UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CHARLES HARTSELL, JR., Plaintiff, *pro se*, v SERGEANT ADAM SCHAAF, OFFICER ERICK JORDAN, OFFICER DAVID LOZA, OFFICER JOHN DOE ONE, OFFICER JOHN DOE TWO Defendants.	Case No. 3:20-CV-505-JD-MGG Hon. Jon E DeGuilio

CHARLES HARTSELL, JR.
Plaintiff, *pro se*
P.O. Box 20000
White Deer, PA 17887

O'NEILL, WALLACE & DOYLE, P.C.
BY: TOBIN H. DUST (P36741)
GREGORY W. MAIR (P67465)
Attorneys for Defendants
300 St. Andrews Road, Suite 302
Saginaw, MI 48638
(989) 790-0960 / *tdust@owdpc.com*

DEFENDANTS' MOTION TO DISMISS

NOW COMES Defendants, SERGEANT ADAM SCHAAF, OFFICER ERICK JORDAN AND OFFICER DAVID LOZA by and through their attorneys, O'Neill, Wallace & Doyle, P.C., and for their Motion to Dismiss state to this Honorable Court as follows:

1.) This Motion is brought pursuant to Fed. R. Civ. P. 12(b)(1), and / or (6).

2.) Defendants, while acting in their capacity as tribal police officers are empowered to: (a) investigate potential violations of state or federal laws by non-Indians within the Indian country of the Pokagon Band of Potawatomi Indians, a federally recognized Indian tribe ("Tribe"); and (b) to detain and search non-Indians to otherwise safeguard the community

because the exercise of such power is a vital component of the Tribe's inherent authority and goes to the heart of the Tribe's right to self-govern.

3.) At all times Plaintiff complains of alleged unlawful search and seizure, Defendants were acting: (a) solely within Indian country; (b) solely in their capacity of tribal police officers under the authority granted to them by the Tribe; and (c) wholly independent of their authority pursuant to a law enforcement cross-deputization agreement with St. Joseph County Sheriff's Department, Indiana. Therefore, the Defendants were not acting under color of state law.

4.) The Tribe is the real party in interest and, accordingly, this action is barred by the Tribe's sovereign immunity from suit, which has not been expressly waived by Congress or the Tribe.

5.) For the reasons and based upon the authority as set forth in the attached Brief in Support of this motion, Plaintiff's Complaint must be dismissed.

WHEREFORE, Defendant Sgt. Adam Schaaf, Officer Erick Jordan, and Officer David Loza, respectfully request that this Honorable Court grant their motion and enter an order dismissing Plaintiff's claims against them with prejudice.

Dated: August 6, 2021

Respectfully Submitted,
O'NEILL, WALLACE & DOYLE, P.C.

/s/ TOBIN H. DUST

Tobin H. Dust (P36741)
Gregory W. Mair (P67465)
Attorneys for Defendants
300 St. Andrews Road, Suite 302
Saginaw, MI 48638
(989) 790-0960

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CHARLES HARTSELL, JR., Plaintiff, *pro se*, v SERGEANT ADAM SCHAAF, OFFICER ERICK JORDAN, OFFICER DAVID LOZA, OFFICER JOHN DOE ONE, OFFICER JOHN DOE TWO Defendants.	Case No. 3:20-CV-505-JD-MGG Hon. Jon E DeGuilio

CHARLES HARTSELL, JR.
Plaintiff, *pro se*
P.O. Box 20000
White Deer, PA 17887

O'NEILL, WALLACE & DOYLE, P.C.
BY: TOBIN H. DUST (P36741)
GREGORY W. MAIR (P67465)
Attorneys for Defendants
300 St. Andrews Road, Suite 302
Saginaw, MI 48638
(989) 790-0960 / tdust@owdpc.com

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

NOW COME Defendants, SERGEANT ADAM SCHAAF, OFFICER ERICK JORDAN and OFFICER DAVID LOZA, by and through their attorneys, O'Neill, Wallace & Doyle, P.C., states as their Brief in Support of its Motion to Dismiss as follows:

INTRODUCTION

Plaintiff Charles Hartsell Jr.'s (hereinafter "Plaintiff") Complaint alleges claims of civil rights violations under 42 U.S.C. 1983. *See Exhibit 1,* Plaintiff's (Second) Amended Complaint. These allegations arise out of an incident that occurred on February 23, 2019 on South Bend Four Winds Casino property that resulted in Plaintiff's arrest. *See Exhibit 1.* Plaintiff alleges that his search and seizure violated his Fourth Amendment rights, and he brings this suit against Sergeant

Adam Schaaf ("Sgt. Schaaf"), Officer Erick Jordan ("Officer Jordan") and Officer David Loza ("Officer Loza") in their personal capacity.

However, Plaintiff's claims must fail because Defendants are tribal police officers employed by the Pokagon Band of Potawatomi Indians ("Tribe") and when Plaintiff was detained and searched, Defendants were acting: (1) solely in the capacity of tribal police officers under the authority granted to them by the Tribe consistent with the Tribe's inherent sovereign authority; and (2) wholly independent of their authority pursuant to a law enforcement cross-deputization agreement with St. Joseph County Sheriff's Department, Indiana ("Cross Deputization Agreement"). Accordingly, the Defendants were not acting under color of state law as required to sustain Plaintiff's claims.

Also, the Tribe is the real party in interest, and neither Congress nor the Tribe has expressly waived the Tribe's sovereign immunity from suit. The Tribe's interests are directly and significantly implicated in this matter, which goes to the heart of its inherent sovereign power. Therefore, the Tribe's sovereign immunity from suit extends to the Defendant tribal officers as well notwithstanding the manner in which Defendant has styled his Complaint. Consequently, Plaintiff's claims should be dismissed in their entirety.

STATEMENT OF MATERIAL FACTS

On the afternoon of February 23, 2019, Defendant, Officer Jordan, a tribal police officer, was dispatched to the South Bend Four Winds Casino to investigate a report of suspicious behavior believed to involve counterfeit money. *See Exhibit 2*, Police Report, pg. 13. Officer Jordan spoke with a casino patron who stated that he believed he had been tricked by an unknown man into exchanging a $100 bill in his possession for five $20 counterfeit bills. *See Exhibit 2*, pg. 13. After a slot machine refused to take any of the $20 bills, the casino patron reported to the casino security

that he believed they were counterfeit and he wanted to make a police report. *See Exhibit 2,* pg. 13. Through the use of his casino "player's card" in a slot machine, the casino security team was able to identify the unknown man as Jason Clevenger. *See Exhibit 2,* pg. 14. While viewing the security footage of the incident with members of security team, Officer Jordan watched Mr. Clevenger leave the casino with an unknown man (later identified as this Plaintiff, Charles Hartstell, Jr.). *See Exhibit 2,* pg. 14. The two men got into Plaintiff's vehicle, a grey PT Cruiser, and Plaintiff drove them both to Mr. Clevenger's vehicle, a white Buick Century. *See Exhibit 2,* pg. 14. Officer Jordan could see on the security footage that both men got out of Plaintiff's vehicle, and Mr. Clevenger retrieved an object from his vehicle that appeared to Officer Jordan to be a long rifle concealed under fabric. *See Exhibit 2,* pg. 14. The object was passed to the Plaintiff, who opened the rear driver side door of his vehicle and placed it inside. *See Exhibit 2,* pg. 14. The two men then got back into Plaintiff's vehicle, with Plaintiff driving, and proceeded to leave the casino property. *See Exhibit 2,* pg. 14.

At this point in time, Officer Jordan contacted Sgt. Schaaf, a tribal police officer, to notify him of the incident. *See Exhibit 2,* pg. 14. Sgt. Schaaf, Officer Jordan and Officer Loza, all tribal police officers, were also cross-deputized as St. Joseph County police officers. *See Exhibit 3,* Agreement. Sgt. Schaaf notified command, as well as the FBI at that time, and also arranged for additional law enforcement from St. Joseph County Sheriff's Department to respond if the two suspects returned to the casino. During the subsequent investigation into the incident, the investigating officers were notified by casino security that there had been activity on Mr. Clevenger's casino account. *See Exhibit 2,* pg. 15. Sgt. Schaaf, Officer Jordan, and Officer Loza, along with officers from St. Joseph County Police Department, were dispatched to the casino to make contact with the suspects. *See Exhibit 2,* pg. 15.

The two men were located in the casino and detained. *See Exhibit 2*, pg. 15. Sgt. Schaaf handcuffed Plaintiff there but did not conduct a pat down or search of Plaintiff while on the casino floor. Plaintiff was escorted to a secure room and was at that time searched by Sgt. Schaaf. *See Exhibit 2*, pgs. 63-64. No counterfeit bills were found, although Sgt. Schaaf discovered a narcotic smoking pipe and methamphetamine. Officer Loza then entered the room and read Plaintiff his *Miranda* rights, which Plaintiff stated he understood. *See Exhibit 2*, pg. 19. Plaintiff then openly spoke with Officer Loza, eventually admitting that he had a pistol and rifle in his car. *See Exhibit 2*, pgs. 19-20. Plaintiff later provided oral and written consent for the officers to search his vehicle, and the officers obtained warrants to search Plaintiff's cell phone. *See Exhibit 2*, pg. 16. It was not until after Plaintiff had been detained, brought to the secure room and mirandized that the officers learned that Plaintiff was non-Indian for purposes of tribal criminal jurisdiction. *See Exhibit 5*, Affidavit of Sgt. Adam Schaaf. Plaintiff was subsequently transported to the St. Joseph County Jail. *See Exhibit 2*.

As reflected in the affidavit of Sgt. Schaaf, the Defendants' investigatory detention and search actions in response to Plaintiff's suspected criminal activities within Indian country were undertaken: (1) solely within Indian country; (2) solely in the course and scope of their employment as tribal police officers; (3) solely under the authority granted to them as tribal police officers by the Tribe; and (4) wholly independent of their authority pursuant to the Cross Deputization Agreement. Importantly, when Plaintiff was detained and searched, the Defendants were acting solely in their capacity of tribal police officers under the authority granted to them by the Tribe to protect and safeguard the tribal community.

Plaintiff was initially charged on state law crimes, which were later dismissed and replaced with one federal count of unlawfully possessing a firearm as a felon pursuant to U.S.C. 922(G)(1).

Plaintiff ultimately pled guilty to one count of conspiring to sell one or more firearms to a known drug user under 18 U.S.C. 371.922(d)(3). *See Exhibit 5*, Sentencing Memo.

MOTION STANDARD

The instant motion requests dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and / or (6). A motion based upon sovereign immunity can be characterized as a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. 12(b)(1). The Court may consider evidence outside the pleadings to make necessary factual determinations to resolve its own jurisdiction. *Estate of Osuyuwamen OJO v United States of America*, 2013 WL 2480739; *Apex Digital, Inc. v Sears, Roebuck & Co.*, 572 F3d, 440, 444, (7th Cir. 2009). The 7th Cir. has indicated that evidentiary materials can be considered and resolved in a motion brought pursuant to Fed. R. Civ. P. 12(b)(1) and that challenges to jurisdiction should be dealt with under Rule 12(b)(1). *Midwest Knitting Mills v United States*, 741 F Supp 1345, 1348, (E.D. Wisc. 1990) aff'd 950 F2d 1295 (7th Cir. 1991). Matters outside the pleadings need be considered only insofar as the jurisdictional issue is intertwined with the issue of whether the Plaintiff has established all the essential elements of claims upon which relief can be granted. *Midwest Knitting Mills, Inc., supra* citing *Roman v United States Postal Service*, 821 F2d 382, 385 (7th Cir. 1987).

When subject matter jurisdiction is at issue, the burden of proving the jurisdictional allegations is on the party asserting jurisdiction. *Graffon Corp. v Hausermann*, 602 F2d 781, 783 (7th Cir. 1989).

Motions upon immunity have also been treated as motions pursuant to Fed. R. Civ. P. 12(b)(6), however if matters outside the pleadings are presented to and not excluded by the Court, the motion may be treated as one for summary judgment under Rule 56. *Halker v United States*, 2010 WL 2838468. *See Exhibit 6*.

LAW AND ARGUMENT

I. PLAINTIFF'S DETENTION AND SEARCH WAS CLEARLY AN EXERCISE OF DEFENDANTS' INHERENT TRIBAL AUTHORITY

As a general rule, the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565, 101 S. Ct. 1245, 67 L. Ed. 2d 493. The Court in this case recognized two exceptions to this general rule: 1) if the nonmembers entered "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or 2) the nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-6. The Supreme Court later relied on the second exception to the general rule in its opinion for *United States v. Cooley* to hold that tribal police officers have the authority to temporarily detain and search non-Indians who are traveling on public right of ways passing through reservations, because the non-Indians' conduct threatens "the health or welfare of the tribe." *United States v. Cooley*, 141 S. Ct. 1638, 1639 (2021).

In *United States v. Cooley*, a tribal police officer approached a vehicle parked on a public right of way within the Crow reservation. *Id.* at 1639. He noticed that the driver, who he suspected to be non-Indian, had bloodshot eyes. *Id.* The officer also noticed two semiautomatic rifles lying on the passenger seat. *Id.* The tribal officer ordered the driver out of the vehicle and conducted a pat-down, fearing that the driver may become violent. *Id.* Later, methamphetamine was located inside the vehicle as well. *Id.* Additional tribal and county officers responded to the scene. *Id.* at 1642. The driver was taken to the Crow Police Department, where federal and local officers questioned him. *Id.* He was then charged with gun and drug charges. *Id.* The driver subsequently sought to suppress the evidence discovered during his stop and search. *Id.*

The Ninth Circuit ruled in the driver's favor, holding that tribes "cannot exclude non-Indians from a state or federal highway," and "lack the ancillary power to investigate non-Indians who are using such public rights of way." 919 F. 3d 1135, 1141 (2019). However, the court held that a tribal officer *could* stop and hold for a reasonable period of time a non-Indian suspect only if the officer first attempted to determine whether the suspect was an Indian, and if, the suspect was an Indian, that it was "apparent" to the officer that the individual had violated state or federal law. *Id.* at 1142. The Ninth Circuit opined that the tribal officer in that case did not sufficiently try to determine whether the driver was an Indian during the initial stop, and therefore ruled that the evidence discovered during the investigatory stop correctly had been suppressed by the lower court. *Id.*

The Supreme Court overruled the Ninth Circuit's ruling, ultimately holding that the tribal officer was acting under the inherent authority of the Indian tribe as a tribal police officer. *Id.* at 1640. The Court emphasized in its opinion that "recognizing a tribal officer's authority to investigate potential violations of state or federal laws that apply to non-Indians whether outside a reservation or on a public right-of-way within the reservation protects public safety without implicating the concerns about applying tribal laws to non-Indians noted in the Court's prior cases." *Id.* Notably, the Court recognized that "to deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats," including, as the Court pointed out, "non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation." *Id.* at 1643. The Court indicated that the tribal officers' inherent authority to search and detain non-Indians doesn't subsequently subject the non-Indian to tribal law, but to suspected violations of state and federal law. *Id.* at

1645. Lastly, the Supreme Court explicitly rejected the Ninth Circuit's standard requiring tribal officers to first determine whether the suspect is a non-Indian, permitting "temporary detention only if the violation of law is "apparent." *Id.* at 1643. The Supreme Court noted that it doubted the workability of this standard, as it would create an incentive for suspects to lie about their status as an Indian and would also introduce a new standard into search and seizure law.

The ruling in *United States v. Cooley* directly supports the position that wholly independent of their authority under the Cross Deputization Agreement, Defendants possessed the authority to detain and search Plaintiff within Indian country, while Defendants were acting in the course and scope of their employment as tribal police officers under the authority granted to them as tribal police officers by the Tribe.

In the present case, tribal police officers were investigating unrelated suspected criminal activity when they witnessed on surveillance footage what they believed to be Plaintiff receiving what appeared to be firearms on the Tribe's casino property before leaving the scene. While conducting an investigation into both the original suspicious counterfeit money and the suspected gun exchange, the officers received notice that Mr. Clevenger and Plaintiff had returned to the casino property. The tribal police officers were not required to first ascertain whether Plaintiff was Indian before they stopped him, as the Supreme Court made clear in *United States v. Cooley*. The tribal police officers subsequently detained Plaintiff to further investigate Plaintiff's suspected criminal activity. The tribal police officers in this case were concerned about Plaintiff's activities and moved quickly to investigate and prevent any threat that Plaintiff may have posed. Officer Jordan immediately believed he had identified a firearm being hidden under the sheets, which raised his concern and precipitated his relay of this information to Sergeant Schaaf. *Exhibit 2*, pg. 14. This is the very sort of threat to the wellbeing of the Tribe that the opinion in *Cooley* confirmed

the Tribe has the inherent authority to protect against. It is abundantly clear that Sgt. Schaaf, Officer Jordan and Officer Loza were acting within their inherent authority as tribal police officers when Plaintiff was searched and detained within the Tribe's Indian country.

II. THE TRIBAL OFFICERS WERE ACTING SOLELY PURSUANT TO THEIR TRIBAL AUTHORITY AND WHOLLY INDEPENDENT OF THE CROSS-DEPUTIZATION AGREEMENT

Plaintiff alleges in his Complaint that the tribal police officers were, at the time of his search and seizure, acting in concert with county police officers, therefore conducting themselves under color of state law. *See Exhibit 1*, pg. 5.[1] In *Eyck v. United States*, the Court distinguished tribal police officers who were acting pursuant to their tribal authority and those who were acting under the color of state law. 463 F. Supp. 3d 969, 989 (D. S.D., 2020). Plaintiffs in that case argued that the employees of the tribal police department were acting in their role as police officers "pursuant to a Section 638 contract entered into with the United States Government which renders them employees of the United States Government. The Plaintiffs in that case also allege that at all relevant times, [the tribal officer] was acting as the tribe's Chief of Police under color of state and federal law." *Eyck*, 463 F. Supp. 3d at 973. The Court agreed with the Plaintiff in that case on this point, emphasizing that the investigation occurred off tribal property and holding that although the Defendant police chief was acting within his role as the tribe's Chief of Police, "his authority to assist with state law matters off tribal land specifically derived from the section 638 contract entered into by and between the Tribe and the Federal Government." *Id.* at 974. Section 638 contracts render tribal officers employees of the United States Government for certain purposes. *Id.* "Tribal police do not otherwise have authority to assist with state law matters on non-tribal

[1] Plaintiff's Complaint does not specify at what time and what specific action by each Defendant was allegedly undertaken under color of state law, only that they so acted when Plaintiff was seized, arrested and illegally searched. (*Exhibit 1*, par. 26, pg. 5).

land," and therefore the police chief was acting under color of federal and state law rather than tribal. *Id.* at 974.

The Court differentiated this holding from other similar cases in which the tribal police officers were subject to Section 638 contracts. In one, *Boney v. Valline*, a tribal police officer employed by a tribal police department subject to a section 638 contract was responding to a report of drunk driving by a tribal member on the reservation. 597 F. Supp. 2d 1167 (D. Nev. 2009). Plaintiff later brought a *Bivens* claim against that tribal police officer arising out of this event, claiming that the tribal police officer was acting under color of federal law because of the Section 638 contract. *Id.* Instead, the court opined that one factor courts should consider "in determining whether the federal government could be held liable for the tribal officer's conduct was whether he was performing a function that was traditionally within the exclusive prerogative of the federal government." *Id.* at 1172. In considering this factor, the *Boney* court found that based on the facts available, the tribal police officer was not "performing a function that was traditionally within the exclusive prerogative of the federal government," but was rather "acting under the Tribe's inherent tribal sovereignty" in enforcing tribal criminal laws against tribal members. *Id.* at 1178.

It is evident that Sgt. Schaaf, Officer Jordan and Officer Loza were performing their functions under their inherent authority as tribal officers independent of the Cross Deputization Agreement. Although Defendants worked with county and federal law enforcement in investigating this matter and detaining Plaintiff and, under the Cross Deputization Agreement, were cross-deputized as state law enforcement officers of the St. Joseph County Sheriff's Department, they were not performing a function that was traditionally within the exclusive prerogative of the federal or state government. Rather, the officers in this case stopped and investigated Plaintiff within the Tribe's Indian country as they expressly are permitted to do pursuant in their capacities as tribal police officers under the

Tribe's inherent authority, as established in *Cooley*. Their status as cross-deputized state officers and involvement with the county and federal law enforcement does not diminish the Tribe's inherent authority or alter the Defendants' ability to act in their capacity as tribal police officers under the Tribe's inherent authority. Accordingly, Defendants were not acting under the color of state law.

III. PLAINTIFF'S COMPLAINT IS BARRED BY SOVEREIGN IMMUNITY

Under federal law, Indian tribes have immunity not only from liability but also from suit, except where: (1) Congress has expressly authorized such a suit; or (2) the Tribe has expressly waived its immunity by consenting to suit. *Turner v. United States*, 248 U.S. 354 (1919); *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977). Tribal sovereign immunity also extends to tribal officers and employees for official capacity suits. *Lewis v. Clarke*, 137 S. Ct. 1285, 1286 (2017). However, it is possible for a tribal officer or employee who is sued in their individual capacity for money damages to avail themselves of the protection of tribal sovereign immunity under certain circumstances. *Id.* at 1290.

Importantly, the Supreme Court has emphasized that "the distinction between individual- and official-capacity suits is paramount. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Id.* at 1291. "Notably, it is not sufficient for courts to merely rely on the "characterization of the parties in the complaint," but rather must determine "whether the remedy sought is truly against the sovereign," even if the tribe itself is not named in the suit. *Id.*

In this regard, the Supreme Court emphasized that courts should look to whether the tribe is "the real party in interest to determine whether sovereign immunity bars the suit." *Id.* at 1291. The general rule for "determining when a suit is in fact against the sovereign is the *effect* of the

relief sought." *Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 107, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*. Therefore, "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the *effect* of allowing the suit would be to either restrain the tribe from acting or compelling it to. *Eyck v. United States, supra* 978.

As set forth above, the standards stated in *Lewis v. Clarke* were discussed in *Eyck v. United States, supra.* The *Eyck* Court emphasized that there was no language in the Supreme Court precedent that required it to conclude that a tribal official is precluded from invoking the defense of tribal sovereign immunity to a claim for money damages alleged against the officer in his individual capacity *if* such claim arises from the officer exercising the tribe's inherent sovereign powers." *Id.* at 980. Specifically, the Court in *Eyck* establishes that barring sovereign immunity for individual tribal officers in a case like this "would have the effect of interfering with a tribe's inherent powers of self-government." *Id.*

The Court in *Eyck* distinguished its holding from the Court's ruling in *Lewis v. Clarke* by emphasizing that the "tribal employee in *Lewis* was not exercising the Tribe's inherent powers of self-government." *Id.* 980. In the *Lewis* case, the opinion of *Eyck* points out, the defendant was a tribal employee of the casino driving a vehicle on non-tribal lands when the accident occurred, and was sued to "recover for his personal actions." *Id.* Any recovery from him would "not require action by the sovereign or disturb the sovereign's property." *Id.* (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949)). While the opinion in *Eyck* is not binding on this Court, it does reflect the stance of many other courts on how sovereign immunity should be applied to individual tribal officials and employees. *Id.* at 980-3.

Plaintiff's claims are barred by the Tribe's inherent sovereign immunity. While the Court in *Lewis* held that generally tribal sovereign immunity did not extend to tribal employee's individual actions, this Court should look to what *effect* of not applying sovereign immunity to Defendants will have on the Tribe, which has a substantial interest in being able to properly investigate suspected violations of law, including state and federal law within its Indian country, including by non-Indians. The Supreme Court has held as much in *United States v. Cooley*, making clear that a tribe's interest in the welfare and public safety of the tribe is the source of its inherent authority to investigate non-Indians in these scenarios.

In this case, the Tribe has a considerable interest in not becoming a soft target. The seriousness of the charges brought against Plaintiff underscore the substantial concern that the Tribe has in having the ability to investigate and prevent similar threats. The seriousness of the Plaintiff's actions are confirmed by his present incarnation based upon his plea to a federal firearms charge. Unlike the tribal employee in *Lewis*, a casino driver who was denied the protection of the tribe's sovereign immunity by the Court, the officers in this case were exercising inherent tribal authority at the very heart of the tribe's power of self-government. Their inherent authority as tribal police officers is clearly established under the *Cooley* holding. Because the Tribe's ability to investigate and prevent non-Indians from violating state and federal law within its Indian country is so central to its ability to self-govern, actions by tribal police officers in furtherance of such interest goes to the very heart of the Tribe's sovereign power. Any suit brought against tribal police officers acting under that inherent authority must be seen as a suit against the interests of the Tribe itself. It is clear in cases such as this one that the real party in interest in the suit is the Tribe, rather than merely Defendants in their individual capacities. Because the Tribe is the real party in interest in

this suit, this suit is barred by the Tribe's sovereign immunity because neither Congress nor the Tribe has expressly waived such immunity.

Accordingly, in the first instance, Plaintiff's action is barred by sovereign immunity.

CONCLUSION

WHEREFORE, for the reasons stated, Defendants, SERGEANT SCHAAF, OFFICER JORDAN AND OFFICER LOZA, respectfully request that this Honorable Court GRANT their instant Motion for Dismissal, and DISMISS Plaintiff's Complaint in its entirety, with prejudice.

Dated: August 6, 2021

Respectfully submitted,
O'NEILL, WALLACE & DOYLE, P.C.

/s/TOBIN DUST
Tobin Dust (P36741)
Gregory W. Mair (P67465)
Attorney for Defendants
300 St. Andrews Road, Suite 302
Saginaw, MI 48638
(989) 790-0960

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing paper with the Clerk of the Court using the ECF system.

I also hereby certify that I filed the foregoing paper with Plaintiff Pro Se by regular mail, with postage fully prepaid thereon and depositing said envelope and its contents in an official United States Mail receptacle at the following address:

Charles Hartsell, Jr.
47759-048
Allenwood FCI – 2000 – Medium
Federal Correctional Institution
Inmate Mail/Parcels
P.O. Box 2000
White Deer, PA 17887

Dated: August 6, 2021

Respectfully submitted,
O'NEILL, WALLACE & DOYLE, P.C.

/s/TOBIN DUST
Tobin Dust (P36741)
Gregory W. Mair (P67465)
Attorney for Defendants
300 St. Andrews Road, Suite 302
Saginaw, MI 48638
(989) 790-0960