NO: 08-20-00180-CR

IN THE EIGHTH COURT OF APPEALS

FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

THE STATE OF TEXAS, Appellant

V.

RAMON ASTORGA, Appellee

APPELLEE RAMON ASTORGA'S BRIEF
ORAL ARGUMENT IS NOT REQUESTED

ON APPEAL FROM 20190D06768
IN THE
243RD JUDICIAL DISTRICT COURT
EL PASO COUNTY, TEXAS
HON. SELENA N. SOLIS, JUDGE PRESIDING

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Texas Code of Criminal Procedure

Treatises

Texas Rules of Appellate Procedure

Constitutional Provisions

Websites

United States Code

Texas Health and Safety Code

Tribal Traffic Code

Tribal Peace Code

Texas Transportation Code

TO THE HONORABLE EIGHTH COURT OF APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

Mr. Astorga believes that the arguments are set forth fully in this brief and is not requesting oral argument at this time. However, if this Court finds that oral argument would aid in the resolution of this appeal, he does not waive his right to oral argument.

STATEMENT OF THE CASE

Ramon Astorga was indicted for knowing possession of between 4 and 200 grams of methamphetamine, with intent to deliver. It was alleged in the indictment that he had a prior conviction for distribution of a controlled offense which had become final prior to the commission of the primary offense. (CR, p. 7)[1]. The defense filed a motion to suppress evidence.[2] On March 11, 2020, a hearing was held on the motion.[3] The record was supplemented at the invitation of the trial court by both the State and the defense.[4]

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[1] Citations to the Clerk's Record will appear as CR and page number. Citations to the Reporter's Record will appear as RR, volume, and page number. Citations to the State Exhibits will appear as SX and exhibit number or letter. Citations to the Defense Exhibits will appear as DX and exhibit number or letter.
[2] CR, pp. 22-27.
[3] CR, p. 57.
[4] CR, pp. 32-34.

On August 7, 2020, the trial court issued an order granting Astorga's motion to suppress.[5] The trial court issued findings of fact and conclusions of law on August 26, 2020.[6]

The State filed a written notice of appeal on August 27, 2020.[7]

REPLY TO STATE'S POINTS OF ERROR

I. Appellant's first point of error is multifarious and preserves nothing for review.

II. Appellant failed to preserve error by failing to raise the arguments raised on appeal at the trial level.

III. Astorga's arrest and search were not authorized under Tribal law. Tribal officers had no authority under Tribal law to arrest Astorga and to search him incident to that arrest.

IV. Astorga's arrest and search were not authorized by federal law. Tribal officers had no authority under

[5] CR, p. 57.
[6] CR, pp. 61-68.
[7] CR, pp. 69-70.

federal law to arrest Astorga and to search him incident to that arrest.

V. Tribal officers had no authority to detain Astorga under state law.

VI. Tribal officers had no authority to arrest Astorga under state law.

VII. Tribal officers had no authority to search Astorga under state law.

VIII. Astorga's detention, arrest, and search violated the Fourth Amendment.

IX. Astorga's detention, arrest, and search violated the Indian Civil Rights Act. (ICRA).

X. Astorga's strip search violated the Indian Civil Rights Act. (ICRA).

XI. Astorga's strip search violated the Fourth Amendment.

XII. Astorga's strip search violated Texas Law.

STATEMENT OF FACTS

Ramon Astorga was arrested on the 30th day of January, 2019, by the Ysleta Del Sur Pueblo Police Department.[8] (Hereinafter, YDSPPD or Tribal Police). He was stopped at the intersection of Socorro and Zaragoza street in El Paso County, Texas, off of the reservation and arrested without a warrant.[9] He was told that he was stopped because he failed to use his blinker coming out of a parking lot.[10] At the time of the traffic stop, he was searched and no contraband was found.[11] His vehicle was searched.[12] No drugs were found in the automobile, just a pipe believed to be paraphernalia.[13] He was searched two additional times at the Tribal police station at the result of his arrest.[14] The police did not have a search warrant to conduct the searches of his person or his vehicle.[15] It was never established by the State (or even alleged) that Astorga is an Indian.

[8] RR 2, pp. 6-7.
[9] RR 2, pp.6- 7, 14, 16.
[10] CR, pp. 7-8.
[11] RR 2, p. 8.
[12] RR 2, p. 8.
[13] RR 2, p. 48.
[14] RR 2, p. 8.
[15] RR 2, p. 8.

Officer Alarcon conducted the initial traffic stop of Mr. Astorga on January 30, 2019, He had a partner that arrived on the scene, Officer Villar,[16] to assist.[17] Sergeant Perez also was at the scene.[18]

Astorga had failed to initiate the turn signal while exiting the parking lot belonging the Speaking Rock Entertainment Center,[19] violating the Ysleta Del Sur Traffic Code (YDS Traffic Code), rules of the road, 6.8.150 .[20] Under the YDS traffic code parking lots are defined as a "roadway".[21] There was no other reason to stop Astorga other than a violation of the YDS Traffic Code.[22] Under the YDS Traffic Code a signal is required for turning out of a parking lot.[23] Cross examination of Alarcon focused on whether the YDS Traffic Code actually had been violated.[24] Closing arguments on the motion to suppress also centered on whether Tribal Law was actually violated

[16] RR 2, p. 21 transcript refers to Villa but Villar appears to be correct.
[17] RR 2, p. 21.
[18] RR 2, P. 23.
[19] RR 2, pp. 14-15.
[20] RR 2, pp. 19-20.
[21] RR 2, p. 49. SX 1, p. 2.
[22] RR 2, pp.33-37.
[23] YDS Traffic Code § 6.8.150.
[24] RR 2, pp.31, 35, 36, 36-37, 37, 39, 39-40, 40, 40-41,53.

by the turn signal violation and it was noted that Texas law was different but did not apply.[25]

In the dash cam video[26] (without audio) of the stop, two officers are seen approaching the vehicle with a third officer close behind. An officer can be seen looking into the backseat of the vehicle.[27] Astorga is seen being handcuffed.[28] A very thorough search of Astorga is done.[29] His property is placed in Ziplock bags.[30] His cap is searched.[31] Astorga is placed in the Tribal Patrol car.[32] While he is in the patrol car, handcuffed, Tribal Police officers continue to search his vehicle.[33]

An open container was observed in the vehicle, a violation of the Ysleta del Sur Peace Code (Peace Code).[34] When the open containers were being retrieved from the vehicle, a clear white glass pipe was found in the vehicle.[35] It was believed to be a pipe used to

[25] RR 2, pp. 56-57, 58-59, 61
[26] SXD.
[27] SXD.
[28] SXD.
[29] SXD.
[30] SXD.
[31] SXD.
[32] SXD.
[33] SXD.
[34] RR 2, p. 21.
[35] RR 2, p. 23.

smoke methamphetamine.[36] This was also a violation of Tribal Law.[37] Alarcon testified that a search incident to arrest was conducted at that point.[38] Astorga and his passenger were read their *Miranda*[39] rights and they were searched.[40] A thorough search of the vehicle was conducted.[41] Astorga was transported in handcuffs via patrol car to the Tribal Police Headquarters.[42] Another search of Astorga was done as soon as he arrived to the Tribal Police Headquarters.[43]

The State argued these violations of Tribal Law (due to the open containers and the pipe) justified the extension of the stop and the roadside searches.[44] The State also argued that the case would not have been any different if the offender was a member of the Tribe or if the detention had occurred on Tribal Lands.[45] The State further justified the search based on Public Law 280.[46]

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[36] RR 2, p. 25.
[37] RR 2, p. 23.
[38] RR 2, pp. 23-24.
[39] *Miranda v. Arizona,* 384 U S 436 (1966).
[40] RR 2, p. 24.
[41] RR 2, p. 24.
[42] RR 2, p. 26.
[43] RR 2, p. 26.
[44] RR 2, pp. 61, 62.
[45] RR 2, p. pp. 63-64.
[46] RR 2, p. 64.

The Court clarified that the detention was solely based on Tribal Law during closing arguments.[47]

THE COURT: But what I want to make sure is that while the eventual stop was off tribal land, that the – the law, so to speak, that the officers relied on were in -from the traffic code, which I think that it was.

MS. MOORE: They were.

THE COURT: That's what I heard.

MS. MOORE[48]: That's his testimony. And that's why I asked him, 'Was that a violation of tribal law? Is that the law that was applied at the time?' Because it was the stop – the reason for the stop was observed and done by the actor on tribal land. And that was his testimony today. The fact that the stop occurred off tribal land did not change the fact that the infraction was one of tribal law.[49]

Based on these violations of the YDSP Peace and Traffic Codes, Alarcon asked Astorga to exit the vehicle to conduct a further

[47] RR 2, p. 64.
[48] State prosecutor at the trial level.
[49] RR 2, p. 64

investigation.[50] Astorga complied.[51] Alarcon was investigating the open container, not the traffic violation, and opined that he had authority to do so through the Bureau of Indian Affairs (BIA) handbook if he had probable cause.[52] Sergeant Perez with the YDSPPD is the third officer that arrived.[53] Sergeant Perez assisted Alarcon with the defendant.[54] Alarcon testified that at the time the alcoholic beverages were observed inside the vehicle , "[a] decision was made to take him into custody," as there was probable cause.[55] The decision to take him into custody was due to the open containers inside the vehicle.[56] Alarcon advised the El Paso Police Department (EPPD) that Astorga was **placed under arrest** for possession of narcotics paraphernalia prior to being found in possession of the baggies of methamphetamine.[57] Officer Villar, who was assisting Alarcon, also reported that Astorga was placed **under arrest** for possession of narcotics paraphernalia.[58] Astorga was transported to

[50] RR 2, p. 21.
[51] RR 2, p. 21.
[52] RR 2, p. 22.
[53] RR 2, p. 23.
[54] RR 2, p. 23.
[55] RR 2, p. 46.
[56] RR 2, p. 46.
[57] RR 3, p. 111. [Emphasis supplied].
[58] RR 3, p. 113.

Tribal Police Headquarters for processing and was placed in a holding cell .[59]

Alarcon also testified at one point, that although he detained Astorga for further investigation due to finding the pipe, he was not arrested.[60] The Tribal Incident Narrative indicated the commission of the civil infractions of possession of methamphetamine and open container citing to YDSP Infraction Code §§ 4.7.2020 and 6.8.220.[61]

Another search of Astorga was done as soon as he arrived at the Tribal Police Headquarters.[62] It was a secondary pat down to make sure that he had no dangerous items before being placed into a cell.[63] This search of Astorga was more thorough than the one done at the scene, and nothing was found on him.[64] He was placed in a cell at the Tribal Police Department.[65]

At the station, the passenger of the vehicle informed the Tribal Police that the Astorga was attempting to conceal illegal narcotics

[59] RR 3, p. 113. [Emphasis supplied].
[60] RR 2, p. 47.
[61] RR 3, p. 63.
[62] RR 2, p. 26.
[63] RR 2, pp. 26-27.
[64] RR 2, p. 27.
[65] RR 2, p. 51.

within his groin area.[66] At that point a strip search of Astorga was conducted.[67] Astorga was asked to remove his trousers.[68] A bulge in his underwear was noted before he was asked to remove his underwear.[69] Astorga's genitals were searched and a clear plastic baggy containing other multiple bags was found.[70] The substance was field tested at the station and was positive for methamphetamine.[71] The lab report indicated 27.77 grams of methamphetamine.[72] At this point, Officer Alarcon turned the case over to the EPPD.[73]

Officer Alarcon enforces the YDSP government traffic code and the YDSP Peace Code.[74] The YDSP traffic code details everything from driver's licenses to vehicle insurance.[75] The YDSP Peace Code addresses such violations as trespass, illegal drugs, or

[66] RR 2, p. 27.
[67] RR 2, p. 27-28.
[68] RR 2, pp. 27-28.
[69] RR 2, p. 29.
[70] RR 2, p. 28.
[71] RR 2, pp. 28-29, 30.
[72] CR, p. 46.
[73] RR 2, p. 30.
[74] RR 2, p. 12. SX 1.
[75] RR 2, pp. 12-13.

anything of that nature.[76] Those codes are what Officer Alarcon uses to enforce the laws on the reservation.[77]

Alarcon testified that "we model public law 280" and that allowed Tribal law enforcement to have concurrent jurisdiction with the State of Texas and enforce their traffic laws and peace code laws on property adjacent to the reservation when the violation occurred on the reservation.[78] He further testified that, when probable cause is found criminally, he was allowed to "initiate an investigation" and he was able to contact other agencies such as EPPD for other resources.[79] He opined that it did not matter if the driver of the vehicle or the offender was a Tribal member or not.[80]

Alarcon testified that Public Law 280 "goes through" SLEC cards, special law enforcement commission cards, which is why Tribal Police are able to enforce the law through the Bureau of Indian Affairs handbook.[81]

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[76] RR 2, p. 12.
[77] RR 2, p. 13.
[78] RR 2, p. 17.
[79] RR 2, pp. 17-18.
[80] RR 2, p. 18.
[81] RR 2, p. 46.

The Tribal Peace Code actually refers to Public Law 100-89, [Restoration Act, attached to this brief as Exhibit A], it does not refer to Public Law 280.[82] It also stipulates that a person committing a violation under the Tribal Peace Code will be subject to a civil assessment, which is basically a fine.[83]

SUMMARY OF THE ARGUMENTS

The State's first point of error challenges the trial court's ruling under two distinct legal theories. As such, that point of error is multifarious, preserves nothing for review, and should be denied on that basis. In addition, the State argues for the first time on appeal that the search was justified by the Tribal Police's enforcement of state law. At the trial level, the State argued tribal law justification for the Tribal Police's detention, arrest, and ultimate strip search. As such, the State failed to preserve error and that point of error should be denied on that basis. This Court can uphold the trial court's ruling for reasons not raised at the trial court or even contemplated at the

[82] RR 3, p. 66.
[83] Peace Code § 4.2.10. RR 3, pp. 70-71.

trial court; however, it cannot reverse the trial court's ruling for reasons not raised below.

The State has not shown that the trial court clearly abused her discretion in granting the motion to suppress. Her fact findings, the fact-intensive findings of law made to support her ruling, and her ruling suppressing the evidence in this case are entitled to deference. Further, this Court is not bound by concessions made at the trial court level and can affirm the trial court's ruling due to the unlawful initial detention made in violation of State law. Under conflict of law principles - the law of the forum controls the admission of evidence, in this case the admission of the evidence found during the strip search. That strip search was conducted in violation of Texas law and was the fruit of a detention that was unlawful under Texas law.

The evidence obtained in this case was the result of the Tribal Police exploiting an unlawful arrest and should be suppressed. This was an arrest and not a detention. The trial court, who viewed the testimony, so found. The restriction upon Astorga's freedom of movement was consistent with a formal arrest and not a detention. He was handcuffed, placed in a patrol car, transported in a patrol car to

the Tribal Police headquarters, searched again, placed in a cell, and then subjected to a humiliating strip search.

It strains credulity to think that this was a mere detention rather than a full-blown-custodial arrest. Tribal law simply does not authorize any arrests. It provides only for the assessment of fines. Federal law does not authorize this arrest, as there was no evidence of a request by the EPPD for assistance or a cross-deputization agreement. The Restoration Act -Texas is not a Public Law 280 State- does not authorize this detention, arrest, or search. It limits Tribal Law enforcement authority by transferring that authority to the States. State law does not authorize the detention, arrest, or search: the initial detention was not authorized under State law: YDSPPD are not defined as peace officers under Texas law and could not lawfully arrest or detain. The strip search is not authorized under Texas law.

Further, the strip search violated Federal law, Indian law, and State law because it was based on a tip which did not state the basis of knowledge that Astorga had contraband concealed in his underwear.

REPLY TO THE APPELLANT'S POINTS OF ERROR

I. Appellant's first point of error is multifarious and preserves nothing for review.

The State's first point of error alleged that:

> The trial court erred by concluding that the PTPD officers illegally detained or arrested Astorga after the officers discovered a methamphetamine pipe in his vehicle because:
>
> (1) Tribal police officers are allowed to assist outside law-enforcement agencies with enforcement of state law; and
> (2) Astorga's detention was reasonable under the Fourth Amendment.

This point of error raises two separate and distinct points of error challenging the trial court's ruling under two distinct legal theories: one raising the Tribal Police officer's authority to act and the other raising the constitutionality of their actions. A point of error that embraces more than one specific ground of error is multifarious.[84] A court may refuse to consider a point of error that is multifarious.[85] By combining more than one contention in a single point of error, an

[84] *Bell v. Texas Dep't of Criminal Justice,* 962 S. W. 2d 156, 158 n. 1 (Tex. App. – Houston [14th Dist.] 1998- no pet.).
[85] *Davidson v. State,* 249 S. W. 3d 709, 717-718 n. 2 (Tex. App. – Austin 2008 – pet. ref'd).

appellant risks rejection on the ground that nothing will be presented for review.[86]

II. Appellant failed to preserve error by failing to raise the arguments raised on appeal at the trial level.

The party complaining about the trial court's ruling bears the burden of preserving error for review.[87] Ordinarily, the appealing party must have raised a particular complaint at trial before he can raise it on appeal.[88] Preservation rules are judge protection rules.[89] In suppression cases in which the State is the appellant, the basic principle of appellate jurisprudence - that arguments not presented in the trial court are deemed waived – applies. [90] Ordinary notions of procedural default should apply equally to the defendant and to the State.[91] The trial court cannot be held to have abused its discretion in ruling on the only theory of law presented to it by the State.[92]

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[86] *Sterling v. State,* 800 S. W. 2d 513, 521 (Tex. Crim. App. 1990).
[87] *Bonilla v. State,* 452 S. W. 3d 811, 813 (Tex. Crim. App. 2014).
[88] *Darcy v. State,* 488 S. W. 3d 325, 329 (Tex. Crim. App. 2016).
[89] *Martinez v. State,* 91 S. W. 3d 331, 335 (Tex. Crim. App. 2002).
[90] *State v. Mercado,* 972 S. W. 2d 75, 78 (Tex. Crim. App. 1998), TEX. R. APP. P. 33.1.
[91] *Id.*
[92] *Id.*

To permit the State to inject a new theory into the case at this stage would unfairly deprive Astorga of an adequate opportunity to respond. In the trial court, he had no reason to conduct cross-examination or to adduce evidence of his own to rebut the contentions that the State is now raising for the first time on appeal – that Alarcon was actually enforcing State not Tribal law. The facts on which the State now relies upon to uphold the search were fully known to it at the time of the suppression hearing and this theory could have been developed in front of the trial court.[93]

The appellate courts may *uphold* a trial court's ruling on any legal theory or basis applicable to the case, but usually may not *reverse* a trial court's ruling on any theory or basis that might have been applicable to the case but was not raised.[94] Under TEX. R. APP. P. 33.1, the issue is not whether the appealing party is the State or the defendant or whether the trial court's ruling is legally "correct" in every sense, but whether the complaining party on appeal brought to the trial court's attention the very complaint that the party is now

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[93] See, *Giordenello v. United States,* 357 U. S. 480, 488, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958).

[94] *Martinez v. State,* 91 S. W. 3d 331,336 (Tex. Crim. App. 2002).[Emphasis in original].

making on appeal.[95] This "raise it or waive it" forfeiture rule applies equally to goose and gander, State and defendant.[96]

At the trial court level, it was crystal clear that the State was relying on violations of Tribal Law to justify the detention, search, transport to YDSP headquarters, placement in a holding cell, and additional searches. Officer Alarcon testified that the detention was for the **Tribal law** violation of paraphernalia.[97]

The trial court specifically found that the traffic stop was for failing to signal when leaving a parking lot and that the initial stop was lawful under the YDSP Traffic Code. [98] Failing to signal from a parking lot is not a violation of State law. Under State law, defendant's failure to signal from a private parking lot does not establish probable cause or reasonable suspicion warranting a traffic stop.[99]

The traffic stop was not made in order to enforce State law. The trial court specifically found that:

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[95] *Id.*
[96] *Id.*
[97] RR 2, p. 60. [Emphasis supplied].
[98] CR, pp. 66-68. Finding of Law. (FL) 1.S
[99] *State v. Ballman,* 157 S. W. 3d 65, 70 (Tex. App. – Fort Worth 2005 – pet. ref'd).

- an open alcoholic beverage was found in the vehicle in violation of YDSP Traffic Code § 6.8.220.
- that a pipe was found in the vehicle in violation of YDSP Peace Code § 4.7.20.
- Arrest and detention are not authorized for the commission of civil infractions pursuant to the YDSP Peace Code.[100]
- The drugs found were as a result of an unlawful detention that there was no basis for under Tribal law.[101]

At the motion to suppress it was established that:

- Astorga was stopped due to a violation of Tribal law and that there was no other reason for the stop other than a violation of Tribal law.[102]
- The open container found in the vehicle was a violation of the YDSP Peace Code.[103]
- The State was relying on Tribal law,[104]

[100] CR, p. 67. FL 3.
[101] CR, p. 67.
[102] RR 2, pp. 19-20, 31, 33-37, 39-41, 53, 56-57, 58-59-61.
[103] RR 2, pp. 21, 50.
[104] RR 2, p. 64.

- That Alarcon was investigating the YDSP Peace and Traffic Codes when he asked Astorga to exit his vehicle,[105]
- Alarcon enforces the YDSP codes,[106]
- Those codes are what Alarcon uses to enforce the laws on the reservation.[107]
- The Tribal Incident Narrative indicated the commission of the civil infractions of possession of methamphetamine and an open container, citing YDSP Infraction Code §§ 4.7.2020 and 6.8.220.[108]
- The pipe found in the vehicle was a violation of Tribal Law.[109]

State law is never referenced at the motion to suppress, the post-hearing briefing, or in the findings of fact and conclusions of law. The State's exhibits contained the Ysleta Del Sur Pueblo Traffic Code[110] and the Ysleta Del Sur Pueblo Code of Laws.[111] The State

[105] RR 2, p. 21.
[106] RR 2, p. 12. SX 1.
[107] RR 2, p.13.
[108] RR 3, p. 63.
[109] RR 2, pp. 23,25.
[110] SX 1.
[111] SX B.

did not reference the Texas Penal Code nor the Texas Health and Safety Code at the suppression hearing.

The State now complains, for the first time on appeal, that Astorga was detained by Tribal Police for a violation of State law: "possession of the methamphetamine pipe." And that this is a violation of Texas law for which Astorga could have been arrested."[112] This argument was waived by failing to raise it in the court below. Further, there is no evidence whatsoever that Alarcon was actually enforcing State law. All the testimony and evidence submitted by the State indicates the contrary, that he was not enforcing State law; instead he was enforcing Tribal law. There was no evidence that he was assisting Texas officers with the enforcement of Texas law. There is no evidence of a request from the EPPD of a request to the Tribal police to investigate Astorga for open containers and paraphernalia. To the contrary, all the evidence was that he was enforcing Tribal law until the methamphetamine was found.

[112] State's brief p. 20 citing to TEX. HEALTH & SAFETY CODE § 481.125 (a).

In order to preserve a complaint for appeal, the complaining party must have done everything necessary to bring the relevant rule and its precise and proper application to the trial court's attention.[113]

III. Astorga's arrest and search were not authorized under Tribal law. Tribal officers had no authority under Tribal law to arrest Astorga and to search him incident to that arrest.

IV. Astorga's arrest and search were not authorized by Federal law. Tribal officers had no authority under Federal law to arrest Astorga and to search him incident to that arrest.

V. Tribal officers had no authority to detain Astorga under State law.

VI. Tribal officers had no authority to arrest Astorga under State law.

VII. Tribal officers had no authority to search Astorga under State law.

VIII. Astorga's detention, arrest, and search violated the Fourth Amendment.

[113] *Resendez v. State,* 306 S. W. 3d 308,313 (Tex. Crim. App. 2009).

IX. Astorga's detention, arrest, and search violated the Indian Civil Rights Act. (ICRA).

X. Astorga's strip search violated the Indian Civil Rights Act. (ICRA).

XI. Astorga's strip search violated the Fourth Amendment.

XII. Astorga's strip search violated Texas Law.

Due to the interrelated nature of these separate reply points, they will be addressed together. The identical standard of review supports each.

a. Standard of Review

The standard of review on a trial court's motion to suppress is whether the court clearly abused its discretion.[114] All of the evidence should be viewed in the light most favorable to the trial judge's ruling.[115] The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence.[116] The trial court is within its discretion in

[114] *Nichols v. State,* 886 S. W. 2d 324, 325 (Tex. App. – Houston [1st Dist.] 1994 – pet. ref'd).
[115] *State v. Johnston,* 336 S. W. 3d 649, 657 (Tex. Crim. App. 2011).
[116] *Id.*

disbelieving testimony and granting a motion to suppress.[117] The reviewing court will not presume error.[118]

The defendant in a criminal proceeding who alleges a Fourth Amendment violation bears the burden of producing some evidence that rebuts the presumption of proper police conduct; that initial burden of proof is met by establishing that a search or seizure occurred without a warrant.[119] In this case, the defense established that Astorga was detained, arrested, and searched without a warrant.[120]

At that point, the burden shifts to the State to prove that the search or seizure was nonetheless reasonable under the totality of the circumstances.[121] It is the State's burden to establish in the trial court, the authority to detain (or arrest) the defendant.[122]

The amount of deference a reviewing court affords to a trial court's ruling on a "mixed question of law and fact" (such as the issue of probable cause) is often determined by which judicial actor is in a

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[117] *State v. Ross,* 32 S. W. 3d 853 (Tex. Crim. App. 2000) (*en banc*).
[118] *Ross, p. 857.*
[119] *Amador v. State,* 221 S. W. 3d 666, 672 (Tex. Crim. App. 2007).
[120] RR 2, pp. 7,8.
[121] *Amador, supra pp. 672-673.*
[122] *Amador, supra, p. 675.*

better position to decide the issue.[123] If the issue involves the credibility of a witness, thereby making the evaluation of that witness' demeanor important, compelling reasons exist for allowing the trial court to apply the law to the facts.[124]

The appellate courts should afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's findings are based on an evaluation of credibility and demeanor.[125] Those courts should also afford the same amount of deference to a trial court's rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor.[126] The appellate courts may review *de novo* mixed questions of law and fact not falling within this category.[127]

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility.[128] "The trial judge's major role is the

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[123] *Miller v. Fenton,* 474 U. S. 104, 106 S. Ct. 445, 88 L. Ed. 405 (1985).
[124] *Miller,* at 114-116, 106 S. Ct. at 453.
[125] *Guzman v. State,* 955 S. W. 2d 85,89 (Tex. Crim. App. 1997).
[126] *Guzman at p. 89.*
[127] *Id.*
[128] *Anderson v. Bessemer City,* 470 U. S. 564, 574, 105 S. Ct 1504, 84 L. Ed. 2d 518 (1985).

determination of fact, and with experience in fulfilling that role comes expertise."[129] The trial on the merits should be the main event rather than a tryout on the road; the parties to a case have already expended their resources on persuading the trial judge.[130]

The credibility of the arresting police officer would certainly be weighed heavily by a trial court in a ruling on a motion to suppress evidence.[131] A question does not turn upon evaluation of credibility and demeanor if everything testified to is believed and still does not add up to the questioned conclusion.[132] In this case, the issue of whether Astorga was "arrested" or "detained" is pivotal to the resolution of this appeal; Alarcon's credibility is critical to that issue. The trial court is entitled to deference as to her assessment of his credibility.

"Right ruling, wrong reason" doctrine

The trial court's ruling is to be upheld if it is reasonably supported by the record and is correct on any theory of law applicable to the

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[129] *Id.*
[130] *Anderson,* 470 U. S. at p. 575.
[131] *Loserth v. State,* 963 S. W. 2d 770, 772 (Tex. Crim. App. 1998).
[132] *Loserth, at p. 773.*

case.[133] The trial court's ruling will be upheld even if it articulated an invalid basis for that ruling.[134] In the review of judicial proceedings, the rule is settled that, if the decision below is correct, it must be affirmed, even though the lower court relied on the wrong ground or even gave a wrong reason.[135] Appellate courts may **uphold** a trial court's ruling on any legal theory or basis applicable to the case, but **usually may not reverse a trial court's ruling on any theory or basis that might have been applicable to the case, but was not raised**.[136] A legal theory is applicable as long as the appellant had an adequate opportunity to develop a complete factual record with respect to the theory.[137]

An appellee has no duty to preserve error.[138] Because Astorga prevailed at trial, he was not required to raise all theories which might be found to support the trial court's ruling at trial.[139] This Court may, in its discretion, address subsidiary arguments that support the trial

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[133] *Gomez v. State,* 606 S. W. 3d 276, 282 (Tex. App. – Houston [1st Dist.] 2020-no pet.)
[134] *Rhodes v. State,* 240 S. W. 3d 882, n.9 (Tex. Crim. App. 2007).
[135] *Helvering v. Gowran,* 302 U. S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224 (1937).
[136] *Najar v. State,* NO. PD-1049-19, 2021 WL 800768 (Tex. Crim. App. March 3, 2021)(not yet published). [Emphasis supplied].
[137] *Id.*
[138] *Id.*
[139] *Volosen v. State,* 227 S. W. 3d 77, 80 (Tex. Crim. App. 2007).

court's ruling that had not been previously presented.[140] The party who wins at the trial level can prevail on appeal on the basis of a rationale not addressed by the trial court.[141]

Not bound by concessions or confessions of error

The reviewing court is not bound by any agreement or concessions by the parties on an issue of law.[142] Such a concession does not relieve this Court of the performance of the judicial function.[143] Astorga understands a concession was made at the trial level as to the legality of the initial stop. He makes no such concession at the appellate level. He urges this Court to make an independent examination of the issue and to uphold the grant of the suppression on the grounds of the illegality of the initial detention should this Court conclude that ground has merit.[144]

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[140] *Rhodes v. State,* 240 S.W. 3d 882, 886 n. 9 (Tex. Crim. App. 2007).
[141] *Id.*
[142] *Oliva v. State,* 548 S. W. 3d 518, 520 (Tex. Crim. App. 2018).
[143] *Rogers v. State,* 594 S. W. 3d 432, 434 (Tex. App. – Waco 2019 – no pet.).
[144] See, *Rogers v. State,* 594 S. W. 3d 432, 434 (Tex. App. – Waco 2019 – no pet.).

b. Conflict of Laws

This case involves the complicated intersection of federal law, Indian law as applied to a non-Indian, Ysleta Del Sur Pueblo law, and Texas law.[145]

Under basic conflict-of-law principles, the **law of the forum** in which the judicial proceeding is held **governs the admissibility of evidence**. [146] For example, the law of the State of Texas, governs the admissibility of confessions in a trial in Texas although the confession was taken in Chicago.[147] Also the fact that the federal courts may characterize a successfully completed probation as a "final conviction" for federal purposes, that by no means controls the admissibility of evidence for the purposes of general impeachment of a witness in Texas court.[148] The question is purely one of State evidentiary law and it would be error to hold that the federal law is controlling in determining the character of the conviction at issue.[149]

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[145] The State never alleges and never certainly never established in the trial court that Astorga was an Indian. It is the State's burden to provide the authority to arrest or detain a defendant. *Amador v. State,* 221 S. W. 3d 666, 675 (Tex. Crim. App. 2007).
[146] *Nonn v. State,* 117 S. W. 3d 874, 879 (Tex. Crim. App. 2003).[emphasis supplied]
[147] *Nonn at pp. 879, 881*
[148] *Davis v. State,* 645 S. W. 2d 288, 291 (Tex. Crim. App. 1983).
[149] *Davis, at p. 291-292.*

> Considerations of efficiency and convenience require that questions relating to the admissibility of evidence, whether oral or otherwise, should usually be determined by the local law of the forum. The trial judge must make most evidentiary decisions with dispatch if the trial is to proceed with reasonably celerity. The judge should therefore, as a general rule, apply the local rule of his own state.[150]

A rigid and literal enforcement of the full faith and credit clause, without regard the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. *Alaska Packers Ass'n v. Ind. Accident Comm*., 294 U. S. 532, 547 (1935).

Likewise, evidence seized in compliance with federal law is admissible in federal court without regard to state law, even if state authorities obtained the evidence without any federal involvement.[151] Tribal law does not govern the admissibility in federal court of the statements made by a juvenile to Tribal investigators.[152] This is because the law of the forum governs the admissibility of evidence.[153]

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[150] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 cmt. a.
[151] *United States v. Cormier,* 220 F. 3d 1103, 1111 (9th Cir. 2000).
[152] *United States v. Male Juvenile,* 280 F. 3d 1008, 1023 (9th Cir. 2002).
[153] *Id.*

Traditional conflict-of-laws principles prescribe that issues that are strictly procedural in nature are governed by the laws of the forum state. Issues that are substantive in nature require an analysis of which state has the most significant relationship with the communication in question.[154] A procedural right is viewed as a right that helps in the protection or enforcement of a substantive right; a substantive right is the right to equal enjoyment of fundamental rights, privileges, and immunities.[155] Since the procedural rules of its courts are surely matters in which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts.[156]

State law, not federal law, governs the legality of a State arrest so long as the State law does not violate federal constitutional protections against unreasonable searches and seizures. [157] In this case, the law of the forum – Texas law - governs the admissibility of the evidence. Texas law applies as to the initial detention, the extension of that detention, the arrest, and the ultimate strip search.

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[154] *Gonzalez v. State,* 45 S. W. 3d 101, 104 (Tex. Crim. App. 2001).
[155] *Gonzalez v. State,* 45 S. W. 3d 101, n. 8 (Tex. Crim. App. 2001).
[156] *Sun Oil v. Wortman,* 486 U. S. 717,722 (1988).
[157] *Sandoval v. State,* 35 S. W. 3d 763, 769 (Tex. App. – El Paso 2000- pet. ref'd).

c. Findings of Fact and Conclusions of Law

Reviewing courts give deference to the trial court's factual findings because the trial court is the sole trier of fact and judge of witness credibility and the weight to be given to a witness's testimony.[158] This deferential review also applies to the trial court's conclusions regarding mixed questions of law and fact that turn on credibility and demeanor.[159] Reviewing courts should not make implied findings of fact and credibility determinations that are contrary to the trial judge's ultimate ruling.[160] The reviewing court has the authority to abate the appeal and remand for additional findings of fact if necessary.[161]

The trial court found that the Tribal Police arrested, rather than detained, Astorga.[162] The trial court's findings of fact and conclusions of law as loosely summarized:

- A traffic stop was conducted on Astorga's vehicle for failing to signal when leaving a parking lot. [163]

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[158] *Gomez v. State,* 606 S. W. 3d 276, 282 (Tex. App. – Houston [1st Dist.] 2020 – no pet.).
[159] *Id.*
[160] *State v. Mendoza,* 365 S. W. 3d 666, 667 (Tex. Crim. App. 2012).
[161] *State v. Saenz,* 411 S. W. 3d 488 (Tex. Crim. App. 2013).
[162] CR, pp. 67-68.
[163] CR, p. 62 Finding of Fact (FF) 1,2.

- Astorga was driving that vehicle.[164]
- An open alcoholic beverage was observed in the vehicle in violation of YDSP Traffic Code § 6.8.220.[165]
- Alarcon believed he had probable cause;[166]
- Astorga and his passenger were asked to exit the vehicle;[167]
- A pipe was found in the vehicle in violation of YDSP Peace Code § 4.7.20.[168]
- Alarcon's testimony is contradicted by the video and by SXC;[169]
- Astorga was handcuffed by Tribal Police.[170]
- Alarcon conducted a search incident to arrest;[171]
- Alarcon read Astorga and the female passenger *Miranda* rights:[172]
- In the second body search of Astorga, a Tribal officer searched his shirt and pants pocket, removed his personal

[164] CR, p. 62. FF 6.
[165] CR, pp. 62-63. FF 8, 9.
[166] FF 12; CR, p. 63.
[167] FF 10; CR, p. 63.
[168] CR, p. 63. FF 14.
[169] CR, pp. 63,64,65, 67. FF 11,19,22,23. Finding of Law (FL) 4.
[170] CR, p. 64. FF 18.
[171] CR, p. 63. FF 17
[172] CR, p. 64. FF 17.

effects placing them in a plastic bag, and removed and searched the inside of his ski cap;[173]

- Tribal officers admitted to EPPD that they had placed Astorga under arrest;[174]
- Drugs were not found on Astorga or in his vehicle at the roadside stop. Paraphernalia was found.[175]
- Tribal officers transported Astorga from the traffic stop to Tigua Police Headquarters for potential transfer to EPPD.[176]
- Astorga was placed in a cell at Tribal Police Headquarters. A secondary and more thorough search was conducted of him at that time. Nothing was found on him in that search.[177]
- The female passenger told Tribal Police that Astorga had drugs in his genital area.[178]
- Another search was conducted of Astorga based on this information. He was told to remove his pants. A bulge was noted in his underwear.[179]

[173] CR, p. 64. FF 19.
[174] CR, pp. 64-65. FF 22,23.
[175] CR, p. 65. FF 24.
[176] CR, p. 65. FF 25.
[177] CR, 65. FF 26,27.
[178] CR, p. 65.
[179] CR, pp. 65,66. FF 29,30.

- Astorga told the officers that was a hernia.[180]
- Tribal Officers told Astorga to remove his underwear. methamphetamine was discovered.[181]
- After methamphetamine was discovered, the case was turned over to the EPPD.[182]
- No citation was issued to Astorga by the Tribal Police for possession of drug paraphernalia. He was cited for possession of methamphetamine and open containers in a vehicle.[183]
- The initial traffic stop was lawful under the Ysleta Del Sur Pueblo (YDSP) Traffic Code;[184]
- Astorga conceded the lawfulness of the initial stop in his post-suppression briefing,[185]
- Pursuant to the YDSP Peace Code, arrest and detention are not authorized for the commission of civil infractions;[186]

[180] CR, p.66. FF 31.
[181] CR, p. 66. FF 32, 33.
[182] CR, p. 34. FF 34.
[183] CR, p. 66. FF 36.
[184] CR, pp.66-67. FL 1.
[185] CR, p. 67. FL 2.
[186] CR, p. 67. FL 3.

- Upon finding Astorga in possession of drug paraphernalia, Tribal Law requires the issuance of a civil citation;[187]
- Astorga was unlawfully arrested and subjected to an intrusive search of his body in violation of his right to be free of unlawful search and seizure.[188]
- The drugs found were as a result of an unlawful detention that there was no basis for under Tribal Law.[189]
- The search of Defendant's person at Tribal Police Headquarters is therefore found to be illegal and any evidence found as a result thereof is suppressed and inadmissible at trial.[190]

As summarized above, the findings of facts and conclusions of law are very fact-intensive and are entitled to deference by this Court. They are mixed questions of law and fact that turn on credibility and demeanor – relating to Alarcon placing Astorga under arrest. The trial court specifically noted that the officer's testimony was not credible as it was directly contradicted by other evidence. Factual findings are

[187] CR, p. 67. FL 3.
[188] CR, p. 67. FL 5.
[189] CR, p. 67. FL 6.
[190] CR, pp. 67-68. FL 7.

extremely important to the legal conclusion as to whether the custody of Astorga by the Tribal Police was an investigatory detention or an arrest. In addition, as noted by the trial court, the testimony was contradicted by the dash cam video. A videotape presents indisputable visual evidence.[191]

d. This was an arrest not a detention

It is State law and not federal law that governs the legality of a State arrest so long as the law does not violate federal constitutional protections against unreasonable searches and seizures.[192]

The fruit of the poisonous tree doctrine generally precludes the use of evidence obtained following an illegal arrest.[193] Evidence that is sufficiently attenuated from an unlawful arrest is not considered to have been obtained therefrom.[194] The prosecution carries the burden of proving attenuation.[195] The burden is also on the State to show that the arrest was within an exception to the warrant requirement.[196]

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[191] *Carmouche v. State,* 10 S. W. 3d 323, 332 (Tex. Crim. App. 2000).
[192] *Milton v. State,* 549 S. W. 2d 190, 192 (Tex. Crim. App. 1977).
[193] *Martinez v. State,* 589 S. W. 3d 869, 883 (Tex. App. – El Paso 2019 – pet. granted).
[194] *Id.*
[195] *Id.*
[196] *Bell v. State,* 724 S. W. 2d 780, 786 (Tex. Crim. App. 1986) (*en banc).*

This was an illegal arrest because Officer Alarcon, as a Tribal Police officer had no authority to arrest a non-Indian and it is undisputed that Astorga is not an Indian. All of the evidence was obtained by exploiting the unlawful arrest and should be suppressed.[197] In addition, the evidence was obtained by an unlawful detention under Texas law as a turn signal is not required under Texas law when exiting a parking lot.

When a defendant seeks to suppress evidence because of an allegedly illegal arrest, the defendant bears the initial burden to rebut the presumption of proper police conduct.[198] The defendant meets this burden by proving that the police seized him without a warrant.[199] Once the defendant establishes that a warrantless search or seizure occurred, the burden shifts to the State either to produce evidence of a warrant or to prove the reasonableness of the search or seizure.[200] Astorga met his burden of establishing that a warrantless search or seizure occurred.[201]

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[197] CR, p. 67. FL 6.
[198] *Morris v. State,* 50 S. W. 3d 89,94 (Tex. App. – Fort Worth 2001 – no pet.).
[199] *Id.*
[200] *Id.*
[201] RR 2, pp. 7-8.

A person is in custody if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest.[202] A traffic stop may escalate from a non-custodial detention into a custodial detention when formal arrest ensues or a detainee's freedom of movement is restrained to the degree associated with a formal arrest.[203]

Four factors are relevant to determining custody:

(1) Probable cause to arrest;

(2) The subjective intent of the police to the extent communicated to the suspect;

(3) Focus of the investigation, and

(4) Belief of the defendant as manifested in the words or actions of law enforcement officials.[204]

Four general situations may constitute custody:

(1) When the suspect is physically deprived of his freedom of action in any meaningful way;

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[202] *Stansbury v. California,* 511 U. S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994).
[203] *Berkemer v. McCarty,* 468 U. S. 420, 441 (1984).
[204] *Dowthitt v. State,* 931 S. W. 2d 244,254 (Tex. Crim. App. 1996).

(2) When law enforcement officers tell the suspect that he cannot leave;

(3) When law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and

(4) When there is probable cause to arrest and law enforcement does not tell the suspect that he is free to leave.[205]

The restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention.[206] The officers' knowledge of probable cause must be manifested to the subject for example by relating information substantiating probable cause to the suspect or by the suspect to the officers.[207] Custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest.[208]

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[205] *Dowthitt v. State,* 931 S. W. 2d 244,255 (Tex. Crim. App. 1996).
[206] *Id.*
[207] *Id.*
[208] *Id.*

The reasonable person standard presupposes an innocent person.[209] The determination of custody is based on objective circumstances on an *ad hoc* basis.[210] The mere fact that a detention begins as noncustodial does not prevent custody from arising later.[211]

An arrest occurs when a person's liberty of movement is restricted or restrained.[212] Tex. Code Crim. Proc. art. 15.22 provides that a person is arrested when he has actually been placed under restraint. The giving of *Miranda* warnings is a factor indicating an arrest rather than detention.[213] The transport of another location against one's will is also indicative of an arrest rather than a detention.[214] A trip to the stationhouse is an arrest.[215] Being taken from the location where one is found and transported to a police station and not being informed one is free to go is indistinguishable from a traditional arrest.[216] There mere facts that petitioner was not told he was under

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[209] *State v. Consaul,* 960 S. W. 2d 680, 686-687 (Tex. App. – El Paso 1997) pet. dism'd as improvidently granted, 982 S. W. 2d 899 (Tex. Crim. App. 1998, cert. denied, 526 U. S. 1160 (1999).
[210] *Id.*
[211] *Ussery v. State,* 651 S. W. 2d 767, 770 (Tex. Crim. App. 1983).
[212] *Amores v. State,* 816 S. W. 2d 407, 411 (Tex. Crim. App. 1991).
[213] *State v. Crisp,* 74 S. W. 3d 474, 482 (Tex. App. – Waco 2002 – no pet.).
[214] *Moore v. State,* 55 S. W. 3d 652, 656 (Tex. App. – San Antonio 2001 – no pet.).
[215] *Terry v. Ohio,* 392 U. S. 1, 16 (1968).
[216] *Dunaway v. New York,* 442 U. S. 200, 212 (1979).

arrest, was not "booked", and would not have had an arrest record if the interrogation had proved fruitless, obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny.[217]

The question of whether a person is under arrest is not to be determined solely by the opinion of the arresting officer.[218] The facts may establish that the initial detention of the appellant constitute an arrest even though the arresting officer characterized it as an investigative detention.[219] When the officer is not questioning the witness but is searching him or his vehicle – that is indicative of an arrest rather than a detention.[220]

The investigative detention contemplated by *Terry v. Ohio,* 392 U. S. 1 (1968), is one during which the police are allowed to briefly question a suspicious person respecting his identity, his reason for being in the area, and other things of a truly investigatory nature.[221] An investigative detention implies that the intrusive act is for the

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[217] *Dunaway,* 442 U. S. at pp. 212-213.
[218] *Amores, p. 412.*
[219] *Id.*
[220] *Id.*
[221] *Amores p. 412.*

purpose of actually investigating.[222] Thus, where no investigation is undertaken, the detention cannot be considered investigatory and rises to the level of an arrest.[223] Transportation to the stationhouse for investigation, when investigation at the scene would not pose a serious safety risk indicates that there was an arrest not a detention.[224] Holding an individual for the police by a security guard is an arrest and not a detention.[225]

If the force utilized exceeds that reasonably necessary to effect the goal of the stop, this force may transform an investigative detention into a full-blown arrest.[226] An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop, and the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.[227] The constitutional considerations for post-stop investigations are whether the stop was

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[222] *Rodriguez v. State,* 191 S. W. 3d 428,442 (Tex. App. – Corpus Christi 2006 – pet. ref'd).
[223] *Id.*
[224] *Id.*
[225] *Hardinge v. State,* 500 S. W. 2d 870, 873 (Tex. Crim. App. 1973).
[226] *Mount v. State,* 217 S. W. 3d 716, 724-725 (Tex. App. – Houston [14th Dist.] 2007 – no pet.).
[227] *Rodriguez,* 191 S. W. 3d at p. 442.

too long in duration, whether police officers diligently pursued means of investigation that were likely to confirm or dispel their suspicions quickly, and whether police officers were unreasonable in recognizing less intrusive means by which their objectives might have been accomplished.[228]

When officers possess reasonable suspicion justifying a temporary investigative detention, they may use such force as is reasonably necessary to effect the goal of the stop: investigation, maintenance of the status quo, or officer safety.[229] Additional factors to consider in determining the reasonableness of the detention include the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, the reaction of the suspect, and whether the officers actually conducted an investigation after seizing the suspect.[230]

Handcuffing is not ordinarily proper in a mere investigation, but it may be resorted to in special circumstances, such as when necessary to maintain officer safety or to thwart the suspect's attempt

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[228] *Id.*
[229] *Morris at p. 95 .*
[230] *Mount at pp. 724-725.*

to frustrate further inquiry.[231] Handcuffing does not automatically convert a detention into an arrest **if the officer has legitimate safety concerns**.[232] Police procedures do not justify the intrusive measures of handcuffing and placing a suspect into a patrol car.[233] It must be considered whether handcuffing was reasonably necessary to preserve the status quo or to promote officer safety during the investigation.[234] Handcuffing may transform a detention into an arrest.[235] If the degree of incapacitation appears more than necessary to simply safeguard the officers and assure the suspect's presence during a period of investigation, this suggests that the detention is an arrest.[236]

In this case, unlike *Morris,* there were more police officers than suspects[237], this case did not involve a staged drug transaction, and there were no other factors indicating officer safety concerns. It was in broad daylight; there was no testimony that it was high crime location; there had been no car chase; and there was never an officer

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[231] *Akins v. State,* 202 S. W. 3d 879,886 (Tex. App. – Fort Worth 2006 – pet. ref'd.).
[232] *Mount, at p. 726.* [Emphasis supplied].
[233] *Gordon v. State,* 4 S. W. 3d 32, 37 (Tex. App. – El Paso 1999 – no pet.).
[234] *State v. Moore,* 25 S. W. 3d 383,387 (Tex. App. – Austin 2000 – no pet.).
[235] *Id.*
[236] *State v. Sheppard,* 271 S. W. 3d 281, 291 (Tex. Crim. App. 2008).
[237] SXD.

alone with a suspect.[238] Handcuffing in this case was not for officer safety. Handcuffing indicated an arrest rather than a detention.

Astorga was stopped by law enforcement, his vehicle was thoroughly searched, and his person was searched at least three times without a warrant.[239] Three officers approached his vehicle shortly after the traffic stop.[240] He was handcuffed and subjected to an extremely thorough search at the roadside.[241] He was placed in a patrol car.[242] There was testimony that a decision was made to take Astorga "into custody" as there was probable cause. [243] It was reported to the EPPD that Astorga was placed under arrest.[244] Alarcon testified that the searches were incident to "arrest".[245]

Astorga was transported in handcuffs in a patrol car to Tribal Police Headquarters for processing and was placed in a holding cell.[246] Another more thorough search of Astorga was done as soon as

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[238] *See, Rhodes v. State,* 945 S. W. 2d 115, 117 (Tex. Crim. App. 1997).
[239] RR 2, pp. 7,8.
[240] SXD.
[241] SXD.
[242] SXD.
[243] RR 2, p. 46.
[244] RR 3, pp. 111, 113.
[245] RR 2, pp. 23-24.
[246] RR 3, pp. 26, 113.

he arrived to the Tribal Police Headquarters.[247] After the passenger provided information that Astorga had concealed narcotics, a strip search was conducted.[248] In justifying the intrusive strip search done in this case the State cites authority relating to searches incident to arrest.[249] This Court is not bound by the implicit concessions in the State's arguments but the cases cited therein are instructive in establishing that Astorga was arrested, not merely detained.

Also, under federal law, 25 C. F. R. § 11.0301 (a), "Arrest is the taking of a person into police custody in order that he or she may be held to answer for a criminal offense." That is authority indicating that this was an arrest and not a detention. As Tribal law defines civil infractions it provides no guidance as to whether this was a detention or an arrest.

e. Fourth Amendment and ICRA

Detention and arrests are Fourth Amendment seizures and therefore implicate Fourth Amendment protections.[250]

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[247] RR 2, pp. 95, 27.
[248] RR 2, pp. 27-28. 102-103.
[249] State's brief pp. 30-32
[250] *Johnson v. State,* 414 S. W. 3d 184, 191 (Tex. Crim. App. 2012).

The United States Constitution does not restrict actions by Tribal governments.[251] Indian Tribes are bound by 25 U. S. C. § 1302, referred to as the Indian Civil Rights Act or ICRA. It provides 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, 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."[252] Congress enacted language that mirrored the Fourth Amendment protections, expressing concerns that Tribal authorities were violating the Fourth Amendment.[253]

The exclusionary rule applies to evidence obtained in violation of ICRA's Fourth Amendment counterpart.[254] The exclusionary rule prohibits the prosecution from using evidence obtained in violation of a defendant's constitutional rights, as direct proof of a defendant's guilt.[255] The rule also applies to evidence that is "secondary" or "derivative" in character – for example where an illegal custodial

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[251] *Bressi v. Ford,* 575 F. 3d 891,895 (9th Cir. 2009).
[252] 25 U. S. C. § 1302 (2).
[253] *United States v. Cooley,* 919 F. 3d 1135, 1144 (9th Cir. 2019), *cert. granted,* 2020 WL 6811249 (November 20, 2020).
[254] *Cooley, p. 1145.*
[255] *United States v. Leon,* 468 U. S. 897, 906 (1984).

arrest results in the police seizing evidence.[256] The integrity of the judicial system requires that courts not be made a party to lawless invasions of constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.[257]

ICRA imposes an identical limitation on tribal government conduct as the Fourth Amendment does.[258] Thus the analysis is under Fourth Amendment as it nets the same result as analysis under ICRA[259].

When a Tribal officer exceeds his Tribe's sovereign authority, his actions may violate ICRA's Fourth Amendment counterpart because, when the Fourth Amendment was adopted, officers could not enforce the criminal law extra-jurisdictionally in most circumstances.[260]

An arrest made outside the arresting officer's jurisdiction violates the Fourth Amendment.[261] A warrantless arrest executed outside the arresting officer's jurisdiction is analogous to a warrantless arrest

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[256] *Id.*
[257] *Terry v. Ohio,* 392 U. S. 1. 13 (1968).
[258] *United States v. Becerra-Garcia,* 397 F. 3d 1167, 1171-1172 (9th Cir. 2005), *cert. denied,* 547 U. S. 1005 (2006).
[259] *Id.*
[260] *Cooley, p. 1148.*
[261] *Ross v. Neff,* 905 F. 2d 1349, 1353-1354 (10th Cir. 1990).

without probable cause.[262] Absent exigent circumstances, such an arrest is presumptively unreasonable.[263]

The Fourth Amendment is violated if, once the original purpose for the traffic stop is exhausted, the police detain drivers solely in hopes of finding evidence of some other crime.[264] There is a potential open question regarding whether the YDSP peace and traffic codes could ever provide reasonable suspicion to extend the search, as they are not criminal codes and provide for only civil assessments.

This is potentially problematic because the rule announced in *Terry v. Ohio,* 392 U. S. 1 (1968), allows that police officers may briefly detain a person for investigative purposes if they can point to specific and articulable facts that give rise to reasonable suspicion that a particular person has committed, is committing, or is about to commit a *crime.*

f. Tribal Law

Under Tribal Law, a "roadway" is defined as "any highway, road, street, lane, trail, path, or parking area which members of the public are entitled to use regardless of the nature of its surface or the agency

[262] *Id.*
[263] *Id.*
[264] *Kothe v. State,* 152 S. W. 3d 54, 63 (Tex. Crim. App. 2004).

responsible for its maintenance.[265] It is further provided that it is an infraction to fail to use a signal to indicate an intention to turn.[266] Thus the turn signal violation was a civil infraction under Tribal law, but not under Texas law.

Under the YDSP Traffic Code § 6.8.230 it is an infraction to have an open container of alcohol in a vehicle with a penalty of a class C civil assessment. A class C traffic infraction civil assessment is a monetary fine not to exceed $250.[267]

Tribal Traffic Code § 6.8.233 dictates the procedure for an issuing officer that, instead of taking the person before a magistrate, **shall issue the person a written citation** and notice to appear that contains the time and place the person must appear before a magistrate, the name and address of the person charged, and the offense charged.

Tribal Traffic Code § 6.2.040(A) provides that to "ensure compliance" of the Traffic Code, Tribal law enforcement officers are permitted to "issue citations" for traffic infraction violations

[265] Ysleta Del Sur Traffic Code § 6.1.140.
[266] Ysleta Del Sur Traffic Code § 6.8.150.
[267] Traffic Code § 6.2.020 Classification of Parking and Traffic Infractions.

Tribal Traffic Code § 6.2.040 (C) provides that, "[t]he individual receiving a traffic infraction citation is permitted, except for certain violations to accept the citation from the officer at the scene of the violation and **to immediately continue on his way** after promising or being instructed to comply with the terms of the citation." [Emphasis supplied]. The Traffic Code further provides that, "[i]t is unlawful and Official Misconduct for any tribal officer, tribal official or other tribal employee to dispose of a traffic citation or charge, or the record of the issuance of the same, in a manner than as provided in this Code."[268] Even if the civil assessment is not paid, no criminal sanctions or incarceration is authorized. [269]

Under Tribal law, possession of illegal drugs and possession of drug paraphernalia are civil infractions.[270] Civil penalties subject an individual to a civil assessment.[271] A civil assessment is a fine – ranging from $250 dollars to $5,000.[272] The Traffic Code also only provides for fines which are described as civil assessments.[273]

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[268] Tribal Traffic Code § 6.2.040(F).
[269] Tribal Traffic Code § 6.2.100.
[270] Tribal Peace Code §§ 4.7.20, 4.7.22. CR, p. 42.
[271] CR, pp. 42-43. Peace Code § 4.2.10. General Penalty Provisions.
[272] CR, p. 43. Peace Code § 4.230. Civil Assessments.
[273] Ysleta Del Sur Traffic Code § 6.2.020. SX 1.

Options are also provided for community service, restitution, treatment, counseling, expulsion, and traditional sanctions.[274] It is indicated that the Tribal Court has authority to forfeit property, dissolve a corporation, dissolve a contract, suspend or cancel a license or permit or cite for content.[275] This is an exhaustive list of penalty provisions. Notably absent is any authority whatsoever to jail, detain, incarcerate, or impose any criminal sanction whatsoever.

The Tribal Peace Code also provides for civil assessments in lieu of incarceration.[276] The civil assessments are fines ranging from $250 to $5000.[277] Importantly, the provision relating to enforcement of civil assessments also does not provide for incarceration.[278] Under the Peace Code, possession of any drug identified as a controlled substance or drug paraphernalia is a civil infraction.[279] It yields a penalty of a fine from $ 2,000 to $ 5,000 dollars.[280]

Tribal law governing searches and seizures incident to a civil infraction indicate that if the search is incident to a citation for a civil

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[274] *Id*.
[275] *Id.*
[276] Peace Code § 4.2.10.
[277] Peace Code § 4.2.30.
[278] Peace Code § 4.2.90.
[279] Peace Code § 4.7.20.
[280] Peace Code §§ 4.7.30, 4.2.30.

infraction the official may search the alleged offender and his property then under his direct immediate control, to locate and prevent the use of weapons and to prevent the destruction of evidence of the commission of a civil infraction. [281] A search under this section was conducted at the roadside scene and yielded no evidence of possession of contraband. [282]

The Tribal authority to investigate offenses extends from their power to exclude others from the reservation. Investigation is limited to situations in which the exclusion of a trespassing offender from the reservation may be contemplated. *Ortiz-Barraza v. United States,* 512 F. 2d 1176, 1180 (9th Cir. 1975).

The State indicates that Peace Code § 4.1.10 authorizes prosecution, an action under the Peace Code does not "preclude other possible actions under another [article] of this code nor a criminal action by another jurisdiction." This does not, as the State suggests, authorize Tribal law enforcement to arrest a non-Indian as was done in this case. It merely stands for the unremarkable proposition that the Indian nation is a separate sovereign and their prosecution would

[281] CR, p. 43. Peace Code § 15.09.
[282] RR 2, pp. 8,48.

not provide a jeopardy bar for another separate sovereign. An Indian Tribe acts as a separate sovereign when it prosecutes its own members. *United States v. Wheeler,* 435 U. S. 313, 318 (1978). Since Tribal and federal prosecutions are brought by separate sovereigns, they are not for the same offense and the Double Jeopardy Clause thus does not bar one when the other has occurred. *Wheeler,* 435 U. S. at p. 332.

g. Federal Law

Tribal authorities have no legal basis to arrest a non-Indian on a Tribal charge or require that a non-Indian submit to the jurisdiction of the Tribe.[283] This law, may be, as characterized by the State, an "absurd result" but it is the law and the consequence of the dependent sovereign status of the Tribes. The Tribes can detain a non-Indian for a brief period to turn over to the State or can act as a state agent -- at the request of the State or with a cross-deputization agreement. They cannot arrest without the cross-deputization agreement or a state request, and there was no evidence of either a request for assistance from the EPPD or a cross-deputization agreement before the trial

[283] *United States v. Medearis,* 236 F. Supp. 2d 977,982 (S. D. 2002).

court. The absurd result contemplated by the State could be avoided by obtaining a cross-deputization agreement with the EPPD or the El Paso Sheriff's Department.

Tribes do not, as a general matter, possess authority over non-Indians who come within their border.[284] Tribes lack criminal jurisdiction over nonmembers.[285] The inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers of the tribe.[286] The Tribes have, by virtue of their incorporation into the American republic, lost the right of governing persons within their limits except themselves.[287] State sovereignty does not end at a reservation's border.[288]

Indian Tribal courts are without inherent jurisdiction to try and punish non-Indians, and must depend on the federal government for protection from intruders.[289] The inherent sovereignty of the Indian

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[284] *Plains Commerce Bank v. Long Family and Cattle Co.,* 554 U. S. 316, 328 (2008).
[285] *Nevada v. Hicks,* 533 U. S. 353, 358, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).
[286] *Plains Commerce Bank,* 554 U. S. at p. 328.
[287] *Id.*
[288] *Nevada v. Hicks,* 533 U. S. at pp. 361-362.
[289] *Oliphant v. Suquamish Indian Tribe,* 435 U. S. 191, 204-205, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978), *superseded by statute on other grounds,* as stated in, *United States v. Lara,* 541 U. S. 193 (2004).

tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation.[290] This remains the law today.[291] In the absence of some form of State authorization, Tribal officers have no inherent power to arrest and book non-Indian violators.[292] Non-Indians cannot be tried in Tribal courts.[293] Tribal officers may stop an individual long enough to ascertain that he or she is not an Indian.[294] If it is apparent that a State or federal law has been violated, the officer may detain the non-Indian a reasonable time in order to turn him or her over the federal authorities.[295] This detention must be for obvious violations, such as alcohol impairment.[296] "[I]nquiry going beyond Indian or non-Indian status, **including searches for evidence of crime**, **are not authorized on purely tribal authority in the case of non-Indians**."[297]

The Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers described as plenary and

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[290] *South Dakota v. Bourland,* 508 U. S. 679, n. 7 (1993).
[291] *Swinomish Indian Tribal Community v. Sam,* 15 Am. Tribal Law 375, 376 Swinomish Tribal Ct. (NO. CRCO-2017-0050).
[292] *Bressi v. Ford,* 575 F. 3d 891, 896 (9th Cir. 2009).
[293] *United States v. Wheeler,* 435 U. S. 313, 326 (1978).
[294] *Id.*
[295] *Id.*
[296] *Bressi at p. 897.*
[297] *Bressi at p. 897.* [Emphasis supplied].

exclusive.[298] Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. I § 8 cl. 3.[299] Congress, with the approval of the United States Supreme Court, has interpreted the Constitution's plenary grants of power as authorizing it to enact legislation that both restricts, and in turn, relaxes those restrictions on tribal sovereign authority.[300]

Criminal jurisdiction over offenses committed in "Indian Country" is governed by a complex patchwork of federal, state, and tribal law.[301] Crimes committed against non-Indians by non-Indians are subject to the jurisdiction of the States.[302]

Tribal police not cross-deputized as State actors have no authority whatsoever to act for the State.[303] That they could have been a State actor had they been deputized is irrelevant.[304]

Nonmembers do not consent to the Tribes adjudicatory authority by availing themselves of the benefit of Tribal police protection while

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[298] *Washington v. Confederated Bands and Tribes of Yakima Nation,* 439 U. S. 463, 470-471 (1979).
[299] *White Mountain Apache Tribe v. Bracker,* 448 U. S. 136, 142 (1980).
[300] *United States v. Lara,* 541 U. S. 193,202 (2004).
[301] *Negonsott v. Samuels,* 507 U. S. 99, 102 (1993).
[302] *United States v. John,* 587 F. 2d 683, 686 (5th Cir. 1979).
[303] *United States v. Cooley,* 947 F. 3d 1215 (9th Cir. 2020), *petition for certiorari pending.*
[304] *Id.*

traveling within the reservation.[305] Long-standing precedents of the United States Supreme Court hold that State courts have exclusive jurisdiction over crimes committed in Indian country involving only non-Indians or victimless crimes.[306]

Public Law 280

Public Law 280 was enacted by Congress in 1953, in part to deal with the problem of lawlessness on certain Indian reservations and the absence of adequate tribal institutions for law enforcement.[307] It provides that in certain states, that the State has jurisdiction over criminal offenses committed in Indian country. As passed, those states are California, Minnesota, Nebraska, Oregon, and Wisconsin.[308] Public Law 280 transferred jurisdiction to those five willing States, it was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the States.[309] The major concerns underlying the passage of Pub. L. 280 were to reduce the economic burdens

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[305] *Strate v. A-1 Contractors,* 520 U. S. 438,455 (1997).
[306] *N.Y. ex. rel. Ray v.Martin,* 326 U. S. 496 (1946).
[307] *Washington v. Confederated Bands and Tribes of Yakima Nation,* 439 U. S. 463, 471 (1979).
[308] 18 U. S. C. § 1162.
[309] *Washington v. Confederated Bands and Tribes of Yakima Nation,* 439 U. S. 463, 490 (1979).

associated with federal jurisdiction associated with federal jurisdiction on reservations (by transferring that jurisdictions to the States), to respond to a perceived hiatus in law enforcement protections available to tribal Indians, and to achieve an orderly assimilation of Indians into the general population.[310] Optional states have obtained jurisdiction over criminal offenses committed on reservations with tribal consent: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, South Dakota, and Washington have all assumed some degree of jurisdiction over crimes committed by tribal members on tribal lands.[311]

Public Law 280 has generally brought about an increased role for state criminal justice systems in "Indian Country".[312]

Importantly, it reduced the Tribe's authority. It did not expand it. It has created numerous obstacles to individual nations in their development of tribal criminal justice systems.[313] The Indian Nations

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[310] *Yakima Nation,* 439 U. S. at 498.
[311] *Indian Law Handbook,* Homeland Security, Federal Law Enforcement Training Centers, Office of Chief Counsel Artesia Legal Division, Artesia NM (2d ed, 2017) p. 67.
[312] Gardner and Melton, "Public Law 280: Issues and Concerns for Victims of Crime in Indian Country" *Tribal Court Clearinghouse: A project of the Tribal Law and Policy Institute.* http://www.tribal-institute.org/articles/gardner1.htm [last consulted March 16, 2021].
[313] *Id.*

which were affected by Public Law 280 had to deal with greatly increased state authority and state control over a broad range of reservation activities without any tribal consent.[314] With the enactment of Public Law 280, affected states received criminal jurisdiction over reservation Indians.[315] It extended state criminal jurisdiction and the application of state criminal laws into Indian reservations within the affected states.[316]

Indian nations lost control over many criminal and civil matters within their territory due the policies of the federal and state governments.[317] Instead of enhancing Tribal criminal justice systems, Congress chose to radically shift the balance of jurisdictional power towards the states away from the federal government and away from the Indian Nations.[318] Indians have opposed Public Law 280 due to its complete failure to recognize tribal sovereignty and tribal self-determination.[319] In many Public Law 280 states, the BIA refused to

[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] *Id.*

support tribal law enforcement and tribal courts on the grounds that Public Law 280 made tribal criminal jurisdiction unnecessary.[320]

Actions which might be treated as a criminal action in federal or state court may need to be treated as civil actions in tribal courts.[321] This may be due to legal jurisdictional issues such as Public Law 280 and resource limitations.[322]

In sum, Public Law 280 could not have authorized this search as it (1) is not applicable in Texas, and (2) it reduced the authority of Tribal Law Enforcement – it did not increase it. Public Law 280 does not apply to Texas tribes.[323]

The Restoration Act and Ysleta Del Sur Pueblo

In Public Law 100-89, the Ysleta Del Sur Pueblo was forced to concede to the State jurisdiction over criminal matters on the reservation.[324] Public Law 100-89 is also termed the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes Restoration Act.

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[320] Carole Goldbert-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (UCLA American Indian Center, 1997) pp. 8-12.
[321] https://www.tribal-institute.org/lists/jurisdiction.htm [last checked March 16, 2021].
[322] *Id.*
[323] *Texas v. Ysleta Del Sur Pueblo,* 79 F. Supp. 2d 708,711 (W. D. Texas 1999).
[324] Gardner, supra. Public Law 100-89 is attached as Appendix A as it can be difficult to locate.

The YDSP pursued federal status under the Restoration Act; however, since obtaining it, it has consistently fought the terms of the Restoration Act.[325] The Restoration Act, Pub. L. 100-89, 25 U. S. C. § 1300g *et seq,* is omitted from the updated United States Code, but it is still in effect. *Texas v. Alabama-Coushatta Tribe of Texas,* 918 F. 3d 440, 42 n. 1(5th Cir. 2019), *cert. denied,* 140 S. Ct. 855 (2020). The Ysleta Del Sur Pueblo enjoys the status of a federally recognized Tribe under 25 U. S. C. § 1300g 1-7.[326] The Tribe consented in that act to the civil and criminal jurisdiction of the State of Texas according to the terms of Public Law 280, codified as 25 U. S. C. §§ 1321 and 1322.[327]

The Restoration Act [Appendix A], indicates that the State shall exercise civil and criminal jurisdiction within the boundaries of the reservation without the consent of the Tribe.[328] It is similar, if not identical to Public Law 280. Any threat to Tribal sovereignty is of the

[325] *State v. Ysleta del Sur Pueblo,* 955 F. 3d 408,411 (5th Cir. 2020), *cert. petition pending and docketed, Ysleta del Sur Pueblo et al. v. Texas,* No. 20-493 (October 2, 2020).
[326] *Holguin v. Ysleta del Sur Pueblo,* 954 S. W. 2d 843, 847 (Tex. App. – El Paso 1997 – review denied).
[327] *Id.*
[328] 25 U. S. C. 1300g-4 (f).

Tribe's own making. They consented to the terms of the Restoration Act.[329]

The Restoration Act could not have justified the actions of the Tribal Police in this case. It reduced the authority of the Tribe and transferred that authority to the State of Texas. It is modeled after Public Law 280 and the limitations on Tribal authority imposed by the Restoration Act are identical to those imposed by Public Law 280.

Indian Law Enforcement Reform Act (ILERA)

The federal statute that authorizes law enforcement in Indian Country is the Indian Law Enforcement Reform Act (ILERA), 25 U. S. C. § 2801 *et seq.*[330] The authority to enforce State laws generally belongs to the states.[331] The ILERA does not change preexisting jurisdictional and law enforcement divisions between governmental entities.[332]

25 U. S. C. § 2803(8), Law Enforcement Authority, allows the Bureau of Indian Affairs employees to assist State agencies with the

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[329] *Ysleta del Sur Pueblo v. State of Texas,* 36 F. 3d 1325, 1335(5th Cir. 1994).
[330] *Allender v. Scott,* 379 F. Supp. 2d 1206,1212 (D.N.M. 2005).
[331] *Brecht v. Abramson,* 507 U. S. 619, 635 (1993).
[332] *United States v. Cleveland,* 356 F. Supp. 3d 1215, 1268 (D.N.M. 2018) citing 25 U. S. C. § 2806 (d).

enforcement of State laws **upon request** of that state. [Emphasis supplied]. It does not expressly authorize federal employees to enforce state law but it does permit them to "assist" with enforcement of State law "when requested".[333] The Secretary of the Interior, through the Bureau of Indian Affairs, is charged with providing or assisting in the provision of law enforcement services on Indian lands.[334] The authority of the Secretary of the Interior and the Bureau of Indian Affairs to enforce State law pursuant to a request by the local agency can be delegated to an Indian tribe pursuant to a 638 contract.[335]

The Indian Self-Determination and Education Assistance Act (ISDEAA) is often referred to as Public Law No. 93-638 or 638. Public Law 638 requires the Secretary of the Interior to enter into certain types of contracts aimed at enhancing tribal self-government.[336] Under this provision a tribe may contract for law enforcement services so that a tribe may maintain a tribal police force

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[333] *Allender v. Scott,* 379 F. Supp. 2d 1206,1212 (D.N.M. 2005).
[334] *Strei v. Blaine,* Civ. No. 12-1095, 2013 WL 6243881 at *6 (D. Minn. Dec. 3, 2013)(not slated for publication).
[335] *Eyck v. United States,* 463 F. Supp. 3d 969,986 (D.S.D. 2020).
[336] *Hopland Band of Pomo Indians v. Norton,* 324 F. Supp. 2d 1067,1069 (N.D. Cal. 2004).

on the reservation.[337] These contracts and deputization agreements allow Tribal police officers to enforce federal law on Indian lands.[338]

To trigger the authority granted by § 2803(8), there must be some kind of "request" made by a state or a local agency for assistance from a BIA[339] officer on a criminal or regulatory matter which the agency has jurisdiction over.[340] In determining whether assistance has been "requested", as contemplated by statute, radio traffic and communication between the parties must be examined in light of law enforcement parlance and customs and circumstances present.[341] The BIA officer must have been asked by the local agency to help them. Cross-commissioning has been held to be a request by the local agency for assistance.[342] In this case, there is no evidence of a state request for assistance – in fact Tribal police initiated the investigation, not EPPD. Further, there is no evidence of cross-deputization by the EPPD or any sort of cross-commissioning.

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[337] *Hopland at p. 1072.*
[338] *Id.*
[339] Bureau of Indian Affairs.
[340] *United States v. Ziegler,* 136 F. Supp. 2d 981, 987 (D.S.D. 2001).
[341] *Id..*
[342] *Allender, at p. 1216.*

Cooperation with the law enforcement agency having primary investigative jurisdiction over the offense is required by employees of the Bureau under 25 U. S. C. § 2806 (b), this subsection does not give authority to arrest it merely encourages cooperation. The federal law, ILERA, controlling law enforcement on reservations and the actions of Tribal law enforcement does not authorize the actions of the YDSPPD in this case.

Special Law Enforcement Commission (SLEC) cards

Traditionally, the enforcement of federal law on Indian lands has been a responsibility of the Bureau of Indian Affairs, an agency within the Department of the Interior.[343] Under the ILERA, the BIA is authorized to delegate that responsibility to Ttribal police through a written contract and, once in place, through federal commissions called "special law enforcement commissions" or "SLEC" issued to individual tribal officers determined to be qualified on a case-by-case basis.[344] Under 25 U. S. C. § 2801, which as stated above provides the authority for Tribal Police to provide law enforcement services in

[343] *Hopland Band of Pomo Indians v. Norton,* 324 F. Supp. 2d 1067, 168 (N. D. Cal. 2004).
[344] *Id.*

Indian Country, "[t]he term "offense" means an offense against the United States". 25 U. S. C. § 2801 (7). SLEC cards are needed to have authority to execute searches, to seize evidence or to make arrests for violations of **federal** law.[345] As Alarcon was not enforcing federal law when he arrested Astorga, his SLEC card in no way authorized that arrest. Tribal officers with SLEC's have authority to enforce **federal** laws.[346]

h. Texas Law

Texas is the forum state. At issue is the admissibility of evidence, specifically the admissibility of the evidence of the methamphetamine found as the result of a stationhouse strip search. Texas law applies in this case to the admissibility of the evidence. If law enforcement from another agency is acting as agents for the state police, they are subject to the same constitutional standards applied to the state police and

[345] *Murgia v. United States,* No. 2:07-CV-0101-HRH, 2008 WL 11442066 * 6 (D. AZ. Feb. 20, 2008)(not slated for publication). [Emphasis supplied].
[346] *United States v. Cleveland,* 356 F. Supp. 3d 1215,1287 (D.N.M. 2018).[Emphasis supplied].

evidence seized by those agents while operating in such a capacity is subject to exclusion if not seized according to those standards.[347]

"The Texas Legislature enacted an exclusionary rule broader than its federal counterpart."[348] Tex. Code of Crim. Proc. Art. 38.23 imposes what is probably the broadest state exclusionary requirement of any jurisdiction. GEORGE E. DIX AND ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE §§ 4.11-4.35 (2d ed. 2011). Tex. Code Crim. Proc. 38.23 excludes evidence that is obtained in violation of Texas laws as well as that obtained in violation of the federal constitution.[349]

Initial detention not authorized under Texas Law

Under the Texas Transportation Code, an operator is required to use a turn signal to indicate an intention to turn, change lanes, or start from a parked position when a vehicle is being operated on a **highway.**[350] A highway is defined as "the width between the boundary lines of a publicly maintained way any part of which is open

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[347] *Pena v. State,* 61 S. W. 3d 745, 755 (Tex. App. – Corpus Christi-Edinburg 2001 – no pet.).
[348] *Miles v. State,* 241 S. W. 3d 28, 35 (Tex. Crim. App. 2007).
[349] *Davidson v. State,* 25 S. W. 3d 183, 186 n. 4 (Tex. Crim. App. 2000).
[350] *State v. Ballman,* 157 S. W. 3d 65,70 (Tex. App. – Fort Worth 2005 – pet. ref'd).

to the public for vehicular traffic."[351] Defendant's failure to use turn signal to indicate his intention to make right-hand turn from parking lot onto public street did not constitute violation of the Texas Transportation Code's provision requiring a signal and could not justify the initial stop under Texas law.[352]

Not a Peace Officer

Texas law defines who is, and who is not a peace officer. Tex. Code of Crim. Proc. art. 2.12 lists 35 categories of individuals defined as, "Who are Peace Officers". Noticeably absent from this list are Tribal peace officers, specifically YDSP Tribal peace officers. Most importantly, under Tex. Code Crim. Proc. art. 2.126, Peace officers commissioned by the Alabama-Coushatta Tribe of Texas and the Kickapoo Traditional Tribe of Texas are recognized as Peace officers. Noticeably absent from this article is any reference to the Ysleta del Sur Pueblo Tribal Police. If the Legislature's objective was to define YDSPPD as Peace Officers, it easily could have said so, as it had done so with other Tribal peace officers. The rule of *ejusdem generis* provides that when words of a general nature are used with the

[351] *Ballman, at p. 70* citing Tex. Trans. Code § § 542.001, 545.104.
[352] *Id.*

designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation. *Hilco Electric Coop. v. Midlothian Butane Gas Co,* 111 S. W. 3d 75, 81 (Tex. 2003).

A BIA law enforcement officer that has taken the oath as a special deputy sheriff and has been appointed as a special deputy sheriff would have the jurisdiction under State law to detain and arrest.[353] There is no evidence of an oath taken by Alarcon, a cross-deputization agreement, or any other authority for him to have acted as a peace officer in this case.

What law was being enforced, informs the inquiry as to whether Alarcon was a peace officer under Texas law and was able to arrest Astorga without a warrant. Whether the officers were acting under color of state law depends entirely on what law was being enforced, which means the facts in each case must be analyzed.[354]

Here, Alarcon was specifically acting as Tribal law enforcement. He was investigating the violations of Tribal law.[355] All

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[353] *United States v. Jenkins,* 17 Fed. Appx. 769, 2001 WL 694476 (10th Cir. 2001)(not slated for publication).
[354] *See, United States v. Medaris,* 775 F. Supp. 2d 1110 , 1119 (D.S.D. 2011).
[355] *Id.*

the testimony indicates that Astorga was held in a Tribal jail for Tribal charges.[356] A valid arrest may not be made outside the territorial jurisdiction of the arresting authority.[357]

Generally, a peace officer is a peace officer only while in his jurisdiction and when the officer leaves that jurisdiction, he cannot perform the functions of this office.[358] Evidence obtained as a result of an officer making an arrest outside his or her jurisdiction must be suppressed under Texas Code of Criminal Procedure art. 38.23 when there is no statutory exception.[359] Further, under Tex. Code of Criminal Procedure Art. 14.01, arrests by non-peace officers is limited to felonies or an offenses against the public peace. The class C misdemeanors at issue in this case do not authorize the arrest made by the Tribe in this case.

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[356] *See, Head v. United States,* Civil No. 07-3555 (DWF/JJG) 2010 WL 9080324 *2 (D. Minn. March 9, 2010) (not slated for publication).
[357] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.07, at 763 (2005).
[358] *McCain v. State,* 995 S. W. 2d 229, 234-235 (Tex. App. – Houston [14th Dist.] 1999 – pet. ref'd untimely filed).
[359] *Halili v. State,* 430 S. W. 3d 549, 552 (Tex. App. – Houston [14th Dist.] 2014 – no pet.).

i. Holding cell strip search

As detailed above, the Fourth Amendment does not bind Tribal Law Enforcement; ICRA is the controlling authority. As ICRA has been defined in line with the Fourth Amendment they shall be discussed interchangeably.

Strip searches or body cavity searches should never be conducted for the sole purpose of obtaining evidence with only reasonable suspicion.[360] A higher standard of cause – such as probable cause – should be adopted and used when conducting strip searches or body cavity searches.[361]

Strip searches involving the visual inspection of the anal and genital areas are demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, and they signify degradation and humiliation.[362] Even searches pursuant to arrest must be reasonable.[363]

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[360] *Indian Law Handbook, supra p. 214.*
[361] *Id.*
[362] *Mary Beth G. v. City of Chicago,* 723 F. 2d 1263,1272 (7th Cir. 1983).
[363] *Gilmore v. State,* 323 S. W. 2d 250, 256 (Tex. App. – Texarkana 2010 – pet. ref'd).

Strip searches should be done based on probable cause.[364] This search was done on the basis of a tip from a named informant.[365] When a named informant supplies the information upon which probable cause is based, the information must be sufficiently detailed to suggest direct knowledge on the informant's part.[366] It is important that the basis of knowledge of the information is clear; sources of information must have sufficient basis of knowledge.[367] The tip must show how the tipster has the knowledge of the concealed criminal activity to support a strip search.[368] An informant's "veracity", "reliability", and "basis of knowledge" are all highly relevant in determining the value of her report.[369]

In this case the record is devoid of sufficient detail to show how the named informant in this case had direct knowledge of the location of the contraband. There are certainly no findings of fact or conclusions of law on this issue.

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[364] *McGee v. State,* 105 S. W. 3d 609,616 (Tex. Crim. App. 2003).
[365] RR 2, p. 27.
[366] *Rivas v. State,* 446 S. W. 3d 575,579 (Tex. App. – Fort Worth 2014 – no pet.).
[367] *Janecka v. State,* 739 S. W. 2d 813, 825 (Tex. Crim. App. 1987)(*en banc*).
[368] *Gilmore v. State,* 323 S. W. 3d 250, 259 (Tex. App. – Texarkana 2010 – pet. ref'd).
[369] *Illinois v. Gates,* 462 U. S. 213, 230 (1983).

In addition, the strip search was obtained by exploiting the illegal arrest and a detention made in violation of Texas law.

PRAYER

Mr. Astorga respectfully requests that this Court overrule the State's points of error and affirm the Trial Court's grant of his motion to suppress.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

This pleading complies with TEX. R. APP. P. 9.4. The undersigned attorney certifies that this computer-generated document has a word count of 14,047 words, based upon the representation provided by the word processing program that was used to create the document and excluding the items not to be included within the word count limit.

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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of April, 2021, a true and correct copy of the above and foregoing was served electronically on the El Paso County District Attorney's Office, Justin M. Stevens at jstevens@epcounty.com , El Paso County, El Paso County Courthouse, 500 E. San Antonio #201, El Paso, Texas 79901.

/s/*Brock M. Benjamin*
Brock Benjamin, Attorney at Law

APPENDIX A
YSLETA DEL SUR PUEBLO
AND COUSHATTA INDIAN TRIBES OF TEXAS
RESTORATION ACT
Public Law 100-89

PL 100–89, August 18, 1987, 101 Stat 666

UNITED STATES PUBLIC LAWS

100th Congress - First Session

Convening January 6, 1987

DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE. (SEE SCOPE)

Additions and Deletions are not identified in this document.

PL 100–89 (HR 318)

August 18, 1987

An Act to provide for the restoration of the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act".

SEC. 2. "25 USC 731 note" REGULATIONS.

The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act. "25 USC 731 note"

TITLE I — YSLETA DEL SUR PUEBLO RESTORATION

SEC. 101. "25 USC 1300g" DEFINITIONS.

For purposes of this title —

(1) the term "tribe" means the Ysleta del Sur Pueblo (as so designated by section 102);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means lands within El Paso and Hudspeth Counties, Texas —

(A) held by the tribe on the date of the enactment of this title;

(B) held in trust by the State or by the Texas Indian Commission for the benefit of the tribe on such date;

(C) held in trust for the benefit of the tribe by the Secretary under section 105(g)(2); and

(D) subsequently acquired and held in trust by the Secretary for the benefit of the tribe.

(4) the term "State" means the State of Texas;

(5) the term "Tribal Council" means the governing body of the tribe as recognized by the Texas Indian Commission on the date of enactment of this Act, and such tribal council's successors; and

(6) the term "Tiwa Indians Act" means the Act entitled "An Act relating to the Tiwa Indians of Texas." and approved April 12, 1968 (82 Stat. 93).

SEC. 102. "25 USC 1300g–1" REDESIGNATION OF TRIBE.

The Indians designated as the Tiwa Indians of Ysleta, Texas, by the Tiwa Indians Act shall, on and after the date of the enactment of this title, be known and designated as the Ysleta del Sur Pueblo. Any reference in any law, map, regulation,

document, record, or other paper of the United States to the Tiwa Indians of Ysleta, Texas, shall be deemed to be a reference to the Ysleta del Sur Pueblo.

SEC. 103. "25 USC 1300g–2" RESTORATION OF THE FEDERAL TRUST RELATIONSHIP; FEDERAL SERVICES AND ASSISTANCE.

(a) FEDERAL TRUST RELATIONSHIP. — The Federal trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), "25 USC 461" as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation.

(b) RESTORATION OF RIGHTS AND PRIVILEGES. — All rights and privileges of the tribe and members of the tribe under any Federal treaty, statute, Executive order, agreement, or under any other authority of the United States which may have been diminished or lost under the Tiwa Indians Act are hereby restored.

(c) FEDERAL SERVICES AND BENEFITS. — Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS. — Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

SEC. 104. "25 USC 1300g–3" STATE AND TRIBAL AUTHORITY.

(a) STATE AUTHORITY. — Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefiting the tribe, and the State is authorized to perform any services benefiting the tribe that are not inconsistent with the provisions of this Act.

(b) TRIBAL AUTHORITY. — The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity —

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency, and

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement.

SEC. 105. "25 USC 1300g–4" PROVISIONS RELATING TO TRIBAL RESERVATION.

(a) FEDERAL RESERVATION ESTABLISHED. — The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) CONVEYANCE OF LAND BY STATE. — The Secretary shall —

(1) accept any offer from the State to convey title to any land within the reservation held in trust on the date of enactment of this Act by the State or by the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) CONVEYANCE OF LAND BY TRIBE. — At the written request of the Tribal Council, the Secretary shall —

(1) accept conveyance by the tribe of title to any land within the reservation held by the tribe on the date of enactment of this Act to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) APPROVAL OF DEED BY ATTORNEY GENERAL. — Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument which conveys title to land within El Paso or Hudspeth Counties, Texas, to the United States to be held in trust by the Secretary for the benefit of the tribe.

(e) PERMANENT IMPROVEMENTS AUTHORIZED. — Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION. — The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes." and approved April 11, 1968 (25 U.S.C. 1321, 1322).

(g) ACQUISITION OF LAND BY THE TRIBE AFTER ENACTMENT. —

(1) Notwithstanding any other provision of law, the Tribal Council may, on behalf of the tribe —

(A) acquire land located within El Paso County, or Hudspeth County, Texas, after the date of enactment of this Act and take title to such land in fee simple, and

(B) lease, sell, or otherwise dispose of such land in the same manner in which a private person may do so under the laws of the State.

(2) At the written request of the Tribal Council, the Secretary may —

(A) accept conveyance to the Secretary by the Tribal Council (on behalf of the tribe) of title to any land located within El Paso County, or Hudspeth County, Texas, that is acquired by the Tribal Council in fee simple after the date of enactment of this Act, and

(B) hold such title, upon such conveyance by the Tribal Council, in trust for the benefit of the tribe.

SEC. 106. "25 USC 1300g–5" TIWA INDIANS ACT REPEALED.

The Tiwa Indians Act "82 Stat. 93" is hereby repealed.

SEC. 107. "25 USC 1300g–6" GAMING ACTIVITIES.

(a) IN GENERAL. — All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.–02–86 which was approved and certified on March 12, 1986.

(b) NO STATE REGULATORY JURISDICTION. — Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS. — Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

SEC. 108. "25 USC 1300g–7" TRIBAL MEMBERSHIP.

(a) IN GENERAL. — The membership of the tribe shall consist of —

(1) the individuals listed on the Tribal Membership Roll approved by the tribe's Resolution No. TC–5–84 approved December 18, 1984, and approved by the Texas Indian Commission's Resolution No. TIC–85–005 adopted on January 16, 1985; and

(2) a descendant of an individual listed on that Roll if the descendant —

(i) has 1/8 degree or more of Tigua–Ysleta del Sur Pueblo Indian blood, and

(ii) is enrolled by the tribe.

(b) REMOVAL FROM TRIBAL ROLL. — Notwithstanding subsection (a) —

(1) the tribe may remove an individual from tribal membership if it determines that the individual's enrollment was improper; and

(2) the Secretary, in consultation with the tribe, may review the Tribal Membership Roll.

TITLE II — ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS

SEC. 201. "25 USC 731" DEFINITIONS.

For purposes of this title —

(1) the term "tribe" means the Alabama and Coushatta Indian Tribes of Texas (considered as one tribe in accordance with section 202);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means the Alabama and Coushatta Indian Reservation in Polk County, Texas, comprised of —

(A) the lands and other natural resources conveyed to the State of Texas by the Secretary pursuant to the provisions of section 1 of the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; and for other purposes." and approved August 23, 1954 (25 U.S.C. 721);

(B) the lands and other natural resources purchased for and deeded to the Alabama Indians in accordance with an act of the legislature of the State of Texas approved February 3, 1854; and

(C) lands subsequently acquired and held in trust by the Secretary for the benefit of the tribe;

(4) the term "State" means the State of Texas;

(5) the term "constitution and bylaws" means the constitution and bylaws of the tribe which were adopted on June 16, 1971; and

(6) the term "Tribal Council" means the governing body of the tribe under the constitution and bylaws.

SEC. 202. "25 USC 732" ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS CONSIDERED AS ONE TRIBE.

The Alabama and Coushatta Indian Tribes of Texas shall be considered as one tribal unit for purposes of this title and any other law or rule of law of the United States.

SEC. 203. "25 USC 733" RESTORATION OF THE FEDERAL TRUST RELATIONSHIP; FEDERAL SERVICES AND ASSISTANCE.

(a) FEDERAL TRUST RELATIONSHIP. — The Federal recognition of the tribe and of the trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), "25 USC 461" as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation.

(b) RESTORATION OF RIGHTS AND PRIVILEGES. — All rights and privileges of the tribe and members of the tribe under any Federal treaty, Executive order, agreement, statute, or under any other authority of the United States which may have been diminished or lost under the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; "25 USC 721" and for other purposes" and approved August 23, 1954, are hereby restored and such Act shall not apply to the tribe or to members of the tribe after the date of the enactment of this title.

(c) FEDERAL BENEFITS AND SERVICES. — Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS. — Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

SEC. 204. "25 USC 734" STATE AND TRIBAL AUTHORITY.

(a) STATE AUTHORITY. — Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefitting the tribe, and the State is authorized to perform any services benefitting the tribe that are not inconsistent with the provisions of this Act.

(b) CURRENT CONSTITUTION AND BYLAWS TO REMAIN IN EFFECT. — Subject to the provisions of section 203(a) of this Act, the constitution and bylaws of the tribe on file with the Committee on Interior and Insular Affairs is hereby declared to be approved for the purposes of section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) except that all reference to the Texas Indian Commission shall be considered as reference to the Secretary of the Interior.

(c) AUTHORITY AND CAPACITY OF TRIBAL COUNCIL. — No provision contained in this title shall affect the power of the Tribal Council to take any action under the constitution and bylaws described in subsection (b). The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity —

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency;

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement; and

(3) to bind any tribal governing body selected under any new constitution adopted in accordance with section 205 as the successor in interest to the Tribal Council.

SEC. 205. "25 USC 735" ADOPTION OF NEW CONSTITUTION AND BYLAWS.

Upon written request of the tribal council, the Secretary shall hold an election for the members of the tribe for the purpose of adopting a new constitution and bylaws in accordance with section 16 of the Act of June 18, 1934 (25 U.S.C. 476).

SEC. 206. "25 USC 736" PROVISIONS RELATING TO TRIBAL RESERVATION.

(a) FEDERAL RESERVATION ESTABLISHED. — The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) CONVEYANCE OF LAND BY STATE. — The Secretary shall —

(1) accept any offer from the State to convey title to any lands held in trust by the State or the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) shall hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) CONVEYANCE OF LAND BY TRIBE. — At the written request of the Tribal Council, the Secretary shall —

(1) accept conveyance by the tribe of title to any lands within the reservation which are held by the tribe to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) APPROVAL OF DEED BY ATTORNEY GENERAL. — Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument from the State or the tribe which conveys title to lands within the reservation to the United States.

(e) PERMANENT IMPROVEMENTS AUTHORIZED. — Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION. — The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" and approved April 11, 1968 (25 U.S.C. 1321, 1322).

SEC. 207. "25 USC 737" GAMING ACTIVITIES.

(a) IN GENERAL. — All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.–86–07 which was approved and certified on March 10, 1986.

(b) NO STATE REGULATORY JURISDICTION. — Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS. — Notwithstanding section 206(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Approved August 18, 1987.

LEGISLATIVE HISTORY — H.R. 318:

HOUSE REPORTS: No. 100–36 (Comm. on Interior and Insular Affairs).

SENATE REPORTS: No. 100–90 (Select Comm. on Indian Affairs).

CONGRESSIONAL RECORD, Vol. 133 (1987): Apr. 21, considered and passed House. July 23, considered and passed Senate, amended. Aug. 3, House concurred in Senate amendments.

PL 100–89, 1987 HR 318

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