you're right there?

THE WITNESS: In certain circumstances, that would be a tactic deployed, yes.

THE COURT: Wouldn't that be more safe?

THE WITNESS: In this circumstance, I felt that I took reasonable action based on what I knew at that time, and I mean, the situation for me was to where I

felt most comfortable approaching from the passenger's side and continuing my interaction with him, versus a felony stop for an individual I'm still just at a reasonable suspicion with. Not—you know, people have guns in their cars all the time. That [65] doesn't mean I'm going to prone everybody out for going hunting—

THE COURT: No. I know. I'm just reflecting your testimony that you, basically, were afraid you were going to get shot.

THE WITNESS: There was options available to me, Your Honor. And I felt that that option worked best for me at that time.

I could hindsight 20/20 and armchair quarterback this, and I could probably do things differently. But I can't go back in time. I tried to make a reasonable decision and follow a reasonable course of action through my training and experience, particularly on an Indian reservation by myself. There wasn't going to be back-up coming quickly, to my knowledge—

THE COURT: It was or was not? I'm sorry. You said there was or was not?

THE WITNESS: At that point, to my knowledge, I didn't know if anybody was coming. I hadn't been able to reach out on my radio.

Could I have done things differently, Your Honor? I'm sure that I could have. And I'm sure that I could sit here and pick it apart all day long as to what was tactically more sound and less sound.

At that moment, at that time, I tried to make a sound decision to go home at the end of that night. And that's the [66] course of action that I took.

THE COURT: Okay.

Thank you.

You may go ahead, Ms. Harada.

Q (BY MS. HARADA) But you had notified dispatch of your location; correct?

A I had given—given them that much while I was still in my patrol unit, yes, ma'am.

Q And had you removed Mr. Cooley from the vehicle and gone back to your patrol vehicle and secured the scene at that point in time, rather than going around to the passenger door, you could have ensured that backup

A I could have, yes, ma'am.

Q Now, your—I'm going to stop that line of questioning and go back to where I was prior to the Judge's questions. was coming; correct?

I was asking where the gun was located, and you indicated under the center console?

A Yes, ma'am.

Q Your report indicates that that was where Mr. Cooley's hand had been lingering?

A Yes, ma'am.

Q However, his driver's license in his pocket are not under the console; correct?

A They're not under the console, no, ma'am.

Q So, how would his hand been lingering there, under the [67] console? Is he reached under lingering?

A He made motions from that area, which, I mean, we're talking a matter of inches here, from where his right pocket was to where I discovered the pistol. And he reached towards the center console on multiple occasions, passing over that area where the pistol was.

Q Over the top of the console, or under the console?

A Beside the console. Beside the console.

And then, where his hand was and where it lingered that final time, when he had reached into his pocket prior to me telling him to stop, we're talking a matter of inches from that area to where that—the area of what I could see of that pistol was.

Q How wide is the console?

A I don't know.

Q As wide as a seat; right?

A As wide as a passenger's seat in a vehicle.

Q Now, your report indicates that you removed a loaded magazine and a round from the chamber of the weapon after you discovered it?

A Yes, ma'am.

Q And did you still have your firearm pointed at Mr. Cooley at this time?

A I don't believe I pointed my firearm at him.

Q Did you still have your firearm in your hand at that time?

[68]

A When I went to the passenger's side, I do not recall if I had removed my firearm again or not. I had reholstered it on the driver's side. And when I went to the passenger's side, I opened that passenger door, I do not recall if I had taken my pistol out of my holster or not.

Q So you felt it was necessary to create a barrier between you and Mr. Cooley, but you are saying that you had put your firearm away?

A I had put my firearm away when I had walked from the driver's side to the passenger's side of the vehicle.

Q Is that typical protocol for safety reasons?

A To put my firearm away—

Q While walking.

A —when I don't need it?

Can you rephrase the question, ma'am.

Q Well, you indicated that you needed a barrier to protect yourself from Mr. Cooley. And then you also indicated that you put your firearm away. So I'm trying to determine if there was actually a need for the firearm, and if you actually felt threatened and needed a barrier, or not?

A Is that a question?

Q Yes.

A Rephrase the question, please.

Q I'm asking you—I'm going to move on.

And Mr. Cooley exited the vehicle?

[69]

A Yes.

Q When you requested him to do so?

A He did.

Q With his child?

A Yes.

Q And you indicated that—you suggested that he was impaired?

A I had seen indicators of impairment.

Q And you didn't smell alcohol?

A No, I did not.

Q He wasn't stumbling?

A I had not seen him stumble.

Q You have indicated that you have experience in roadside impairment and DRE testing?

A Not DRE, no, ma'am.

Q No? Did I mishear that?

When you went through your qualifications at the very beginning, you said roadside impairment?

A Drug abuse recognition.

Q Drug abuse recognition?

A Yes.

Q So, those are two training areas that would have come in at this situation when you were attempting to determine if he is impaired; correct?

A Yes.

[70]

Q And did you perform any testing to determine, based upon your experience, if he was impaired?

A I had not made a safe situation to continue that—down that road yet. There was still the question of: Are there more guns?

Q At any point in time, during that evening, did you determine if he was an impaired driver?

A I did not.

Q Okay.

Now, you inquired about the presence of weapons and observed a bulge in his front pocket?

A Yes, ma'am.

Q Your report indicates that you felt the bulge to determine that it wasn't a weapon?

A Correct.

Q What was the bulge?

A It was—it ended up being money and credit cards. They appeared to be, like, the prepaid debit cards.

Q And your report doesn't indicate that you performed a pat search of Mr. Cooley; does it?

A I thought that it did (witness reviewing document). Let me go to that portion, if you'd allow me. (Witness reviewing document.)

I see where my report says that I felt that bulge, I do not see where it says that I patted him down. But I did pat [71] him down at that time.

Q And the video would reflect that if it had occurred; correct?

A I would imagine so.

Q And at this point in time, Mr. Cooley allegedly asked if he could take things out of his pocket?

A I began to escort him towards the rear passenger compartment of my unit, and that's when he asked if he could remove objects from his pocket, yes.

Q Did he indicate why he wanted to remove objects from his pocket?

A He did not.

Q And yet, you feel threatened enough by this individual that you need to protect yourself, and you're going to allow him to start removing items from his pocket?

A Well, this was after I had patted his pockets, and I felt reasonably sure that there was not a weapon in his pockets. And if he wanted to remove something from his pockets, I wasn't going to stop him.

Q Now, you observed a plastic baggie in Mr. Cooley's pocket?

A Yes. In the hoodie that he was wearing, there was a pocket in the front that went all the way through, I don't know how—

Q It's a hoodie pocket?

A It's a hoodie pocket, if you're okay with that. And the [72] light from the patrol units from where he was standing, I could see a baggie in that pocket, yes.

Q And did you retain that baggie?

A Yes. That baggie was retained.

Q Was it field tested?

A I don't believe that baggie was field tested, no.

Q Did you observe any residue in that baggie?

A There was what's referred to as shake. A small amount of loose vegetable-type dried substance in that baggie.

Q Could you refer me in your report where it states that?

A I don't know if it does. (Witness reviewing document.)

I can't refer you to that.

Q Well, isn't that something that would be worthy of including in your report if you actually had observed marijuana in it, a baggie on his person?

A It may have been so inconsequential to not be worth testing. I could imagine not writing that into my statement.

Q And then you indicated that you located additional baggies amongst money in the pocket?

A That is correct, ma'am.

Q And you specifically differentiated in your report that these were the type of baggies used to package methamphetamine?

A In my experience, I'd seen methamphetamine packaged in that particular type of baggie, yes.

Q What's the difference between packaging for [73] methamphetamine and marijuana? What does the different type of baggie look like?

A So, one that I commonly find marijuana packaged in would be a sandwich-type baggie with the opening tied into a knot. Methamphetamine packaging is typically a very small, Ziploc-style baggie that has a zipper-top seal, and is about the size of a stamp, as far as its square dimensions.

Q Now, were these second set of baggies field tested?

A I don't believe those baggies were, and I don't recall seeing any type of residue in those baggies that were discovered in the folds of that money.

THE COURT: So, were they clean baggies?

THE WITNESS: They were clean baggies, yes, Your Honor.

THE COURT: Okay.

Q (BY MS. HARADA) And for the court's information, your report doesn't indicate that any baggie had any residue; correct?

A I don't believe it indicates anything about either of those baggies that were discovered there at that—on the hood at that particular time, no.

Q You expressed concern that people might be coming back to that scene?

A Yes, ma'am.

Q What is that based upon?

[74]

A He had made mention that the Explorer may have already passed, and that he was going to go to Crow and to meet someone. And again, I couldn't understand what he was trying to say about how this transaction with the vehicle that he was there to purchase was supposed to unfold.

But during that confused conversation about what was supposed to happen, he had mentioned a vehicle may have already passed, the one he was leading me to believe that he was there to purchase.

Q Now, when you returned to the Dodge to secure the weapon—weapons, excuse me, you were on the passenger's side; correct?

A Correct.

Q And you reached over from the passenger's side to turn off the vehicle?

A Yes, I did.

Q Were you using a flashlight at that time?

A I don't recall.

Q So, you reached over across the seat, essentially, to turn off the vehicle?

A Yes, I did.

Q And at that point in time, what did you observe?

A I could see cell phones on the dash, and I could see the—what appeared to be methamphetamines and a pipe in the—tucked between the driver and passenger—middle passenger's [75] seat.

Q But that's tucked between the driver's seat and the console; correct?

A Correct.

Q And you're coming from the passenger's side?

A Correct.

Q So are you seeing over the top of the console or around the console?

A I don't recall the truck—I had to reach into that truck quite a ways to get from the lower elevation of the passenger's side, up and high enough to the—where the keys and ignition would be. I don't recall if it was over —over or around the center seat. I don't recall.

Q And your report indicates that it was tucked in plain view; correct?

A It was tucked, yes. In plain view. There was no —no manipulation that had to take place to be able to see where that was.

Q And did you photograph any of this?

A I did.

Q Where are those photographs?

A I believe they were submitted with the case, along with everything else.

Q There were a total of four phones retrieved; correct?

A I think I testified earlier that there was five. Without [76] looking at an evidence custody receipt, I cannot recall if there was four or five.

Q May I refresh your recollection with the evidence receipt?

A Please.

Q And did you take those photos as they were—as things were located? Did you leave items in place and take the photographs, or did you remove them and photograph them?

A The weapons were removed. I don't believe they were ever photographed in the vehicle. Except for a fourth that was later found.

Q No. I'm asking with regard to where the drugs were located?

A I don't believe the drugs were moved before photographing.

Q And did you take photographs of—well, let me just back up for a second.

I'm going to bring you the evidence log, if I may approach?

THE COURT: You may.

A I don't want to misstate whether the drugs were moved before photographing or not. I don't recall. I don't think that they were. But if they had been, it would have been to show better what it was that was tucked in the seat, if that makes sense.

(Ms. Harada approaching witness and handing him a document.)

[77]

Q (BY MS. HARADA) Is that the evidence receipt log?

A It appears to be a copy of it, yes.

Q I gave you my only copy, so if you could just refer to that and tell me how many cell phones were located?

A (Witness reviewing document.)

This says that four were recovered and an iPod, as well, that is probably why I was thinking that there was five. I think the iPod is a similar shape and size that I may have thought it was a cell phone at that time.

MS. HARADA: May I approach?

THE COURT: You may.

(Ms. Harada approaching to retrieve documents.)

Q (BY MS. HARADA) Were all of these cell phones on the dash?

A I believe so.

Q There weren't any in the back seat?

A I don't recall there being any in the back seat. I think—

Q Go ahead.

Well, shall we run through each cell phone, and see if you can recall where it was located?

A No, ma'am. I don't recall if there was one in the back seat or not.

Q Okay.

Now, you began to seize the items in plain view?

[78]

A Yes, ma'am.

Q And your supervisor was on scene at that point; correct?

A Correct, ma'am.

Q And your supervisor told you to get a warrant; isn't that correct?

A We had discussed the possible different ways to approach it. And she instructed me to seize what was in plain view.

Q Now, you continued to go through the truck and you observed an iPhone box?

A There was an iPhone box under the driver's seat.

Q And was it tucked under the driver's seat?

A It was tucked between, I believe, the mechanism that would allow you to adjust the seat forward and back, which was a metal bar. Excuse me. And the seat itself. The cushion of the seat.

Q And obviously, what you located inside that box wasn't in plain view; correct?

A No.

Q Now, when Mr. Cooley was taken into custody and transported, he was allowed to take his child with him?

A He was.

Q Why wasn't that child restrained?

A We did not have the ability to do so.

Q There was a child restraint device present, though; wasn't there?

[79]

A There was a car seat in his truck.

Q But you couldn't take that?

A The nature of that patrol unit wouldn't allow for a seat to be installed in the rear.

It was a plastic, after-market type of seat for restraining prisoners.

MS. HARADA: Could I have just a moment, Your Honor?

THE COURT: You may.

(A brief off-the-record discussion was had between Ms. Harada and the defendant at counsel table.)

MS. HARADA: I have nothing further. Thank you.

THE COURT: Okay.

Ms. Suek, do you have any redirect?

MS. SUEK: No, Your Honor.

THE COURT: Okay.

You may step down.

And I think, actually, we'll take about ten minutes for a recess before we continue.

Court's in recess.

(Witness excused from the witness stand.)

(The proceedings in this matter were recessed at 3:25 p.m. and reconvened at 3:43 p.m.)

THE COURT: Court's in session.

You may be seated.

Ms. Suek, you may call your next witness.

[80]

MS. SUEK: The United States calls Special Agent Kevin Proctor.

KEVIN PROCTOR, having been called as a witness on behalf of the United States of America, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please take a seat on the witness stand.

DIRECT EXAMINATION

BY MS. SUEK:

Q Sir, as you take your seat, I believe I demoted you in the last couple of minutes. What is your current position?

A My current position is Regional Agent in Charge of the Drug Enforcement Unit for the BIA.

Q And when did you take that position, sir?

A Oh, I took that in August of '16.

Q Prior to that time, what position did you hold?

A I was a special agent with the Bureau of Indian Affairs Drug Enforcement Division. I was an investigator.

Q And what areas of the country did you investigate for BIA?

A Mainly Crow and Northern Cheyenne. That's what I was assigned to.

Q As a drug unit special agent?

A Investigator—yes, ma'am.

[81]

Q How many years did you investigate drug crimes in that area of Crow and Northern Cheyenne?

A August of 2013 was when I was appointed as an investigator for the drug unit for Crow and Northern Cheyenne.

Q So, to August of 2016?

A Yes, ma'am.

Q So, about three years?

A Yes, ma'am.

Q Prior to that, what position did you hold, sir?

A On December of 2012, I was hired as a lieutenant for the Crow Agency Police Department.

Q As a lieutenant for the Crow Police Department, what did you do?

A Oh, I was in charge of day-to-day activity for the officers. Scheduling. One of the main things that I was assigned by the chief of police was the camera systems for the vehicles.

Q Were you a supervisor of the patrol unit?

A Yes, ma'am.

Q And you said that one of your jobs was, you were assigned—what did you do with the camera system?

A I was assigned—I actually had to call a representative from the company. Had them come down, and I sat down with the representative and went through what the camera was capable of doing . There's a lot of things that—they are computerized, [82] so they have their own internal storage units. So when the officer was testifying that they are constantly recording, they record for a certain amount of data, whether that be—you can't quote me on this, but whether it's a gig or a terabyte, it will only hold a certain amount. And then after a certain amount of time, it will take that data and dump it. It gets rid of the oldest data first.

So if you don't go in and what we would call flag or tell the system that you want to hold this for a certain amount of time, it will automatically go to the oldest stuff and start removing it, and start keeping the newer, current data.

Q And so, it's fair to say that you are familiar with the camera system that was operating in Officer Saylor's vehicle on February 26th, 2016?

A Yes, ma'am.

Q Okay.

That system, that dash-cam system, with respect to the video capabilities of that system, how does it work?

A There's several different ways to make it work.

Q I can't understand you. I'm sorry.

A I'm sorry. There's several ways to make the system work. You can tell the system that you want to record, and you can tell it to go back on the audio, and it can—

Q Okay.

I'm going to stop you there.

[83]

A Okay.

Q My question was, I want to break apart video and audio?

A Okay.

Q So, can you explain to us how the video portion of the dash camera system works?

A Yes, ma'am.

When Crow sets up their video, when we set it up for our units, for our officers, it is set to where when you turn on all of your lights, okay? Not the back dash, but all your lights, your emergency equipment, as to make a traffic stop, or you're running code, it runs the video.

The video will run with the audio.

But if you are—if you don't turn everything on, you just turn the back dash on, it will only run the camera system. There is no audio.

Q Okay.

Let's go back to how did the video system of the dash camera work? Just the video.

A Just the video. When we install it into the vehicles, they're set to run continuously, as I explained before, with the data. And it will only run for—and like I said, you can't quote me on this. I'm just making an example, for one terabyte. It will only hold one terabyte. After that, it's going to start taking the oldest stuff first and run again.

So they're set into a vehicle where they're wired in, and [84] then they run off—continuously. I wouldn't say they record, because it's not necessarily a recording. It's just holding in a storage area.

Q So, the video portion of the dash camera is continuously running and can be retrieved at some point; is that fair to say?

A Yes, ma'am, it can be retrieved.

Q Unless it's been dumped, because it's exceeded its data capability?

A Right. Yes, ma'am.

Q How does the audio portion work?

A The audio portion only works if it's manually turned on, or turned on by all of the emergency lights.

Q How is it manually turned on?

A It—the two ways to manually turn it on is—some of the cameras have a mic that goes on the belt or uniform of the officer. Some of those are set up to where they have a record button, where they can push the button on the mic. Now, some of them don't all have that. In that case, you would have to either turn the lights on, or manually turn it on from inside the vehicle.

Q So, with respect to Officer Saylor's vehicle, how would the audio portion of that dash camera have been turned on?

A Only if you turned all of his lights on to make, like, a traffic stop, or he would have had to manually turn it on from [85] inside the vehicle.

Q Now, you have reviewed the footage of the dash-cam from Officer Saylor's vehicle February 26th, 2016; correct?

A Yes, ma'am.

Q Is it fair to say that there is a portion of the footage that only has video and no audio?

A Yes, ma'am.

Q Can you explain how that occurred?

A Officer Saylor did not turn on his full emergency equipment during the stop, which would explain why there was no audio until—there's a portion in the video when you watch the video, where he brings a male out of the vehicle and brings it to his car.

He has a flashlight on the car, and you can see in the camera, the flashlight's on the male. The flashlight disappears for a few seconds and then comes back. At that point, you have audio. The reason that being is: Officer Saylor has manually turned the camera on.

Q How did the dash-cam footage get put on a medium so that we're able to watch it?

A The cameras theirselves have a—at least, this model, has a DVD-capable recorder, self-contained within the camera. So you can go into the camera and tell the camera you want to record from such-and-such date and

time till—until such-and-such date and time. You put in the DVD, and the [86] recorder itself will burn that DVD for you.

Q We do not have a video or audio portion of the beginning of Officer Saylor's encounter with Mr. Cooley. Fair to say?

A Yes, ma'am.

Q Do you know why?

A The—I would say the two reasons, one is the officer either did not go back far enough, unintentionally, or the time difference could have been on the camera. If, say, for the time was he says that he made the stop at one o'clock, he calls dispatch and says: "What time did I make this stop?"

"One o'clock."

He goes back to the camera and says: "One o'clock."

Well, that doesn't necessarily mean that that camera is 100 percent. The camera could have been off a—compared to Daylight Saving Time goes into effect, something like that, can put our times on our cameras off, they can be off a little bit.

So, he very well could have put the time in either unintentionally did not go back far enough, or the time that the stop was made versus the time that the camera says, could be off. They could not be synchronized.

Q When you say "go back far enough," just to explain what you mean by that?

A He could have not gone back in the time on the data on the camera far enough. He made the stop at one

o'clock, and he—even then with what's happening with dispatch, they may have [87] wrote down at the time that he went in and said: "Hey, this is the time."

He put the time down. That doesn't necessarily—and he went by what was on his stop versus what was on the camera. And so he had to go back, and that's why there's no audio, is because at that time, he had not manually turned that recorder on. That's why there's no audio for a portion of when the video begins to when the portion he actually manually turns the audio on.

Q And Agent Proctor, fair to say, you don't know which reason is the reason why we don't have—

A No, ma'am. I'd have to take that camera out, and we'd have to go back and review it, and plug it up, run diagnostics to find out exactly—and at this point, there's no way we could do that. The data has already been lost.

Q Special Agent Proctor, are you familiar with a Thomas Spang?

A Yes, ma'am.

Q How are you familiar with him?

A Mr. Spang was being looked at in a drug investigation.

Q And where is he from?

A He is from Lame Deer.

Q Have you always known him as Thomas Spang?

A No, ma'am. He actually goes by Thomas—his real—his birth name was Thomas Shoulder Blade.

Sometime a few years [88] back, he changed his name legally to Thomas Spang.

Q Is there more than one Thomas Shoulder Blade in Lame Deer?

A Yes, ma'am.

Q So, the Thomas Shoulder Blade that you know as Thomas Spang is one. Who is the other one?

A The other one was a former BIA employee.

MS. SUEK: No further questions.

THE COURT: Cross-exam.

CROSS-EXAMINATION

BY MS. HARADA:

Q So, is it your testimony today that even though Officer Saylor said that he downloaded the entire video, that he didn't?

A No. He probably—he probably assumed that he did when he said—if he went back and said: I want the video to go from whatever time his traffic stop was, normally the way we conduct business, if we are doing a traffic stop, we will call dispatch and tell them: "We're on a traffic stop, such-and-such time."

They log the time down. We go back into the video, punch in the time and the date of the video and burn a CD.

Q And would you agree that these videos are somewhat critical?

A Is what?

Q Somewhat critical for cases such as Mr. Cooley's?

[89]

A Oh, yes, ma'am, they're critical, yes.

But you have to understand on that stretch of the road, we contact people almost daily that—

Q I'm not talking about that stretch of the road—

A —to conduct welfare checks—

Q —I'm asking you about the video.

A Okay.

Q That's a critical piece of evidence in the case?

A Yes, ma'am. It could be a critical piece of evidence, yes.

Q I have just one more question, and not to complicate this, but is there a backup system for this camera at all?

A As in, like, a server? Is that what you're asking me?

Q Correct.

A No, ma'am. We don't have a server.

Q So, it's just always contained within the device?

A Within the internal device over the camera, unless we burn it, and at that point, it goes into evidence, obviously.

Q Now, you interviewed Mr. Cooley at the end of the incident on February 26th; correct?

A Interviewed him? Yes, ma'am.

Q Did you record that interview?

A You would have to go back and look. I can't sit here and tell you 100 percent whether I did or didn't.

Q Okay. I have no—

[90]

A I believe I did, but I can't say yes or no positively.

Q And if you did, would I be able to obtain a copy of that?

A If it's—if it was recorded.

Q Thank you.

I have no further questions.

A Actually, Mr. Cooley did not interview us—he would not—he would talk to us, but he did not interview, to answer your question. He would not talk to us about what was happening.

Q When he spoke with you?

A He did speak with us, yes, ma'am. But just so you understand, when we do a recording on an interview, it's when that person is talking to us.

If I go in and say: "Hey, how are you doing? What's happening today?" I don't record that part of it. I record an interview where he starts talking to us about what's happened, and how he's where he's at. He did not do that; so no, there was no recording done.

Q So when you started talking to him about the incident, did you initiate your recording?

A No.

Q No?

A No. Because he wouldn't talk to us about the incident.

Q Okay.

Thank you.

[91]

THE COURT: Anything further for this witness?

MS. SUEK: Nothing further, Your Honor.

THE COURT: You may step down.

(Witness excused from the witness stand.)

THE COURT: Do you have any other witnesses, Ms. Suek?

MS. SUEK: No, Your Honor.

THE COURT: Okay.

MS. HARADA: I'm sorry, Your Honor?

THE COURT: Do you have any witnesses, Ms. Harada?

MS. HARADA: No, Your Honor.

Thank you.

THE COURT: Okay.

Testimony having been received and the matter fully briefed, the court will deem the motions submitted.

We're adjourned.

(The proceedings in this matter were adjourned at 3:59 p.m.)

CERTIFICATE

**I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.**

**/s/ Tina C. Brilz, RPR, FCRR**

**Dated this 21st day of February, 2017.**

**APPENDIX F**

**UNITED STATES DEPARTMENT OF THE INTERIOR**
**BUREAU OF INDIAN AFFAIRS**
**LAW ENFORCEMENT SERVICES**
**UNIFORM DIVISION**

**POLICE OFFICERS CASE REPORT**

**CASE NUMBER:** BO16027059

**TITLE OF CASE:** U.S. V. Cooley, Joshua James (DOB: 04/15/1984)

**OFFENSE:** Investigation Pending; Referred to BIA Drug Task Force

**STATUTE:** Pending Investigation

**LOCATION OF INCIDENT:** 16 Mile Maker Highway 212

**DATE OF INCIDENT:** February 26th, 2016

**INVESTIGATING OFFICER:** James D. Saylor

**POLICE OFFICER CASE REPORT**

**Case Number: BO16027059**

| NAME OF COMP./REP. PARTY/VICTIM: | ADDRESS AND TELEPHONE NUMBER: |
|---|---|
| On View of Officer | Crow Police Department |

PERSON{S}/VEHICLE{S} INVOLVED:

Driver (arrested): Cooley, Joshua James
(DOB: 04/15/1984)

VEHICLE: WHITE IN COLOR 2007 DODGE RAM 1500 PICKUP BEARING WY REGISTRATION: 3-23876
(VIN: 3D7KS19D67G746110)

Passenger:

Juvenile Male Child Approximately 2 years of age

Narrative:

At or about 0102hrs on Saturday 02/26/20156, while in the performance of my duties as a Highway Safety Law Enforcement Officer within the exterior boundaries of the Crow Indian Reservation, I observed a vehicle parked along the westbound shoulder of Highway 212 near the 16 mile marker. The vehicle was subsequently identified as a: WHITE IN COLOR 2007 DODGE RAM 1500 PICKUP BEARING WY REGISTRATION: 3-23876
(VIN: 3D7KS19D67G746110)

In the performance of my duties, it is not uncommon for me to come along motorists along Highway 212 that are

in need of assistance. On numerous occasions I have rendered assistance to individuals who were out of gas, experiencing mechanical difficulties, or were lost. It is also often the case that due to limited cell phone service areas, such as the 16 mile marker, motorists have no way to contact anyone for help.

As part of a function of my position as a Highway Safety Officer for the Crow Indian Reservation, it is not only one of my responsibilities as a function of my position, but I am duty bound as a law enforcement officer to ensure the well-being of those utilizing the roadways of the Crow Indian Reservation. I decided to stop and conduct a welfare check of the occupants of the Dodge.

I had been traveling eastbound at the time I had spotted the Dodge. I turned around and approached the Dodge. I activated the emergency lighting in the rear of my police unit so as to warn oncoming westbound traffic of the road hazard created by having two vehicles parked along the shoulder of the road. I intentionally did not activated my front emergency lighting equipment as I did not want the occupants of the Dodge to feel as though I was detaining them or "pulling them over".

I radioed my activities to the Crow Agency Dispatch and approached the Dodge on foot. As I approached the Dodge, I noticed that it was running. I could hear the engine and exhaust noise. There was a large amount of stuff in the open bed of the truck. The bed was full almost up to the bed raise with what appeared to be tools, a transmission, and other such mechanical type of items. I could not see inside of the Dodge very well as the windows were heavily tinted. I thought I could see movement between the rear and front seat of the Dodge but was unsure as visibility was very poor.

I knocked on the truck and asked if everything was okay. The rear passenger window of the truck rolled down slightly and I could make out what appeared to be the head of a small near the center console of the truck. I announced "law enforcement, is everything okay?" and continued to approach cautiously.

I shined my flashlight into the front driver compartment where I could see the figure of a man in the driver seat. The man was subsequently identified as: Cooley, Joshua James (DOB: 04/15/1984). It appeared as though Joshua had raised his right hand as he was looking out the window toward me and motioned his thumb downward in a "thumbs down" type of fashion. I did not know for sure what Joshua had meant by the gesture but surmised that thing were not well.

I asked Joshua if he could roll down the driver window so that I could speak with him. Joshua's window rolled partially down and I was able to confirm that there was a small male child (approx 2 or 3 years of age) inside of the Dodge who appeared to be trying to climb from the back seat up to the front driver seat. I couldn't see much else as the driver had not rolled the window all the way down and the tint continued to block my view. I could not tell for sure if there were other occupants in the vehicle but it did appear as though the back seat of the truck was loaded with belongings. I was only able to see shadows of objects, but could tell there was something in the space of the back seat

Joshua advised that he had pulled over because he had gotten tired from his drive. Joshua helped the juvenile child into the front seat with him while I was speaking with him. I apologized to Joshua, thinking that I may have woken his child. Joshua stated that it was okay,

and again assured me that he had only pulled over because he was tired.

I had assumed Joshua had been driving for a while considering it was late at night, on a highly traveled thoroughfare (Highway 212) and the license plate on the truck was from out of state. I asked Joshua where he had come from and was surprised when he answered "Lame Deer", which as only approximately 26 miles away from our location. My assumption that he had been driving a long time seemed wrong.

Additionally, I had worked in and around Lame Deer as a Police Officer for the Northern Cheyenne Indian Reservation for over two years. During that time, I found it quite common to see vehicles in the area with Wyoming License Plates, however, most usually the drivers of the vehicles appeared to be Native American and were from other Indian Reservations. Joshua did not appear to be Native, and I did not recognize his vehicle from my time spent in Lame Deer as an Officer.

I asked Joshua why he had been in Lame Deer. Joshua advised that he had come up from Wyoming purchase a vehicle. The vehicle that Joshua was driving appeared as though was not something that he had just purchased as the bed was loaded with items, and there appeared to be a large quantity of personal items in the rear seat.

I asked Joshua why he was buying a vehicle in the middle of the night. Joshua advised that he had "broke down" so he was driving the Dodge. Joshua advised that the Dodge belonged to a person he identified as "Thomas". Joshua said that he was buying a vehicle from "Thomas" but had broken down, so Thomas was allowing him to use the truck to "get back". I asked

Joshua what Thomas's last name was. Joshua seem to talk while answering, stating that he was not sure. Joshua listed two names, "Spang" and "Shoulderblade", but settled on "Shoulderblade" as what he thought Thomas's last name was.

Through my time as an Officer on the Northern Cheyenne Indian Reservation, I had come to know there to be both a Thomas Spang and Thomas Shoulderblade. I knew Thomas Shoulderblade to be a probation officer for the Tribe, and at one point, a rookie Officer for the Police Department before quitting. Additionally, I knew the name Thomas Spang to be associated with drug activities on the Northern Cheyenne Reservation and had worked cases during which his name had come up as having committed illicit and suspected illegal activities involving weapons and controlled substances.

As I spoke with Joshua I became confused. I could not understand why Joshua was driving a vehicle that had Wyoming license plates which he was claiming belonged to Thomas Spang/Shoulderblade. It made no sense to me that he had driven to Lame Deer to purchase a vehicle, but did not have another passenger with him that would have driven a new purchase home. I could not understand why the potential seller of the new vehicle would allow him to drive his truck. Nothing about Joshua's explanation made any sense to me. Nothing seemed practical or rational.

I questioned Joshua more about the situation, and told him that nothing he had said to me made any sense. Joshua became agitated and stated "I don't know how it doesn't make any sense, I told you I cam up to buy a vehicle". I told Joshua that I understood that to be what he said, but didn't how that could be the case.

It was obvious that Joshua was becoming nervous. Joshua's began to speak in a lower volume making it difficult for me to hear him, his hands began to shake, and Joshua began taking long periods of times to answer seemingly simple questions. I told Joshua that I couldn't hear him and asked him to roll the window down further, he complied.

When he rolled the window down it exposed to my view the butt of two rifles laying against the front passenger seat. The barrels were pointed toward the floor board they were propped against the front passenger seat. The rifles appeared to be semi-automatic assault weapons. I asked Joshua about the guns. Joshua advised that they were not his, and claimed that they belonged to "Thomas".

At that point, I felt lead to believe by Joshua that he had gone to Lame Deer to purchase a vehicle, but had broken down and was allowed to borrow the sellers vehicle, however, I could not reconcile why the seller would would allow Joshua to borrow a truck, loaded with personal items to include firearms, why the transaction was occurring in the middle of the night, and why the truck was bearing Wyoming registration.

Joshua became increasing nervous and appeared as though he was becoming agitated. As I continued to probe Joshua for a response that would explain the discrepancies, he stated to me several more times "i don't know what doesn't make sense, I told you I came to buy a vehicle", but he would not provide a reasonable response about the situation.

Moreover, while speaking with Joshua I noticed that his eyes were very watery and blood-shot, his words were

sometimes slurred and at times it almost sound as if he had a faint foreign accent (such as Russian) and he seemed confused by simple questions. I began to suspect Joshua to be impaired.

I asked Joshua if there were any other weapons in the vehicle. Joshua looked around inside the Dodge but would not provide a direct response to my question. Joshua became very elusive and defensive, stating "I told you, I just pulled over because I was tired".

I asked Joshua if he had his identification with him. He advised that he did and indicated that it was in him pants pocket. Joshua reach with his right hand toward his front right pant pocket while continuing to hold his son in his lap with his left hand. I watched Joshua dig around for a moment and then remove what appeared to be wad of money from his pocket. Joshua placed the money in a compartment of his dash. Joshua did this several times, each time I noticed the denominations of the bills appeared to be twenties, fives, and ones. Each time Joshua did this, it seemed to take him longer to remove the next item from his pocket. Joshua glanced at me several times while moving his hand back and forth from the dash to the area of his pocket. I could not see exactly what he was doing with his right hand but my training and experience told me to exercise extreme caution; I removed my service pistol from its holster and held it to my side.

Eventually, Joshua reached back toward his front right pocket, however, it appeared that his hand did not go into his pocket but rather beside his pocket between him and the center seat. I noticed Joshua's breathing became more shallow and rapid and Joshua stopped looking over toward me. Joshua began to stare intently

forward and had what it commonly described as a "thousand yard stare". Joshua's change in demeanor was an indicator to me that he was contemplating attacking me. Joshua kept his hand in the area for an extended period of time and appeared frozen. I told Joshua to "stop, show me your hands, do it now!".

Joshua seemed startled by my sudden command and quickly put his right hand up where I could see it. I told Joshua that he was no longer allowed to move his hand without my permissions. I kept my service pistol drawn and ordered Joshua to slowly reach to his right pocket and remove only his identification, no more messing around with other items I his pocket.

I shined my flashlight directly toward the area where Joshua was reaching and could tell that he was again placing his hand in his pocket. Joshua slowly retrieved a Wyoming Driver's license (107201-725) and handed to me. I told him to keep his hands were they could be seen as I inspected the license.

Because of the height of Joshua's truck, the obstruction of Joshua's son seated in his lap, and the fact that I knew their to be weapons on the passenger side of the truck I decided to re-position myself to the passenger side of the vehicle. Additionally, I had requested the presence of another patrol to my location, however, was not able to reach out on my portable radio and did not want to return to my unit and allow Joshua the opportunity to cause me harm. I felt that by placing a bigger barrier and distance between he and I, that I would be safer until back-up came to check on my status.

I moved quickly to the passenger side of the truck and opened the front passenger door to continue speaking

with Joshua. When I opened the passenger door I could tell the assault rifles did not appear be loaded. As I shift my gaze back toward Joshua I noticed the handle of a pistol tucked under the center folding seat where Joshua had being lingering with his right hand.

I reached in and quickly removed the pistol and secured it by removing loaded magazine (7 rounds in magazine) and a removing a round from the chamber. I asked Joshua why he did not tell me there was another weapon in the vehicle when I had asked him. Joshua stuck with his claim that the vehicle and it's contents belonged to "Thomas".

I attempted again to gain a reasonable explanation as to what was going on. I asked Joshua again why there were so many weapons in the vehicle. Joshua became very nervous and would not speak in complete thoughts. Joshua stated that he was a mechanic and some times takes things in trade. Joshua advised that he was going to buy a Ford Explorer that had been posted on Facebook. Joshua advised that the person he was buying the Ford from knew his location and was going to be coming to him shortly. Joshua stated that he was trying to get "Thomas" truck to Crow Agency and that he was suppose to drop it off. As Joshua became increasing anxious he began spouting a proliferation of excuses, none of which made any sense.

It caused me concern that Joshua had indicated that he was expecting someone to meet him along the roadside. Nothing Joshua said had made any sense, however, base on my observations I was beginning to believe that Joshua was waiting to meet someone for some type of an exchange of an illicit nature.

It was the middle of the night, there were multiple weapons present, there was large quantities of small denomination bills, there was no legitimate explanation from Joshua to simple questions, and there was an indication that someone was going to be meeting with Joshua.

Joshua again began to place his right hand out of sight, this time between his body and the center folding seat. I ordered Joshua to show me his hands and told him to step out of the vehicle. I met Joshua back on the driver side of the truck, he had exited holding the child.

I asked Joshua if he had any weapons on his person, he stated that he did not, however, I could see a large bulge in in his front right pocket. I asked what it was. Joshua stated that it was credit cards. I felt the bulge and did not feel anything that resembled a weapon. I told Joshua to step toward my patrol unit.

As I began to escort him and his child to my unit Joshua paused and asked if he could remove the money from his pocket. I told Joshua to stand in front of my unit and advised him he could removed anything he wanted to from his pockets. Joshua began to place a large quantity of money on the hood of my unit, mostly in small denominations. Joshua claimed that the money was for the Ford Explorer that he was supposedly in Lame Deer to purchase.

While he emptied his pockets I could see into an opening of his pull over type top. The shirt had a pocket that went all the way across the front of his stomach. Inside there was a small plastic baggy which I knew through my training and experience to resemble that of marijuana packaging. The baggy appeared empty, however, it appeared as though it use to be tied in fashion in which

I am familiar with being associated with controlled substance. I removed the baggy from Joshua and questioned him about what the contents of the bag use to be. Joshua would not answer only to state that it was "just a plastic bag".

I again tried to call out of my hand held radio for another patrol unit, however,

I escorted Joshua around to the side unit and had him sit inside the rear passenger area. I told Joshua that he was being detain investigation. Joshua stated that he did not think that it was legal for him to be detained by the BIA and wanted to know if I could "do that". I told him again that he was being detained as I suspected their to be crime afoot.

I secured the money that Joshua had placed on my unit by tucking it under the wiper bladed of my front windshield. While securing the money I noticed several small zip lock baggies in with the money. I recognized the baggies as the type of packaging material commonly used for the sale of methamphetamine and commonly referred to as "bindles" when filled with methamphetamine. The baggies were empty, and clean, indicating me to that they had not yet been used, which indicated to me that Joshua may have a reason to need empty drug packaging baggies. I asked Joshua about the empty bindles which were in with his money, he stated that he "didn't see any" bindles.

I used my patrol unit radio and was able to get a hold of my dispatch. I requested another officer respond to my location as well as a county Deputy as Joshua appeared to be non-native. Shortly thereafter Lt. Brown,

Officer Spotted Bear, and Officer Eastman responded to the scene.

I returned to the Dodge to secure the weapons and conduct checks on them. While securing the items I check reached over the to the driver side and turned the truck off. While turning off the truck I observed ammunition on the driver seat. I secured the three weapons that were in plain sight and decided to check the driver side where I had seen the ammunition to see if another weapon was present.

While checking the driver side I noticed a plastic bag stuffed with what appeared to be a white powerlessly crystalline substance which I believed to be methamphetamine. The bag was tucked between the driver seat and the center folding seat but was exposed in plain view. Beside the bag was a glass methamphetamine smoking pipe.

In addition to the suspected methamphetamine and paraphernalia, I noticed there to be multiple cellular phones on the dash board of the truck. In my training and experience the combination of controlled substances, weapons, large quantities of small denomination bills, and the presence of multiple means of communication, are all indicators of drug dealing.

Upon arrival of Supervisory Police Officer Sharron Brown I informed her of the situation. Lt. Brown instructed me to seize whatever I had discovered in plain view within the Dodge. Lt. Brown advised that she was going to contact the BIA Drug Task Force agents for further guidance.

I photographed the drug and began collecting the evidence as instructed. I decided to seize all weapons,

suspected controlled substances, money, drug paraphernalia, ammunition, and electronics such as cell phones and communication devices which were in plain view.

While removing the items from the Dodge I located what appeared to be an "Iphone" case beneath the front driver seat. I was going to take the phone out of the box, however, when I opened the box I discovered there was no phone. The box was full of a white powdery crystalline substance similar to that which had already been discovered. Moreover, while removing drug paraphernalia from the driver door panel, another baggie of white powdery crystalline substance was discovered. I photographed as I collected with the assistance of Officers Eastman and Spotted Bear who had arrived to assist. (SEE EVIDENCE CUSTODY DOCUMENTS AND PHOTOGRAPHS FOR DETAILS OF WHAT WAS SEZIED ON SCENE)

Further coordination with Lt. Brown resulted in the decision to have the Dodge Towed to the Crow Police Department. While waiting for the tow, Deputy Gibbons of the Bighorn County Sheriffs Officer responded to assist. Deputy Gibbons further coordinated with Lt. Brown and SA Kevin Proctor resulting in the decision to have Joshua and his son transported to the Crow Agency Police Department to be interview by SA Kevin Proctor of the BIA.

I secured the items seized from the Dodge in the trunk of my patrol unit. I sealed the Doors, gas cap, and hood of the Dodge with evidence tap and Lt. Brown remained on scene for sight security until the tow could arrive. I advised Joshua of his legal rights and transported Joshua and his child to the Crow Police Department

where I met with SA. K. Proctor and explained the situation.

SA Proctor took possession of all suspected controlled substances (approximately 260 grams) and cell phones that I had seized during my initial contact with Joshua (see evidence custody document). SA Proctor conducted invited an Investigator from Sheridan Wyoming to participate in the investigation. SA Proctor and the Investigator from Sheridan conducted an interview with Joshua at the Crow Police Department resulting in Joshua choosing to sign written consent to search the remainder of the Dodge for additional evidence (see report of K. Proctor for details of his interview with Joshua for which I was not present).

During this investigation it was revealed that Joshua's license was suspected. Joshua was subsequently arrested by Deputy Gibbons for state driving offenses and criminal endangerment of a child. Joshua was transported to the Bighorn County Jail for booking.

Lt. Brown coordinated identified the mother of Joshua's child and made arrangements for the child to be picked up by the mother. The Montana Department of Family Services was also notified of this incident. (please refer to report of Lt. Brown for additional information of her actives during this investigation).

Upon arrival of the Dodge to the Crow Police Department the consent to search was executed upon the truck which revealed several additional items of evidence to include but limited to an additional 96 grams of suspected methamphetamine, an AK-47 style assault rifle, and thermal imaging devices and radio equipment believed to be the property of the U.S. Government (BIA).

[SEE EVIDENCE CUSTODY DOCUMENTS FOR DETAILS OF ITEMS SEIZED]

All items seized where photographed, documented, sealed, and secured in evidence property lockers. During processing of the evidence I conducted a field test kit of residue located on seized drug paraphernalia which resulted in a presumptive postie result for the presence of methamphetamine.

The money seized was counted and totaled to be $52,655.

Further investigation is forwarded to the BIA Drug Task Force. Physical evidence, photographs, dash video/audio available upon request. I declare under penalty of perjury that the information as set forth above is true and correct to the best of my knowledge.

ARREST MADE {x} INVESTIGATING OFFICERS {} UNFOUNDED {} SOLVED EXCEPTIONALLY{}

OFFICER'S SIGNATURE:

/s/ JAMES D. SAYLOR BADGE #: 139
JAMES D. SAYLOR