NO. 17-30022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellant,

vs.

JOSHUA JAMES COOLEY,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

Dist. Ct. No. 1:16-cr-0042-SPW
The Honorable Susan P. Watters
United States District Judge

APPELLEE JOSHUA JAMES COOLEY'S RESPONSE BRIEF

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INTRODUCTION

This case is about an eager tribal officer who far exceeded his authority on a State highway right of way passing through the Crow Indian Reservation. Contrary to what the government is asking this Court to believe, the district court did not create a brand new Fourth Amendment test that will lead to lawlessness on the reservation. Repeatedly forgotten in the government's brief, is the fact that this case did not start with a *traffic stop*, but instead, at least according to the tribal officer, was a "*welfare check*" that extended into a full-blown custodial arrest. This is not a case where an observed traffic violation, by itself, will give rise to a reasonable suspicion a crime has been committed. Here, there was no observed traffic violation and there was no suspicion Cooley had violated any law. The tribal officer's detention of Cooley, after determining he was not in need of assistance, was clearly illegal and the district court's decision to suppress all evidence obtained following the illegal seizure was correct.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. The district court ordered the suppression of

evidence on February 7, 2017. ER 1.[1] Cooley does not dispute that the government filed a timely notice of appeal. ER 114.

DETENTION STATUS

Cooley is currently detained in an unrelated case. See Docket Entry 63. The trial date in this case has been vacated and stayed pending appeal. Docket Entry 56.

STATEMENT OF THE ISSUE

Cooley rephrases the issue as follows: Did the district court correctly conclude the tribal officer exceeded his authority and violated Cooley's right to be free from unreasonable searches and seizures when the officer, who approached Cooley for a welfare check, detained him long after determining he was non-Indian and not in need of any assistance?

STATEMENT OF THE CASE

On April 21, 2016, Cooley was indicted for Possession with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count I), and Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count II). ER 103. The district court held a pre-trial suppression hearing on January 6, 2017. ER 12. The district court granted Cooley's motion and ordered suppression of the evidence. ER 1-10. The government filed a

[1] Citations to "ER __" refer to pages in appellant's Excerpts of Record filed with appellant's opening brief. Citations to "Brf. of Govt. __" refer to pages in appellant's opening brief.

notice of appeal and Cooley's trial date was vacated pending a decision from this Court. ER 113.

STATEMENT OF FACTS

Around 1:00 AM on February 26, 2016, Tribal Highway Safety Officer James Saylor (Officer Saylor) was traveling eastbound on State Highway 212 within the exterior boundaries of the Crow Reservation when he noticed a white pickup truck stopped on the shoulder of the westbound lane. ER 002. Officer Saylor travelled approximately one-half mile past the vehicle and then made the decision to turn around and pull up behind the truck to see if the truck's occupants needed assistance. ER 002, 099. As he pulled up behind the truck, Officer Saylor turned on his rear emergency lights but did not turn on his overhead lights. The truck had an extended cab and Wyoming plates. ER 002.

At the hearing on the motion to suppress, Officer Saylor testified that his vehicle had a dash-cam that operated continuously throughout his shift. ER 053. Here, the dash-cam video does not begin until after a large portion of Officer Saylor's original encounter with Cooley had taken place. ER 056, 097, 099; see also, Doc. 34, Ex. 1.[2] The audio portion of the tape does not begin until after Officer

[2] The video was conventionally filed with the district court as Exhibit 1 to the Defendant's Brief in Support of Motion to Suppress. DC Doc. 34. Defendant/Appellee will also be seeking leave of this Court to file the video.

Saylor ordered Cooley out of the truck at gunpoint and took him back to his patrol car. ER 059. Officer Saylor was unable to explain why his video and audio were not working during key parts of the initial encounter, causing the district court to ask:

> THE COURT: Well, I guess I'm curious as to why Officer Saylor wouldn't know how to operate his camera and his audio. Wouldn't that be part – isn't that part of your job? ER 056.[3]

According to Officer Saylor's testimony, when he pulled behind the truck, its engine was running. ER 020. With his flashlight on, Officer Saylor approached the driver's side of the truck and knocked on the truck's side window. The rear driver's side window rolled partway down and then back up. In the backseat, Officer Saylor saw a child's car seat and a small child crawling to the front of the truck. As Officer Saylor came to the front driver's side window, he saw Cooley in the driver's seat. Officer Saylor asked Cooley to roll his window down, which Cooley did about six inches. The child was sitting in Cooley's lap, seemingly content. ER 002.

Officer Saylor observed Cooley was non-Indian and had bloodshot, watery eyes. Officer Saylor did not smell any alcohol. Officer Saylor asked Cooley if everything was okay. Cooley responded that everything was fine, that he had pulled

[3] This is not the first time that Officer Saylor has claimed to not have video evidence of a disputed stop. See *United States v. Jose Isidro Orozoco-Herrera*, Montana District Court Cause No. CR 14-89-BLG-SPW. In the *Orozoco-Herrera* case, at issue was whether Officer Saylor's description of the driving pattern of a vehicle was accurate. In that case, Officer Saylor claimed to have "inadvertently" turned off his dash cam earlier in his shift. Here, Officer Saylor again failed to turn on his equipment, or it mysteriously did not work during portions of the stop.

over because he was tired. ER 003. In Officer Saylor's experience, it is common for travelers along this stretch of highway to pull over because they are tired. ER 024.

During cross-examination, Officer Saylor acknowledged that at this point of his encounter with Cooley, he knew Cooley had pulled over because he was tired, which he testified was not uncommon on that stretch of the highway. ER 024. Cooley had told Officer Saylor he was fine and did not need any assistance. Cooley's child was content. ER 002. When asked why he did not end the encounter at that time, Officer Saylor testified that Cooley had watery, bloodshot eyes, and so he wanted to make sure of Cooley's welfare and the welfare of the child. ER 024.

Officer Saylor continued to question Cooley, asking him where he had come from. Cooley responded Lame Deer, which was about 26 miles away. Officer Saylor testified that he could not tell whether Cooley's speech was slurred. ER 002.

Officer Saylor continued to press Cooley for answers, asking him what his business was in Lame Deer, who he had seen, and why he was traveling so late. ER 002, 109. Cooley explained he had been there to purchase a vehicle, but the vehicle had broken down. He further explained the truck he was in was loaned to him by either Thomas Spang or Thomas Shoulderblade. Officer Saylor knew both Thomas Spang and Thomas Shoulderblade. Thomas Spang was a person Officer Saylor suspected of drug activity on the Northern Cheyenne Reservation. Thomas

Shoulderblade was a former probation officer with the Bureau of Indian Affairs on the Northern Cheyenne Reservation. ER 003.

Officer Saylor suspected Cooley was not telling the truth and ordered Cooley to roll his window down further. Officer Saylor told Cooley that none of his answers were making sense. At this point, Officer Saylor noted in his report that Cooley became agitated exclaiming, "i (*sic*) don't know how it doesn't make any sense, I told you I cam (*sic*) up to buy a vehicle." ER 109.

After Cooley rolled his window down further in response to Officer Saylor's directive, Officer Saylor testified he then saw the butts of two semiautomatic rifles in the front passenger seat. Officer Saylor asked Cooley about the rifles. Cooley stated they belonged to the owner of the truck, Thomas. Officer Saylor then asked Cooley for some identification. ER 004. The child was still sitting in Cooley's lap.

Cooley reached into his right pants pocket and pulled out a wad of cash, which he placed on the dashboard. Cooley did this two or three times. The last time Cooley reached toward his pocket, his breath became shallow and his hand hesitated slightly around his pocket area. Officer Saylor drew his service pistol, held it to his side, and ordered Cooley to stop and show his hands. Cooley immediately complied, attempting to raise both his hands while holding onto the child in his lap. Officer Saylor told Cooley he was no longer allowed to move his hands unless told to do so. ER 004. Officer Saylor instructed Cooley to slowly reach into his pocket and

retrieve his identification. Cooley complied and produced a Wyoming driver's license.

Using his portable unit, Officer Saylor, attempted to radio dispatch to run Cooley's identification. Officer Saylor could not reach dispatch because the portable unit had poor reception in this area. The unit in Officer Saylor's patrol car was capable of reaching dispatch because it had much better reception than the portable unit. Instead of returning to his patrol unit, Officer Saylor maneuvered around the truck to the passenger side and opened the door without permission from Cooley. Officer Saylor saw that the two semiautomatic rifles in the passenger seat were unloaded. He also saw there was a pistol tucked underneath the folded down center console. Officer Saylor asked Cooley why he had not said anything about the pistol. ER 005. Cooley responded he did not know it was there because the truck and its contents belonged to Thomas.

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

bags from his pockets and placed the items on the patrol car's hood. The Ziploc bags were empty. ER 005.

Officer Saylor placed Cooley and the child in the patrol car's backseat and radioed dispatch to send another unit and, because Cooley was non-Indian, a county unit. Officer Saylor returned to the truck to retrieve the rifles. The truck was still running. From the passenger side, Officer Saylor reached across the seats to remove the keys from the ignition. While reaching for the keys, Officer Saylor saw a glass pipe and a plastic bag containing a white powder wedged between the driver seat and middle seat. Shortly thereafter, Bureau of Indian Affairs Lieutenant Sharon Brown and Big Horn County Deputy Gibbs arrived. Lt. Brown instructed Officer Saylor to seize all contraband in the truck within plain view. ER 006. Subsequent searches discovered more white powder, which was later determined to be methamphetamine.

SUMMARY OF THE ARGUMENT

In this interlocutory appeal, the government challenges the district court's decision to suppress all evidence obtained following the illegal seizure of Cooley. The government claims that by suppressing the evidence, the district court has created a new Fourth Amendment test for traffic stops on the reservation. What really is at issue, however, is the government's disagreement with the district court's findings of fact. Here, the district court, who was in the best position to judge the

credibility of the witnesses, did not buy into reasons given by the tribal officer as to why he continued to detain Cooley long after conducting his "welfare check." The tribal officer went far beyond determining whether Cooley needed any assistance and instead, conducted a full-blown criminal investigation without any authority to do so.

The authority of a tribal officer on a state highway right of way that passes through a reservation is limited. When a tribal officer sees a traffic violation, the officer may initiate a traffic stop, but when doing so, is limited to determining whether the violator is native or non-native. If the violator is native, the officer may proceed with his investigation. If the violator is non-native, the tribal officer's authority is limited to detaining the violator for delivery to State or Federal authorities.

Here, at issue is not whether a traffic stop based upon the observation of a traffic violation was valid, but rather whether a tribal officer has the authority to seize and investigate a non-Indian driver long after the reason the officer first made contact with the driver had dissipated. The district court asked the tribal officer to articulate the objective facts that supported his continued detention and seizure of Cooley beyond his "welfare check," but the officer was unable to do so. The tribal officer illegally seized Cooley in violation of his right to be free from unreasonable

searches and seizures and the district court correctly suppressed all evidence obtained as a result.

ARGUMENT

I. Standard of Review.

Whether an encounter between a defendant and an officer constitutes a seizure is a mixed question of law and fact that this Court reviews de novo. On a motion to suppress, this Court reviews a district court's underlying findings of fact for clear error. *United States v. Gorman*, 859 F.3d 706, 714 (9th Cir.), order corrected, 870 F.3d 963 (9th Cir. 2017). Under the clear error standard of review, if "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it." *United States v. Mercado-Moreno*, 869 F.3d 942, 953 (9th Cir. 2017). "The clear error standard is highly deferential and is only met when the reviewing court is left with a definite and firm conviction that a mistake has been committed." *United States v. Sivilla*, 714 F.3d 1168, 1172 (9th Cir. 2013).

The decision on a motion to suppress may be affirmed "on any ground fairly supported by the record." See *United States v. Koshnevis*, 979 F.2d 691, 695 (9th Cir.1992). "When a [lower] court does not enter a specific finding, [the reviewing court] will uphold the result if it is reasonably supported in the record." *Koshnevis*, 979 F.2d at 694.

II. Tribal authority over non-Indians on state rights of way is limited.

It is well-settled that an Indian tribe has no inherent sovereign authority to exercise criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191(1978)(superseded by statute as stated in *United States v. Lara*, 541 U.S. 193(2004)). The "inherent sovereign powers" of an Indian tribe "do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). In *Montana*, stressing that "Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns," the Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Peck*, 10 U.S. 7 (1810)—the first Indian case to reach the Supreme Court—that the Indian tribes have lost any "right of governing every person within their limits except themselves." *Montana*, 450 U.S., at 565 (*internal citations omitted*).

Indian tribes are not gatekeepers on public rights of way that cross reservations. See *Strate v. A–1 Contractors*, 520 U.S. 438, 455–56 (1997). Because the state highway is considered to be alienated land held in fee simple, the usual tribal power of exclusion of nonmembers does not apply there. *Strate*, 520 U.S. at 456.

A tribe does have full law enforcement authority over 1) its *members* and 2) *nonmember Indians* on the reservation. See *Lara*, 541 U.S. at 210. Accordingly, the tribe is authorized to stop and arrest Indian violators of tribal law traveling on a

state highway that crosses a reservation. In the absence of some form of state authorization, however, tribal officers have no inherent power to arrest and book non-Indian violators. The government did not challenge Cooley's assertion that the Crow Tribe does not have a mutual aid agreement with the State of Montana. The government also conceded that Officer Saylor was acting solely as a tribal officer as he was not employed by the BIA when he arrested Cooley. D.C. Doc. 34, ER 016.

The limitation on tribal authority has led to obvious practical difficulties. See *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009). For example, a tribal officer who observes a vehicle violating tribal law on a state highway has no way of knowing whether the driver is an Indian or non-Indian. The solution given in *Bressi* was to permit the officer to stop the vehicle and to first determine whether the violating driver was Indian. *Bressi*, 575 F.3d at 895-96. If the driver is Indian, the tribe has the authority to prosecute both member and non-member Indians for traffic violations. See *Lara*, 541 U.S. at 210.

As to non-Indians, however, the tribe has no authority to prosecute or investigate offenders. *Bressi*, 575 F.3d at 896, citing to *Strate*, 520 U.S. at 456 n. 11. The tribe's authority when dealing with a non-Indian violator is to detain the non-Indian for delivery to State or Federal authorities. *Bressi*, 575 F.3d at 897.

The rule limiting tribal authority over non-Indians on a public right-of-way is thus a concession to the need for legitimate tribal law enforcement against Indians

in Indian country, including the state highways. *Bressi*, 575 F.3d at 596. Tribal officers may enforce tribal law as against member and nonmember Indians. As to non-Indians, the amount of intrusion or inconvenience is relatively minor. Ordinarily, there will be reasonable suspicion that a tribal law has been or is being violated, probably by erratic driving or speeding. The observed violation will justify the stop. After the stop, the amount of time it will take to determine whether the violator is Indian will not be long. At that point, "[i]f it is apparent that a state or federal law has been violated, the officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities." *Bressi*, 575 F.3d at 897.[4]

Importantly, under the circumstances described above, the original stop is justified by a reasonable suspicion that a crime has occurred. After the justified stop, the tribal officer's authority then depends upon whether the violator is Indian. While the tribal officer does not have to ignore obvious or apparent violations of the law by letting a non-Indian violator go free, his authority at that point is limited to detaining the violator for delivery to State or Federal authorities. In the case of a non-Indian violator, the tribal officer does not have the authority to search for

[4] Unlike the present case, in *Bressi* the tribal officers were authorized to enforce state law by virtue of their certification with Arizona Peace Officer Standards and Training Board.

evidence of other crimes. The tribal officer's authority is limited to detaining the non-Indian violator for delivery to state or federal authorities, only.

III. In view of later United States Supreme Court cases, the *Ortiz-Barraza* case cited by the government is no longer controlling authority.

Citing to the forty-two-year-old case of *United States v. Ortiz-Barraza*, 512 F.2d 1176 (1975), the government claims there is no Fourth Amendment distinction between a tribal *stop* of a non-Indian on a public highway and one that occurs elsewhere on the reservation. (Brf. of Govt. at 23.). Again, the government misstates the issue because here, there was no stop. Regardless, the government's claim is not only inconsistent with this Court's 2009 *Bressi* decision, it is inconsistent with United States Supreme Court precedent decided after *Ortiz-Barraza*.

First, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), the Supreme Court held that Indian tribes lack criminal jurisdiction over non-Indians. This is true whether the non-Indian is found off or on tribal land. In *Montana v. United States*, 450 U.S. 544, 564-67 (1981), the Court said, in general, the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. Indian tribes do retain some power to exercise limited *civil* jurisdiction over non-members. They may also retain limited *civil* authority over the conduct of non-Indians on fee lands for conduct that threatens or has some direct effect on the

political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565–566 (citations and footnote omitted). Importantly, the inherent power of the tribe does not include *criminal* jurisdiction over non-Indians – even if that conduct threatens the health or welfare of the tribe. In *Strate*, the right-of-way acquired for the State's highway rendered the land equivalent to alienated, non-Indian land. 520 U.S. at 454. Because the Tribe had consented to, and received payment for, the State's use of the land for a public highway, the Tribe could not assert a landowner's right to occupy and exclude.

In this case, the government, citing to *Ortiz-Barraza*, said that "[r]ights of way running through a reservation *remain within the territorial jurisdiction of the tribal police*." Brf. of Govt. at 23 (emphasis added). This language contradicts *Oliphant's* holding that Indian tribes lack criminal jurisdiction over non-Indians. This language is also inconsistent with *Strate* that characterizes a right-of-way passing through a reservation as the equivalent to alienated, non-Indian land. *Strate*, 520 U.S. at 445-47. As clarified in *Nevada v. Hicks*, 533 U.S. 353, 359 (2001), both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not "assert a landowner's right to occupy and exclude." The power to exclude is critical.

The government refuses to acknowledge this United States Supreme Court precedent, preferring instead to exaggerate the reach of the district court's decision.

The district court did not create a new Fourth Amendment rule for tribal traffic *stops* of non-Indians on public highways. Here, at issue is the tribal officer's lack of authority to detain a non-Indian driver on less than reasonable suspicion long after the reason given for his initial encounter dissipated.

As expressed by the Washington State Supreme Court, the solution to concerns over the limits of tribal authority do not lie "in judicial distortion of the doctrine of inherent sovereignty." *State v. Eriksen*, 172 Wash. 2d 506, 514–15, 259 P.3d 1079, 1083 (2011). Instead, these issues are better addressed by use of political and legislative tools, such as cross-deputization or mutual aid pacts.

IV. The seizure of Cooley was unreasonable under Fourth Amendment standards.

In this case, the district court analyzed whether a seizure had occurred under the Fourth Amendment. ER 008-09. A seizure occurs when an officer, through coercion, exerts "physical force, or a show of authority, in some way restricts the liberty of a person." *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004). A person's liberty is restrained when, "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Washington*, 387 F.3d at 1068 (quoting *Florida v. Bostick*, 501U.S.429, 437 (1991)). This Court has identified five factors that aid in determining whether a reasonable person would have felt "at liberty to ignore the

police presence and go about his business." *Washington*, 387 F.3d at 1068. The factors are: (1) the number of officers; (2) whether weapons were displayed; (3) whether the encounter occurred in a public or non-public setting; (4) whether the officer's officious or authoritative manner would imply that compliance would be compelled; and (5) whether the officers advised the detainee of his right to terminate the encounter. *Washington*, 387 F.3d at 1068.

Here, the district court found that Officer Saylor seized Cooley when Saylor drew his weapon, ordered Cooley to show his hands, and commanded Cooley to produce identification. ER 009. The district court said, "A reasonable person would not feel free to ignore the commands of a police officer with a weapon drawn." ER 009, citing *Washington*, 387 F.3d at 1068.

Prior to that time, based upon Officer's Saylor's commands, the contact between Cooley and Saylor was not consensual. Officer Saylor noted that Cooley was agitated with his continuing questions. Cooley had told Officer Saylor he was not in need of any assistance. Officer Saylor turned his "welfare check" into an investigatory detention without any reasonable suspicion Cooley had violated any law. See *United States v. Monsivais*, 848 F.3d 353 (5th Cir. 2017).

The government claims that "there is no question the stop here would have been reasonable if it had occurred on a dirt road far removed from any public highway, as in *Becerra-Garcia*." Brf. of Govt. at 35; citing to *United States v.*

Becerra-Garcia, 397 F.3d 1167 (2005). Cooley disagrees for several reasons. First, this was not a stop, but a welfare check. The stop in *Becerra-Garcia* was deemed reasonable because the tribal rangers had articulable suspicion Becerra-Garcia was committing a crime. *Becerra-Garcia*, 397 F.3d at 1172. Because he was so far away from the nearest highway, the tribal rangers had reasonable suspicion he was trespassing on reservation lands. *Becerra-Garcia*, 397 F.3d at 1170. Finally, Becerra-Garcia did not challenge the reasonable suspicion for the stop. The sole argument he offered for why the stop was unreasonable was because the rangers lacked authority under tribal law to effectuate the stop. *Becerra-Garcia* 397 F.3d at 1174.

Most traffic stops are based upon the direct observations of unambiguous conduct or circumstances by the stopping officer. That is, in most of the cases the stopping will have been made on full probable cause. The question of whether the initial traffic stop was constitutional is usually not at issue. In the present case, the question of whether his initial seizure was constitutional is the critical issue. The Supreme Court has made it abundantly clear that unless a police officer has reasonable suspicion to conduct an investigatory stop, an individual has the right to ignore the police and go about his business. *Florida v. Royer*, 460 U.S. 491, 498 (1983). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more,

furnish those grounds. At the time Officer Saylor seized Cooley, he did not have any reason to suspect him of criminal activity and the seizure was illegal.

V. The remedy for the unreasonable seizure of Cooley is suppression of the evidence obtained as a result.

The Indian Civil Rights Act provides that "No Indian tribe in exercising powers of self-government" shall "violate the right of the people to be secure ... against unreasonable search and seizures ...." 25 U.S.C. § 1302(a)(2). While the Fourth Amendment does not govern tribal authorities, the ICRA (at least as to search and seizures) has been found to provide identical protections, including suppression of illegally obtained evidence. In *Becerra-Garcia*, 397 F.3d 1167, 1171 (2005), for example, this Court assumed that the suppression of evidence in a federal proceeding would be appropriate if the rangers' conduct violated ICRA. See also *United States v. Male Juvenile*, 280 F.3d 1008, 1023 (9th Cir. 2002)(considering suppression of evidence based on argument that confession was wrongfully obtained by tribal investigators.) The government is not in disagreement that "suppression of evidence in a federal proceeding would be appropriate if the [officer's]conduct violated ICRA." Brf. of Govt. at 17. Here, there is no question that Cooley's rights were violated and suppression is required.

CONCLUSION

Contrary to what the government is asking this Court to believe, the district court did not create a brand new Fourth Amendment test that will lead to lawlessness

on the reservation. Cooley respectfully requests this Court affirm the district court's decision to suppress all evidence obtained following his illegal seizure.

RESPECTFULLY SUBMITTED this 7th day of November, 2017.

/s/ Ashley A. Harada
Ashley A. Harada, MT Bar #7418
HARADA LAW FIRM, PLLC
Counsel for Defendant/Appellee

STATEMENT OF RELATED CASES

I certify that pursuant to Fed. R. App. P. 28-2.6, I know of no related cases pending in this Court.

Dated: November 7, 2017.

/s/ Ashley A. Harada
Ashley A. Harada, MT Bar #7418
HARADA LAW FIRM, PLLC
Counsel for Defendant/Appellee

CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP. 32(a)(1) AND NINTH CIRCUIT RULE 32-1

I certify that pursuant to Fed.R.App.P. 32(a)(1) and Ninth Circuit Rule 32-1, the attached Response Brief of Appellee is proportionately spaced, has typeface of 14 points or more and contains no more than 5,004 words (opening briefs must not exceed 14,000 words; reply briefs must not exceed 7,000 words).

DATED: November 7, 2017.

/s/ Ashley A. Harada
Ashley A. Harada, MT Bar #7418
HARADA LAW FIRM, PLLC
Counsel for Defendant/Appellee

CERTIFICATE OF SERVICE

I, Ashley A. Harada, being over the age of 18 and not a party to this action, hereby certifies under penalty of perjury that on November 7, 2017, electronically filed a true and correction copy of the APPELLEE'S RESPONSE BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF System.

I certify that service will be accomplished to the following persons and parties on the appellate CM/ECF service list:

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Dated: November 7, 2017.

/s/ Ashley A. Harada
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