

## COOLEY'S HIDDEN RAMIFICATIONS: HAS THE SUPREME COURT EXTENDED THE *TERRY* DOCTRINE FOR AUTOMOBILE SEARCHES TO THE POINT OF ELIMINATING PROBABLE CAUSE?

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*Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.*<sup>1</sup>

### *I. Introduction*

Protection against unreasonable searches and seizures dates back to the founding of our nation, when the framers amended the Constitution to add individual rights for citizens. Adding to this history, the long-recognized sovereign authority of our country's Indian tribes as "distinct, independent political communities" that are also "unique and limited [in] character" creates adjudicative challenges when state, federal, and tribal governments intersect into a complex jurisdictional relationship.<sup>2</sup> When criminal activity occurs on Indian reservations, tribal police departments are authorized to enforce tribal, federal, and state laws across their geographical areas of jurisdiction. However, the congressional authority granted to Indian tribes regarding their "powers of self-government" only allows tribes "to exercise criminal jurisdiction over all Indians," leaving non-Indian criminal prosecution to federal or state prosecutors.<sup>3</sup> This jurisdictional limitation on tribal law enforcement becomes further complicated when authorities temporarily detain non-Indian individuals for a suspected offense, and authorities must determine the limits of their investigative abilities since they lack criminal jurisdiction to punish non-Indians.<sup>4</sup> Most importantly, while the Fourth Amendment of the Constitution does not apply directly to tribal

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1. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *see also* U.S. CONST. amend. IV; *Weeks v. United States*, 232 U.S. 383, 392 (1914).

2. *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), and *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

3. 25 U.S.C. § 1301(2).

4. *See* *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

governments, the Indian Civil Rights Act of 1968 (ICRA) imposes identical limits as the Fourth Amendment on the individual tribes.<sup>5</sup> Therefore, searches and seizures conducted by tribal law enforcement agents must be analyzed under Fourth Amendment jurisprudence to determine if they violated the rights of any individuals, Indian or non-Indian.<sup>6</sup> Even if tribal sovereignty authorized tribal police to exercise criminal jurisdiction over non-Indian persons on Indian reservations, their exercise of that jurisdiction still cannot violate well-established Fourth Amendment search and seizure protections.

This Note will analyze the holding and rationale of *United States v. Cooley* and its subsequent lower-court holdings on remand.<sup>7</sup> Part II provides a summary of the *Cooley* facts. Part III sets out the applicable controlling authorities and congressionally enacted statutes that define tribal jurisdiction for handling criminal activity on reservation lands. Part IV summarizes relevant Fourth Amendment jurisprudence that the Court failed to adequately apply to the facts of *Cooley*. Next, Part IV addresses the tribal police officers' missteps in searching Cooley's truck without probable cause. Specifically, Part IV shows that the officers relied on the wrong search and seizure doctrine, in turn violating established Fourth Amendment jurisprudence. In relying on "stop and frisk" authority derived from *Terry v. Ohio*<sup>8</sup> and expanded by *Michigan v. Long*,<sup>9</sup> tribal officers went beyond search authorities granted to all law enforcement agencies and committed constitutional error that warranted suppression of the seized evidence. Part V concludes that the Court's holding opens the door to potential Fourth Amendment abuses by tribal officers in failing to apply well-established search and seizure doctrine and extends the *Terry* automobile search exemption, further undercutting probable cause as the constitutional standard for searches.

## II. Statement of the Case

### A. A Truck Found in the Middle of Indian Country

James Saylor, a tribal police officer for the Crow Tribe of Montana, was driving on an isolated portion of U.S. Route 212 on the Crow Reservation at

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5. *Id.*; compare U.S. CONST. amend. IV, with 25 U.S.C. § 1302(a)(2).

6. *Oliphant*, 435 U.S. 191; *cf. Mapp*, 367 U.S. at 655 (stating that since the Fourth Amendment is enforceable against the states through the Fourteenth Amendment, the same sanctions used against the federal government are enforceable).

7. *Cooley*, 141 S. Ct. 1638.

8. 392 U.S. 1 (1968).

9. 463 U.S. 1032 (1983).

approximately 1:00 a.m. on February 26, 2016, when he noticed a white Dodge Ram parked along the side of the road.<sup>10</sup> In Officer Saylor's experience in tribal law enforcement, it was not uncommon for him to discover motorists needing assistance in that specific area since it was known to have bad cellular service.<sup>11</sup> Officer Saylor pulled his vehicle behind the truck with the intention to conduct a welfare check and to provide assistance, if needed.<sup>12</sup> While approaching the vehicle, the officer noticed that the engine was still running, the bed of the truck was filled with numerous objects, and the windows were tinted.<sup>13</sup> After noticing movement inside the vehicle, Officer Saylor knocked on the vehicle, announced himself as law enforcement, and inquired into the status of the occupants.<sup>14</sup> Thereafter, Officer Saylor identified two persons inside the truck—a young child and Joshua Cooley.<sup>15</sup>

Cooley only partially rolled down the driver side window, giving the officer a limited view of the inside of the vehicle and any potential threats therein.<sup>16</sup> While assisting the child up to the front seat with him, Cooley stated to the officer that he had pulled over because he was “tired.”<sup>17</sup> Initially, Cooley's situation seemed reasonable to Officer Saylor because the truck had a Wyoming license plate and Cooley “appeared to be non-Indian.”<sup>18</sup> However, Officer Saylor's assumption changed when he inquired into where Cooley had come from and the reason for the trip. Cooley told Officer Saylor that he was driving from Lame Deer, an area that was only twenty-six miles from their current location, where he purchased a vehicle from a person Cooley merely identified as “Thomas.”<sup>19</sup> When Officer Saylor asked for the last name of the individual that Cooley allegedly bought the vehicle from, Cooley gave two answers: Thomas Spang or Thomas Shoulderblade.<sup>20</sup> Officer Saylor knew individuals with both names, one who was a probation officer and the other who was known for drug activities on another

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10. Petition for a Writ of Certiorari at 91a-93a, 177a, *United States v. Cooley*, 947 F.3d 1215 (9th Cir. 2020), *petition for cert. filed*, 141 S. Ct. 1638 (2021) (No. 19-1414).

11. *Id.* at 92a, 133a, 177a-78a.

12. *Id.*

13. *Id.* at 93a, 132a, 178a.

14. *Id.* at 94a, 179a.

15. *Id.* at 179a.

16. *Id.* at 95a, 133a, 179a.

17. *Id.* at 97a, 135a-36a, 179a-80a.

18. *Id.* at 95a, 136a, 180a.

19. *Id.* at 98a, 180a.

20. *Id.* at 98a, 138a-41a, 181a.

reservation.<sup>21</sup> Upon further questioning, the rationale behind why Cooley was out on the side of the highway continued to confuse Officer Saylor:<sup>22</sup> “Nothing about [Cooley’s] explanation made any sense to me.”<sup>23</sup>

The more Officer Saylor inquired into the situation, the more Cooley appeared to become agitated by the questioning.<sup>24</sup> Cooley began lowering his voice as the questions continued, which prompted Officer Saylor to ask him to roll down the window further.<sup>25</sup> Then, Officer Saylor noticed the stock-ends of what he thought were two semi-automatic rifles located by the passenger seat.<sup>26</sup> While having rifles inside of a vehicle was not an unusual occurrence in that part of Montana, Officer Saylor also noted that Cooley had “watery, blood-shot eyes,” somewhat slurred speech, and was becoming more nervous and agitated with further inquiries.<sup>27</sup> After asking Cooley to provide identification, Officer Saylor observed Cooley reaching into his right pocket to remove what looked like money.<sup>28</sup> After several similar movements, and while the child was sitting directly on Cooley’s lap, Officer Saylor lost sight of Cooley’s right hand as it appeared to reach to an area away from his pocket.<sup>29</sup> Based upon his training, Officer Saylor noticed specific behaviors from Cooley that indicated that there was a potential threat of immediate violence; as a result, Officer Saylor drew his weapon and asked Cooley to raise his hands.<sup>30</sup> Then, Officer Saylor directed Cooley to remove his identification, and nothing else, from his pocket.<sup>31</sup> After reviewing the Wyoming identification, and based upon the known weapons in the vehicle and a lack of ability to radio for additional support based upon the remote location, Officer Saylor decided to move to the passenger side of the vehicle so that he could better observe Cooley inside the truck for his own safety.<sup>32</sup> Upon moving to the other side of the truck and opening the passenger side door, Officer Saylor noticed the top of a loaded handgun sticking up between the seats next to Cooley’s right pocket and where his hand was previously

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21. *Id.*

22. *Id.* at 100a, 141a.

23. *Id.* at 181a.

24. *Id.* at 142a-43a, 181a.

25. *Id.* at 100a, 182a.

26. *Id.* at 101a, 182a.

27. *Id.* at 95a, 101a, 182a-83a.

28. *Id.* at 102a, 183a.

29. *Id.* at 103a, 142a, 183a.

30. *Id.* at 103a-04a, 183a-84a.

31. *Id.* at 104a, 184a.

32. *Id.* at 105a-07a, 143a-48a, 184a-85a.

placed.<sup>33</sup> Officer Saylor quickly removed and rendered safe the handgun, finding that it was fully loaded with a round in the chamber.<sup>34</sup> Cooley claimed that the vehicle and the firearms were all owned by “Thomas.”<sup>35</sup>

*B. Officer Saylor’s Response: A Terry Search or Probable Cause Arrest?*

Cooley indicated to Officer Saylor that he was expecting someone to come meet him on the side of the road.<sup>36</sup> That information, combined with the weapons and unusual behavior from Cooley, convinced Officer Saylor to ask both Cooley and the child “to step out of the vehicle.”<sup>37</sup> Thereafter, Officer Saylor conducted a quick over-the-clothing search of Cooley, which did not reveal any weapons.<sup>38</sup> Then, Officer Saylor walked Cooley and the child to his patrol vehicle and informed Cooley that he could remove any items from his pockets and put them onto the hood of the vehicle.<sup>39</sup> Cooley began emptying more money in small denominations from his pockets onto the hood when the officer noticed that there were plastic bags inside Cooley’s pullover sweater that resembled packaging for marijuana.<sup>40</sup> Pursuant to his law enforcement training, Officer Saylor removed the bags from Cooley’s sweater and asked about their usage; Cooley gave a vague and evasive response.<sup>41</sup> Subsequently, Cooley and the child were placed into the rear of the patrol vehicle and told that they were being detained for investigation.<sup>42</sup> Cooley told Officer Saylor that he believed that the officer did not have the authority to detain them; however, Officer Saylor informed him “that he was being detained as [Saylor] suspected their [sic] to be *crime afoot*.”<sup>43</sup>

After securing the money and plastic baggies from Cooley, Officer Saylor radioed his dispatch to request both backup and a county deputy to his location, since Cooley “appeared to be non-native.”<sup>44</sup> Then, Officer Saylor returned to the truck to secure the three firearms.<sup>45</sup> While turning off the

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33. *Id.* at 107a, 145a, 149a-50a, 185a.

34. *Id.* at 108a, 185a.

35. *Id.* at 107a, 185a.

36. *Id.* at 118a, 156a-57a, 185a.

37. *Id.* at 109a, 151a-52a, 186a.

38. *Id.* at 110a, 153a-54a, 186a.

39. *Id.* at 116a-17a, 186a.

40. *Id.* at 117a, 154a-55a, 186a.

41. *Id.* at 111a, 117a, 156a, 187a.

42. *Id.* at 117a, 187a.

43. *Id.* at 187a (emphasis added); *see also* Terry v. Ohio, 392 U.S. 1, 30 (1968) (citing exact language used by Officer Saylor to justify detaining Cooley).

44. Petition for a Writ of Certiorari, *supra* note 10, at 187a.

45. *Id.* at 118a, 157a, 188a.

vehicle's ignition, he observed numerous other suspicious items in plain view, including more plastic bags, ammunition, and multiple cell phones on the dashboard.<sup>46</sup> In addition, Officer Saylor noticed another plastic bag tucked next to the driver's seat that he suspected to contain methamphetamine.<sup>47</sup> Further, he observed a smoking pipe next to the plastic bag.<sup>48</sup>

Sharron Brown, a supervisory police officer, arrived at the scene and appears to have initially instructed Officer Saylor to get a warrant prior to searching the truck.<sup>49</sup> After a discussion on the proper procedures for the search, Officer Brown instructed Officer Saylor to seize all items in plain sight.<sup>50</sup> While photographing and seizing the evidence, Officer Saylor located a cellular phone case—not in plain view—tucked under the front seat of the truck.<sup>51</sup> When Officer Saylor opened the phone case, he discovered that it contained additional amounts of suspected methamphetamine.<sup>52</sup> Finally, while removing additional evidence from the driver side door panel, Officer Saylor found and seized another bag of suspected methamphetamine.<sup>53</sup>

The authorities took Cooley and the child to the Crow Agency Police Department for questioning.<sup>54</sup> Also, the authorities secured and turned over evidence to a special agent with the Bureau of Indian Affairs.<sup>55</sup> The Bighorn Country Sheriff's office initially arrested Cooley for driving with a suspended license and child endangerment.<sup>56</sup> After a further consented search of his vehicle, authorities found "an additional 96 grams of suspected methamphetamine, an AK-47 assault rifle, and thermal imaging devices and radio equipment" assumed to be government property inside the truck.<sup>57</sup> A federal grand jury indicted Cooley for possession of methamphetamine with the intent to distribute and possession of a firearm in the furtherance of a drug trafficking crime.<sup>58</sup>

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46. *Id.* at 119a-20a, 157a-59a, 188a.

47. *Id.*

48. *Id.* at 119a, 188a.

49. *Id.* at 161a.

50. *Id.* at 120a, 188a.

51. *Id.* at 161a, 189a.

52. *Id.* at 189a.

53. *Id.*

54. *Id.*

55. *Id.* at 190a.

56. *Id.*

57. *Id.*

58. *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021).

### *C. Motion to Suppress Evidence*

The U.S. District Court for the District of Montana granted a motion to suppress the evidence seized by Officer Saylor.<sup>59</sup> The district judge determined that a seizure of Cooley occurred under the Fourth Amendment since Officer Saylor, with “a show of authority . . . restrict[ed] [Cooley’s] liberty” when he utilized his weapon, ordered a showing of Cooley’s hands, and commanded Cooley’s identification.<sup>60</sup> The court stated that while “the Fourth Amendment technically does not apply to conduct by tribal police, the ICRA imposes identical limitations.”<sup>61</sup> The court held that since it was not apparent at the time of Cooley’s seizure that he had violated a state or federal law, his seizure was unconstitutional and “[a]ll evidence obtained subsequent . . . is suppressed because it [was] ‘fruit of the poisonous tree.’”<sup>62</sup>

The Court of Appeals for the Ninth Circuit affirmed the suppression and held that a tribal officer can only temporarily detain and search a non-Indian individual by first determining if the individual is a non-Indian and, second, if the person is non-Indian, then “it is apparent that a state or federal law has been violated.”<sup>63</sup> Since “[Officer] Saylor acted outside his authority as a tribal officer when he seized Cooley and later twice searched [his] truck,” he in turn violated the “ICRA’s Fourth Amendment counterpart,” which required suppression of the seized evidence.<sup>64</sup>

### *D. The Supreme Court’s Holding and Rationale*

The Supreme Court granted certiorari to determine if tribal officers have authority to temporarily detain and search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law.<sup>65</sup> Ultimately, the Court held that tribal officers have the inherent regulatory authority to temporarily detain and search non-Indians traveling on public rights-of-ways in Indian Country.<sup>66</sup> Further, the Court

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59. *United States v. Cooley*, No. CR 16–42–BLG–SPW, 2017 WL 499896, at \*1 (D. Mont. Feb. 7, 2017).

60. *Id.* at \*4 (quoting *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004)).

61. *Id.* at \*4 (citing *United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005)); see also 25 U.S.C. § 1302(a)(2) (found in Chapter 15: Constitutional Rights of Indians).

62. *Cooley*, 2017 WL 499896, at \*4 (quoting *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1395 (9th Cir. 1989)).

63. *United States v. Cooley*, 919 F.3d 1135, 1142 (9th Cir. 2019) (quoting *Bressi v. Ford*, 575 F.3d 891, 896 (9th Cir. 2009)).

64. *Id.* at 1143, 1148.

65. *United States v. Cooley*, 141 S. Ct. 1638, 1641 (2021).

66. *Id.* at 1642–45.

held that the existence of cross-deputization statutes fail to show that Congress intended to deny tribes detention and search authority over non-Indians on reservations.<sup>67</sup> The Court vacated the suppression of the seized evidence and remanded the case for further proceedings.<sup>68</sup>

In support of its holding, the Court cited prior decisions that established that tribal police have the authority “to detain and turn over to state officers nonmembers stopped on [a private right-of-way on a reservation] for conduct violating state law.”<sup>69</sup> While still heavily relying upon its prior holding in *Oliphant v. Suquamish Indian Tribe*, which provided that “tribes do not have inherent jurisdiction to try and to punish non-Indians,”<sup>70</sup> the Court found that federal statutes fail to show that Congress intended to deny the disputed stop and search authority, as further expanded upon in exceptions articulated in *Montana v. United States*.<sup>71</sup> The Court held in *Montana* that an “[Indian] tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the . . . health or welfare of the tribe.”<sup>72</sup> The Court further held that the holding from *Montana* fits “like a glove” when compared to *Cooley*’s facts.<sup>73</sup> The lack of ability to prosecute non-Indians in tribal courts does not take away the tribe’s regulatory authority to exercise its congressionally granted sovereignty, to include detaining and searching non-Indians for suspected state and federal crimes.<sup>74</sup> In dismissing the Ninth Circuit’s two-part requirements for tribal detention authority, the Court held that asking a person about their tribal status only produces an incentive for someone to lie and that an “apparent” violation of law “introduces a new standard into search and seizure law.”<sup>75</sup> The Court vacated the suppression of the seized evidence and remanded the case for further proceedings.<sup>76</sup>

Justice Alito concurred, reasoning that the search must be “to the extent necessary to protect [the officer] or others.”<sup>77</sup> Further, Justice Alito opined that an officer must have (1) reasonable suspicion that the non-tribal member

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67. *Id.* at 1645-46.

68. *Id.* at 1646.

69. *Id.* at 1644 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997)).

70. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

71. *Montana v. United States*, 450 U.S. 544, 566 (1981).

72. *Id.*

73. *See Cooley*, 141 S. Ct. at 1643, 1646.

74. *Id.*

75. *Id.* at 1645; *see also Bressi v. Ford*, 575 F.3d 891, 896 (2009).

76. *Cooley*, 141 S. Ct at 1646.

77. *Id.* (Alito, J., concurring).



has violated state or federal law and (2) probable cause for detaining the individual until the appropriate law enforcement officers arrive.<sup>78</sup>

*E. District Court's Decision on Remand*

On remand back to the United States District Court, District of Montana, Cooley renewed his suppression motion, putting forward three supporting arguments.<sup>79</sup> First, Cooley maintained that “Officer Saylor unlawfully seized [him] without reasonable suspicion of criminal activity.”<sup>80</sup> Second, since the initial seizure was unlawful, all of the subsequent searches Officer Saylor conducted of both “Cooley and the truck were also unlawful.”<sup>81</sup> Third, Cooley argued that he was unlawfully arrested without probable cause by Officer Saylor when he was placed into the back of the patrol car.<sup>82</sup> While Cooley argued multiple instances of when Officer Saylor illegally seized him, the court held that a seizure of Cooley did not occur “until the moment Saylor drew his service pistol and ordered Cooley to show his hands.”<sup>83</sup> The court also found that, in reviewing the articulated circumstances of the seizure, “Officer Saylor did not have the required reasonable suspicion of *criminal activity* to seize Cooley.”<sup>84</sup>

Although the district court found that Cooley’s seizure was impermissible under a “reasonable suspicion of criminal activity,” it did find that the seizure was authorized based upon Officer Saylor’s “reasonable belief that Cooley was dangerous and had access to weapons.”<sup>85</sup> Utilizing that rationale, the court held that Cooley’s seizure was permissible, along with the subsequent search of his person “and the passenger compartment of [Cooley’s] vehicle.”<sup>86</sup> Applying *Michigan v. Long*, the Supreme Court’s central case in the application of the *Terry* Doctrine to searches of automobiles, the district court found that “[t]he [decisive] issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”<sup>87</sup> The court held that Officer Saylor lawfully seized Cooley to “further mitigate any risk of danger” and was conducting a *Terry*

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78. *Id.* (Alito, J., concurring).

79. *United States v. Cooley*, No. CR 16-42-BLG-SPW, 2022 WL 74001, at \*3 (D. Mont. Jan. 7, 2022).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at \*4.

84. *Id.* at \*5 (emphasis added).

85. *Id.*

86. *Id.* (citing *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)).

87. *Id.* (citing *Long*, 463 U.S. at 1050 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968))).

search of the vehicle when he discovered the additional contraband used as evidence.<sup>88</sup> The district court found that the methamphetamines and associated items found in Cooley's truck during the *Terry* search "established probable cause of violations of federal and state law for an arrest" and, therefore, admitted them.<sup>89</sup>

### III. Controlling Authorities

#### A. Basis of Tribal Jurisdiction

The recognition of tribal sovereign power, subject to congressionally granted regulations, goes back to the initial ratification of the Constitution. In addition to Congress's power to regulate commerce with foreign nations and between states, the Commerce Clause also enumerates the ability for Congress to regulate commerce with Indian tribes.<sup>90</sup> In addition, the executive authority to enter treaties, subject to congressional approval, allowed the United States to enter into agreements with tribal governments.<sup>91</sup> The Supreme Court has traditionally recognized that the Indian Commerce Clause,<sup>92</sup> combined with the Treaty Clause,<sup>93</sup> allowed Congress, with "plenary and exclusive" powers, to legislate Indian tribes.<sup>94</sup> Although treaty authority is an executive power, those treaties allowed "Congress to deal with 'matters' with which otherwise 'Congress could not deal.'"<sup>95</sup> Although Congress ended the practice of enacting treaties with tribes in 1871, it permitted then-existing treaties to remain in effect.<sup>96</sup>

In 2011, the Honorable Jefferson Keel, President of the National Congress of America Indians, told Congress that with the passage of the Dawes Act in 1887, the federal government took ninety million acres of land from the nation's tribes in an alleged attempt "to disband our tribes, break up our

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88. *Id.*

89. *Id.*

90. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.").

91. U.S. CONST. art. II, § 2, cl. 2 (stating that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

92. U.S. CONST. art. I, § 8, cl. 3.

93. U.S. CONST. art. II, § 2, cl. 2.

94. *United States v. Lara*, 541 U.S. 193, 200 (2004) (quoting *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 470 (1979)).

95. *Id.* at 201 (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

96. *See* 25 U.S.C. § 71.

families and suppress our culture.”<sup>97</sup> However, the Indian Reorganization Act of 1934 (IRA) reversed congressional course and sought to encourage self-governance of Indian tribes while protecting and restoring tribal lands.<sup>98</sup> In 1968, the enactment of the ICRA helped further clarify and define an Indian tribe’s “power of self-government.”<sup>99</sup> According to the ICRA, the power of self-government includes the ability to exercise criminal jurisdiction over Indians and to maintain adjudicative mechanisms to maintain that authority.<sup>100</sup> In addition, the ICRA specified constitutional rights and procedural protections granted to individuals with whom the Indian tribes sought to prosecute in exercising their self-government.<sup>101</sup>

While establishing requirements that tribal courts must follow regarding sentencing of defendants, the Act also mirrors the Constitution in extending individual rights guarantees on search and seizures, speedy trial, and protection against double jeopardy, to name a few.<sup>102</sup> Tribal governments must protect people from unreasonable search and seizures and require probable cause for the issuance of warrants analogous to the protection guaranteed by the Fourth Amendment.<sup>103</sup> By implementing the ICRA, Congress showed its intent to secure “broad constitutional rights” identical to the U.S. Constitution to provide protections to American Indians from tribal governments.<sup>104</sup> Congress has never granted tribal courts the authority to subject non-Indians to their jurisdiction. Although Congress has the authority to grant Indian tribes the ability to try and punish non-Indians for criminal conduct that occurs on reservations, “tribes do not have [the] inherent jurisdiction” to do so.<sup>105</sup> Naturally, this causes friction between differing jurisdictional authorities when tribal law enforcement officers exercise their protective duties on non-Indians for acts they commit on Indian reservations.

To assist tribal law enforcement officers with their duties, Congress granted substantial authority to Bureau of Indian Affairs employees, through

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97. *American Indians and the New Deal*, LIVING NEW DEAL <https://livingnewdeal.org/what-was-the-new-deal/new-deal-inclusion/american-indians-and-the-new-deal/> (last visited Mar. 18, 2022).

98. *Id.*; see also Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101-5129 (original version at ch. 576, 48 Stat. 984 (1934)).

99. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1305.

100. *Id.*

101. *Id.* § 1302.

102. *Id.*

103. See *United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981).

104. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).

105. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

the Secretary of the Interior, by enacting the Indian Law Enforcement Reform Act.<sup>106</sup> Section 2803 of the Act grants tribal officers the authority to perform a range of duties, from carrying firearms to executing warrants and other orders issued by both federal courts and Indian tribal courts.<sup>107</sup> Further, this section grants officers the authority to make warrantless arrests within certain parameters.<sup>108</sup> Tribal officers are authorized to arrest any individual—Indian or non-Indian—on reservation land that (1) commits a felony offense in the officer’s presence, and (2) leads the officer to believe that probable cause exists, because “the person to be arrested has committed, or is committing, the felony” offense.<sup>109</sup> The arrest authority continues to incorporate several specified misdemeanor offenses, including offenses violating the Controlled Substance Act.<sup>110</sup> The common requirement for all criminal offenses that gives tribal officers the authority to arrest individuals lies with the establishment of probable cause that a person either has committed, or is committing, the specified offense. Congress also granted tribal police with investigative authority “over offenses against criminal laws of the United States in Indian country.”<sup>111</sup> However, when an investigation involves a non-Indian individual suspected of state crimes, tribal officers must “cooperate with the law enforcement agency having primary investigative jurisdiction over the offense committed.”<sup>112</sup>

Tribal law enforcement officers maintain full jurisdictional authority to enforce federal and tribal laws against Indian members on reservations. The lack of criminal jurisdiction over non-Indian individuals limits tribal law enforcement authority to arrest and/or investigate non-Indians in certain circumstances. The Supreme Court has previously held that tribes “retain [the] inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens . . . the health or welfare of the tribe.”<sup>113</sup> When tribal law enforcement officers perform duties that cross the tribal sovereign powers of civil authority protection and criminal law enforcement, constitutional protections for both Indian and non-Indian persons are still guaranteed and must be followed.

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106. Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2815 (2018).

107. 25 U.S.C. § 2803(1)-(2).

108. *Id.* § 2803(3).

109. *Id.*

110. *Id.* § 2803(3)(D)(i)(I)(aa); *see* 21 U.S.C. § 801.

111. 25 U.S.C. § 2806(a).

112. *Id.* § 2806(b).

113. *Montana v. United States*, 450 U.S. 544, 566 (1981).

### *B. Fourth Amendment Jurisprudence*

The Fourth Amendment's scope and protections have a long history of judicial examination and contestation. Three specific Fourth Amendment issues that require analysis prior to application of the Court's holding in *Cooley* are: searches incident to arrest; "stop and frisk" and the *Terry* Doctrine; and the exclusionary rule, along with the associated "good faith" exceptions.

#### *1. Search Incident to Arrest*

The rights "against unreasonable searches," and warrants unless based on probable cause, afford the people protection from government agencies in wrongfully intruding into their private domains.<sup>114</sup> Long ago, the Court recognized that "zealous officers" who "engage[] in the often competitive enterprise of ferreting out crime" failed to understand that the purpose of the Fourth Amendment was not to undermine their inferences in supporting a search of a person.<sup>115</sup> Instead, the purpose is to remove "[a]ny assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officer[] in [conducting] a search without a warrant."<sup>116</sup> Allowing anything else would afford law enforcement officers unlimited discretion, which would act to nullify the Fourth Amendment.<sup>117</sup> Further, the Court has repeatedly emphasized that searches outside of the judicial process are *per se* unreasonable—unless a limited exception applies.<sup>118</sup> As such, if a warrant based on probable cause was not obtained prior to performing a search, the government must show that an established exception existed that authorized the governmental agent to perform the search in question.<sup>119</sup>

Over time, several Supreme Court decisions have defined limits of police searches based upon the location of and the circumstances supporting the seizure. First, the Court held in *United States v. Robinson* that the authority to search a person incident to arrest, for both the safety of an officer and potential evidence of a crime, is not contingent on whether a court later finds that it was probable that evidence or weapons would be found on the

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114. U.S. CONST. amend. IV.

115. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

116. *Id.* at 14.

117. *Id.*

118. *Katz v. United States*, 389 U.S. 347, 357 (1967).

119. *Id.*

person.<sup>120</sup> An arrest “based [upon] probable cause is a reasonable intrusion under the Fourth Amendment.”<sup>121</sup>

Flowing from the rationale in *Robinson*, the Court further expounded in *Knowles v. Iowa* that, for a search incident to arrest, there must be an offense that warrants more than a citation—in this case a speeding ticket—to justify the officer’s safety and the potential loss of evidence to justify a warrantless search of a vehicle.<sup>122</sup> To search a vehicle incident to an arrest, there *must* be a valid arrest. The holding in *Knowles* added to the already complicated analytical steps needed to evaluate searches of persons when they are detained from an automobile.<sup>123</sup>

Searches conducted while in execution of a valid arrest warrant when a person is found inside an automobile were further limited to the individual being arrested and the areas within that individual’s immediate control.<sup>124</sup> The Court held in *Chimel v. California* that a search could not exceed “the area from . . . which he might obtain either a weapon or something that could have been used as evidence against [them].”<sup>125</sup> Building off of its prior holding in *Chimel*, the Court’s holding in *New York v. Belton* later expanded the search authority to include the entire passenger area, and any containers within, incident to the “lawful custodial arrest of the occupant of an automobile.”<sup>126</sup> In *Belton*, the Court found that a jacket containing cocaine was within an area of immediate control of the arrestee, as defined by *Chimel*, although the jacket was still inside the vehicle after the search authority removed and separated the defendant and the other.<sup>127</sup> The Court ultimately held that the evidence could be admitted since there “was a search incident to a lawful custodial arrest.”<sup>128</sup>

Finally, the Court again clarified its prior holdings of *Chimel* and *Belton* by imposing a two-step determination of whether a search incident to arrest of a vehicle occupant is permissible under the Fourth Amendment. In *Arizona v. Gant*, the Court held that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe

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120. 414 U.S. 218, 235 (1973).

121. *Id.*

122. 525 U.S. 113, 117-18 (1998).

123. *Id.* at 119.

124. 395 U.S. 752, 768 (1969).

125. *Id.*

126. 453 U.S. 454, 460 (1981).

127. *Id.* at 456.

128. *Id.* at 462-63.

the vehicle contains evidence of the offense of arrest.”<sup>129</sup> Recognizing that many lower courts have continuously misread and applied this line of automobile search cases, Justice Stevens pointed out in dicta that many of his fellow Justices recognize that police had begun searching the vehicles of recently arrested occupants as a rule rather than an exception.<sup>130</sup> Justice Stevens further elaborated that by following a broad interpretation of the holding in *Belton*, “a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle’s passenger compartment will not be within the arrestee’s reach at the time of the search.”<sup>131</sup> Once the circumstances allowing officers to search an automobile under exigent circumstances are gone, or when they have no reason to believe there is evidence inside related to a lawful arrest, an individual is afforded the Fourth Amendment’s protections, which require police officers to seek a warrant based upon probable cause to search the vehicle.

## 2. “Stop and Frisk”

Recognizing the inherent dangers to law enforcement and the persons in the immediate area when officers are performing their duties, modifications to the rigid search and seizure jurisprudence were needed to comport with modern society. In 1968 in *Terry v. Ohio*, the Court held that an officer may conduct a limited search of an individual’s outer clothing for weapons when the police officer, based upon their training and experience, (1) reasonably concludes criminal activity is afoot and (2) that the person suspected of the criminal activity is likely armed.<sup>132</sup> If, during the course of the investigation, nothing dispels the reasonable fear for the officer’s or others’ safety, then it is reasonable to search and seize weapons that could be used to harm the officer or others around them.<sup>133</sup> In creating a careful distinction between “search and seize” and “stop and frisk,” the Court added authorities for law enforcement to protect themselves and others. Additionally, the Court crafted an exception to the once rigorous Fourth Amendment protections. Since a “stop and frisk” intruded less than an arrest and search, the purpose of the stop must be reasonable—rather than determined by probable cause—when the officer believes that crime is “afoot” and when they are confronting

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129. 556 U.S. 332, 351 (2009).

130. *Id.* at 342.

131. *Id.* at 343.

132. 392 U.S. 1, 30 (1968).

133. *Id.*

someone they believe to be armed and dangerous.<sup>134</sup> In order to show reasonableness, officers must have more than an “unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which [they are] entitled to draw from the facts in light of [their] experience.”<sup>135</sup>

Defining the individual terms of “stop” and “seizure” was another challenge that confronted the Court. In 1980, *United States v. Mendenhall* provided more specific guidance for police officers to assess when a stop of an individual becomes a seizure. In a case where DEA agents eventually received consent to search a woman who possessed drugs, the Court upheld the search, espousing that the woman understood during the initial “stop” she was free to leave, which ultimately led to her providing consent for the search of her person and the discovery of illegal drugs.<sup>136</sup> The Court found that to determine if a person was “seized” within the Fourth Amendment, the surrounding circumstances must show that a person reasonably believed that they were not free to leave.<sup>137</sup>

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, *the display of a weapon by an officer*, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.<sup>138</sup>

Finally, the slow expansion of the *Terry* Doctrine eventually intersected with automobile search jurisprudence when the Court decided *Michigan v. Long* in 1983.<sup>139</sup> In holding that an officer could search a vehicle during an investigative stop, Justice O’Connor distinguished this case by explaining that if an individual is not placed under arrest and still has the ability to return to their vehicle, the same reasonableness search standard utilized in *Terry* applied.<sup>140</sup> The Court refused to force officers to utilize other “means to ensure their safety” while avoiding excessive intrusions when engaged in a *Terry* stop.<sup>141</sup> The holding in *Long* allows “officer[s] to search a vehicle’s passenger compartment when [they have] reasonable suspicion that an

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134. *Id.*

135. *Id.* at 27.

136. *United States v. Mendenhall*, 446 U.S. 544, 547-49, 555 (1980).

137. *Id.* at 554.

138. *Id.* (emphasis added).

139. 463 U.S. 1032 (1983).

140. *Id.* at 1051-52.

141. *Id.* at 1052.



individual, whether or not the arrestee, is ‘dangerous’ and might access the vehicle to ‘gain immediate control of weapons.’”<sup>142</sup> Law enforcement protection and public safety remains at the forefront in determining when to exercise “stop and frisk” authority. All officers now need is reasonable suspicion and the ability to articulate any dangerousness to fully search an automobile, a premise that runs counter to the Fourth Amendment probable cause standard.

### *3. Exclusionary Rule and Good Faith Exceptions*

Since the Court expanded the exclusionary rule to searches conducted by state officials in 1961, the Court began a systematic reduction in applying the rule based upon numerous case-specific circumstances.<sup>143</sup> Originally intended to deter police from utilizing physical evidence that they unconstitutionally obtained as the “Fruits of the Poisonous Tree,”<sup>144</sup> the Court clarified that the exclusionary rule “is a judicially created remedy [that is] designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”<sup>145</sup> In addition, the Court has specifically expressed that the exclusion of evidence obtained via an unconstitutional search is not “designed to ‘redress the injury’” that the judicial use of the evidence caused an individual since “[e]xclusion is ‘not a personal constitutional right.’”<sup>146</sup> This judicial versus constitutional distinction has allowed the Court to slowly reduce the application of the rule, bringing its application to only the most outrageous and far-reaching constitutional violations from governmental officials.

Numerous “good faith” exceptions to the exclusionary rule exist. These exceptions include: (1) when evidence is obtained via a facially valid search warrant that is later found to be a defective search warrant;<sup>147</sup> (2) when the preponderance of the evidence shows that, despite the illegal search, the government would have inevitably discovered the evidence;<sup>148</sup> and (3) when officers inadvertently find incriminating evidence in plain view when those

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142. *Arizona v. Gant*, 556 U.S. 332, 346-47 (2009) (quoting *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)).

143. *See Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

144. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

145. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

146. *Davis v. United States*, 564 U.S. 229, 236 (2011) (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)).

147. *See United States v. Leon*, 468 U.S. 897, 922 (1984).

148. *See Nix v. Williams*, 467 U.S. 431, 444, 448 (1984).

officers have a legal right to be where they are when they find it—otherwise known as the plain view doctrine.<sup>149</sup>

Moreover, regarding the plain view doctrine, the Court held in *Arizona v. Hicks* that an officer must still have probable cause—not just reasonable suspicion—to invoke the doctrine, unlike the reverse approach taken in *Terry*.<sup>150</sup> In the words of Justice Scalia delivering the opinion of the Court, not requiring probable cause “would be to cut the ‘plain view’ doctrine loose from its theoretical and practical mooring[.]”<sup>151</sup> The Court’s holding in *Hicks* addressed suppression of evidence based upon moving stereo equipment inside an apartment to allow officers to record serial numbers to verify if the equipment was stolen.<sup>152</sup> Unfortunately, continuous interplay between these different search exceptions with automobile search authority has blurred the lines regarding which cases should serve as controlling precedent.<sup>153</sup> Regardless of where a search occurs, the goal of law enforcement accountability intended by the exclusionary rule requires “an assessment of the flagrancy of the police misconduct” and that “evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’”<sup>154</sup>

#### IV. Constitutional Overreach?

The Supreme Court’s primary focus in deciding *Cooley* keyed on tribal sovereignty and congressionally granted powers when tribal law enforcement officers interact with non-Indians on reservation lands. What the Court missed was the application of Fourth Amendment doctrine regarding the conduct leading to an illegal search of Cooley’s truck. Based upon Officer Saylor seizing both Cooley and the child in a matter that was tantamount to arrest, the *Terry* “stop and frisk” ability to search the truck was no longer an option. Either Cooley’s consent or a probable cause warrant was required to completely search the truck pursuant to the Court’s holding in *Gant*. Rather than continuing the overexpansion of the *Terry* Doctrine, the Court could

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149. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); see also *Horton v. California*, 496 U.S. 128 (1990).

150. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

151. *Id.*

152. *Id.* at 324-25.

153. See *Davis v. United States*, 564 U.S. 229 (2011); see also *Arizona v. Gant*, 556 U.S. 332, 351 (2009). See generally *id.*

154. *Herring v. United States*, 555 U.S. 135, 143 (2009) (quoting *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987)).

have held that Officer Saylor had probable cause to arrest Cooley based upon the totality of the circumstances and public safety, thus eliminating any search issues utilizing investigative reasonable suspicion. In holding that Officer Saylor had probable cause to arrest Cooley and granting tribal officers arrest authority under this limited circumstance, the search would have then been authorized under *Gant* as “evidence of the offense of arrest”<sup>155</sup> based upon the threat of imminent violence from Cooley.

*A. Conduct Leading to the Search*

Officer Saylor, in both his police report and during his testimony at the suppression hearing, stated that it was customary for him to come across vehicles needing assistance parked along the side of Route 212 on the Crow Reservation.<sup>156</sup> Upon making initial contact with Cooley while conducting a welfare check of the vehicle occupants, Officer Saylor specifically noted in the report and his testimony that Cooley “appeared to be non-native.”<sup>157</sup> Such an acknowledgement by Officer Saylor tends to show that he recognized the criminal jurisdictional limits of tribal law enforcement on non-Indians and the congressionally granted authorities provided by the Indian Law Enforcement Reform Act.<sup>158</sup> Officer Saylor asked numerous questions in an attempt to have Cooley explain why he and the young child were parked along the side of a road late at night for no apparent reason.<sup>159</sup> During this questioning, Officer Saylor began to suspect there was more to the situation than simplistic reasons.<sup>160</sup> In addition to Cooley’s illogical answers to the posed questions, Officer Saylor also noticed the stock-ends of what appeared to be semi-automatic rifles in the adjacent front seat of the truck.<sup>161</sup> Officer Saylor stated that it was common for rifles to be inside of trucks in that particular location; however, Cooley’s actions became indicative of someone with violent and aggressive propensities, which concerned Officer Saylor.<sup>162</sup> After Officer Saylor repeatedly asked for his identification, Cooley failed to provide it to Officer Saylor and appeared to move his right hand towards an area away from his pocket.<sup>163</sup> The presence of these factors, combined with

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155. *Gant*, 556 U.S. at 351.

156. Petition for a Writ of Certiorari, *supra* note 10, at 177a-78a.

157. *Id.* at 95a, 136a, 180a.

158. *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

159. Petition for a Writ of Certiorari, *supra* note 10, at 95a, 98a, 100a, 136a, 138a-41a, 180a-81a.

160. *Id.* at 181a.

161. *Id.* at 101a, 182a.

162. *Id.* at 101a, 182a-83a.

163. *Id.* at 103a, 142a, 183a.

his background and experience in law enforcement, led Officer Saylor to draw his weapon and order Cooley to raise his hands in the interest of protecting his own safety.<sup>164</sup> Once Officer Saylor moved to the other side of the truck and opened the passenger side door, he discovered and rendered safe a loaded firearm located next to Cooley where his right hand was originally reaching.<sup>165</sup> Officer Saylor then ordered Cooley and the child out of the truck for further investigation.<sup>166</sup>

Officer Saylor was justified in his actions to remove Cooley and the child, because the totality of the circumstances indicated that there was more to the situation that Cooley refused to disclose. The isolation of the truck, Cooley's mentioning that he was meeting someone else at the location, and the presence of firearms gave Officer Saylor reasonable suspicion that, as he later stated to Cooley, "crime [was] afoot."<sup>167</sup> At this point of the encounter with his service pistol drawn, Officer Saylor seized Cooley and the child within the understanding of the Fourth Amendment, a holding that the district court confirmed on remand.<sup>168</sup>

The Court's decision in *Mendenhall* provides a subjective evaluation of situations when individuals are considered seized within the Fourth Amendment, thus invoking constitutional protections.<sup>169</sup> As previously stated, Officer Saylor ordering both Cooley and the child out of the truck while handling his firearm, and then securing them both in the back of the police cruiser, are circumstances indicative of a legitimate seizure since a reasonable person would likely believe they were not free to leave.<sup>170</sup> The combination of Cooley's behavior and the presence of multiple weapons, led Officer Saylor to seize Cooley in a manner tantamount to arrest, where the Officer's actions contradicted his stated objectives of simple investigation. It is during this time where Officer Saylor's continued invocation of the *Terry* Doctrine created a fatal sequence of events for the subsequent search of the truck.

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164. *Id.* at 103a-04a, 183a-84a.

165. *Id.* at 107a-08a, 145a, 149a-50a, 185a.

166. *Id.* at 109a, 151a-52a, 186a.

167. *Id.* at 187a.

168. *United States v. Cooley*, No. CR 16-42-BLG-SPW, 2022 WL 74001, at \*4 (D. Mont. Jan. 7, 2022).

169. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.").

170. *See, e.g., id.*; *Petition for a Writ of Certiorari*, *supra* note 10, at 109a, 151a-52a, 186a.

Officer Saylor skirted around the search requirement by carefully utilizing the language of *Terry* to justify the search of the truck once Cooley and the child were in the back of the patrol vehicle and seized within Fourth Amendment standards. Further, Officer Saylor's testimony indicated that there was a disagreement between the Bureau of Indian Affairs lieutenant and himself on the proper procedure and authorities for conducting the search of the vehicle—as evidenced by the decision to seize only the items from the truck that were in plain sight.<sup>171</sup> The multiple officers on-site recognized their limited search authority, decided instead to knowingly push their constitutional limits, which, in turn, provided the requisite showing articulated in *Herring v. United States* of a knowing violation of Cooley's Fourth Amendment rights.<sup>172</sup> Officer Saylor stated in both his report and testimony that Cooley and the child were detained under the reasonable suspicion standard of *Terry*, where the plain view doctrine can only be invoked under a probable cause standard that gives an officer the legal right to be where they find the evidence.<sup>173</sup> Once Cooley and the child were escorted to the patrol car, searched, and secured in the back of the vehicle, the *Terry* “stop and frisk” analysis ends; and the Fourth Amendment automobile search doctrine begins. “The *Terry* stop is a far more minimal intrusion [than arrest and detention on probable cause and], simply allow[s] the officer to *briefly investigate* further.”<sup>174</sup>

The actions of Officer Saylor in placing Cooley and the child in the back of the police cruiser, and not simply allowing them to stand along the side of the road, contradicts any indication of brevity of investigation as evaluated under the criteria articulated in *Mendenhall*. Further, this distinction is critical to delineate when the *Terry* Doctrine intersects with an automobile search of a passenger compartment under *Long*, and when the warrant with probable cause requirement begins under *Gant*.<sup>175</sup> Reliance on the decision in *Long*, as ultimately held by the District Court in Montana on remand, conflicts with *Gant*'s automobile search doctrine because a new “good faith” exception is extended to tribal police officers for a warrantless search of an

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171. Petition for a Writ of Certiorari, *supra* note 10, at 161a, 189a.

172. See *Herring v. United States*, 555 U.S. 135, 143 (2009).

173. Petition for a Writ of Certiorari, *supra* note 10, at 187a; see also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (holding that police cannot conduct a warrantless search of an automobile if (1) they have prior knowledge that they would find incriminating evidence and (2) failed to secure a warrant.).

174. *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000) (emphasis added).

175. See *Michigan v. Long*, 463 U.S. 1032, 1050-52 (1983); see also *Arizona v. Gant*, 556 U.S. 332 (2009).

automobile, without probable cause, even when officers on-scene suspected that they were not constitutionally nor jurisdictionally authorized to conduct such a search.<sup>176</sup> Justice Breyer foreshadowed this continued use of exception practice in his dissenting opinion in *Davis* in predicting that when the Court merely asks whether the officer's conduct rises to the level of "'deliberate, reckless, or grossly negligent,' then the 'good faith' exception will swallow the exclusionary rule."<sup>177</sup> Justice Breyer's observation that good-faith exceptions were expanding to the point that the exclusionary rule would be essentially eliminated came true, thus continuing to make a judicial rule designed to protect individuals from governmental overreach into a principle of legal fiction.

Instead of relying on "civil authority over the conduct of non-Indians,"<sup>178</sup> as held in *Montana*, the Court needed to look to its Fourth Amendment jurisprudence—specifically *Gant*—which held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search, or it is reasonable to believe the vehicle contains evidence of the offense of arrest."<sup>179</sup> Cooley was seized in a manner tantamount to arrest, although Officer Saylor never specifically stated that fact to Cooley while seizing him. When Officer Saylor initially seized Cooley, the combination of his evasive answers to questioning and Officer Saylor's inclination that Cooley intended to utilize potentially deadly force against the officer indicated the only possible criminal activity.<sup>180</sup> Further, when applying *Belton* to Cooley's facts, it was solely after the seizure that the tribal officer developed probable cause to arrest based upon his authority granted via the Indian Law Enforcement Reform Act.<sup>181</sup> The *Cooley* holding that law enforcement officers, even with limited arrest authority over non-Indians on tribal lands, can fully search any vehicle without a warrant opens the door for exploitation by all law

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176. Compare *Michigan v. Long*, 463 U.S. 1032 (1983) ("the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts" . . . that the suspect is dangerous and the suspect may gain immediate control of weapons."), with *Arizona v. Gant*, 556 U.S. 332 (2009) (law enforcement may search the vehicle of a recent occupant arrestee "only if the arrestee is within reaching distance of the passenger compartment at the time of the search," or there is reasonable belief that crime-related evidence is inside the vehicle.).

177. *Davis v. United States*, 564 U.S. 229, 258 (2011) (Breyer, J., dissenting).

178. *Montana v. United States*, 450 U.S. 544, 566 (1981).

179. *Gant*, 556 U.S. at 351.

180. Petition for a Writ of Certiorari, *supra* note 10, at 103a-04a, 183a-84a.

181. 25 U.S.C. § 2803.

enforcement as long as they provide a mere indication of an explanation of why they conducted the search. The Court could have eliminated this distinction by holding that tribal officers have probable cause to arrest individuals, based upon the totality of the circumstance and public safety, when the suspect presents an imminent threat to the officer or others.

Justice Stevens articulated his fear of *Terry* Doctrine over expansion in declaring that “[e]ven if the warrant requirement does inconvenience the police to some extent, that fact does not distinguish [the] constitutional requirement[s] from any other procedural protection secured by the Bill of Rights.”<sup>182</sup> The Constitution has long enumerated Congress’s power to regulate jurisdictional powers granted to Indian tribes.<sup>183</sup> The ICRA provides individual rights for persons that mirrors the Constitution—including protections against unreasonable searches and seizures.<sup>184</sup> If the Court holds that tribal police have more authority than traditional governmental agents regarding Fourth Amendment restrictions, then that effectively eliminates prior case law requiring probable cause for searches and makes reasonable suspicion the new standard to allow any full automobile search. To echo the prophetic words of Justice Scalia in *Hicks*, the Court has effectively turned “stop and frisk” of an automobile into “search and seize” whenever an officer’s inclinations deem it appropriate.<sup>185</sup>

### *B. What the Court Should Have Done*

After Officer Saylor put Cooley and the child into the back of his patrol vehicle, he returned to the truck with the stated intention to secure the weapons.<sup>186</sup> During this process, he further observed ammunition on the front seat, multiple cellular phones on the dashboard, and “what appeared to be methamphetamine[] and a pipe” tucked in between the front seats.<sup>187</sup> Officer Saylor testified that no manipulation was needed for him to both see items and identify what they were.<sup>188</sup> Once the Bureau of Indian Affairs lieutenant arrived and directed Officer Saylor to seize what he had found in plain sight,

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182. *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

183. *See supra* Section III.A.

184. *United States v. Cooley*, No. CR 16-42-BLG-SPW, 2017 WL 499896, at \*4 (D. Mont. Feb. 7, 2017) (citing *United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005)); *see also* 25 U.S.C. § 1302(a)(2) (found in Chapter 15: Constitutional Rights of Indians).

185. *See Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

186. *Petition for a Writ of Certiorari*, *supra* note 10, at 118a, 157a, 188a.

187. *Id.* at 119a-20a, 157a-59a, 188a.

188. *Id.* at 119a, 158a.

it was then an unconstitutional overreach conducted by an overzealous, yet well intentioned, law enforcement officer.

The Indian Law Enforcement Reform Act allows tribal officers to arrest non-Indian persons when they are suspected of violating the Controlled Substance Act.<sup>189</sup> The discovery of the initial amounts of methamphetamine, combined with the firearms, would have served as probable cause under the Act to arrest Cooley. At that point, the holding in *Gant* would have allowed a further search of the vehicle since then the search would be reasonable for additional “evidence of the offense of arrest.”<sup>190</sup> Further, rather than the Court determining if the application of *Terry* allowed tribal police to temporarily search and detain non-tribal persons, the Court could have ruled on a broader arrest authority for those officers when individuals present dangerous circumstances that endanger officers and others. When Officer Saylor seized Cooley based upon the perceived danger, the Court could have determined that the seizure was authorized for public safety within the Fourth Amendment and avoided further confusion on *Terry* Doctrine exceptions. Cooley was not arrested until after his truck was seized, and both he and the child were also taken to the Crow Police Department for further questioning.<sup>191</sup> Further, Cooley’s initial arrest was on state charges for “driving offenses and criminal endangerment of a child” and not the federal drug and firearm offences that became this instant case.<sup>192</sup> Clarifying and expanding upon the tribal officer’s arrest authority would have avoided the search question by authorizing tribal officers to arrest individuals, when the totality of the circumstances gives them probable cause, and when the individual presents a significant danger to officers and others in the immediate area. If the Court held that Officer Saylor could have lawfully arrested Cooley, the Court’s holding in *Gant* ensured that once Cooley and the child were secured in the back of his patrol vehicle, that a probable cause warrant or potential evidence of the alleged crime were required to continue the search of the truck.

#### V. Conclusion

The holding by the Supreme Court in *Cooley* failed to properly apply Fourth Amendment jurisprudence and wrongfully approved the tribal officer’s search of Cooley’s vehicle beyond what is constitutionally allowed.

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189. 25 U.S.C. § 2803.

190. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

191. Petition for a Writ of Certiorari, *supra* note 10, at 190a.

192. *Id.*



In reversing both the district court's and Ninth Circuit's decisions, the Court's holding has opened the door to potential abusive policing procedures from all law enforcement officers by failing to acknowledge the Court's Fourth Amendment jurisprudence. Search and seizure limitations apply to all governmental agencies. The tribal officer's recognition that he was conducting a search pursuant to *Terry* failed to account for additional case law that would have directed him to either allow proper authorities to conduct a search incident to arrest or acquire a search warrant based upon probable cause. Officer Saylor violated Cooley's Fourth Amendment protections by performing a search beyond the Court's holding in *Gant*, and the subsequent evidence used as the basis for the federal charge should have been suppressed under the exclusionary rule. The opinion from *Terry* stated it best: "[a] ruling admitting evidence in a criminal trial . . . has the . . . effect of legitimizing the conduct which produced the evidence."<sup>193</sup> The Court's holding in *Cooley* and the district court's subsequent decision on remand is yet another step in removing the Fourth Amendments "moorings" from overzealous law enforcement officers.<sup>194</sup>

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193. *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

194. *See generally* *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).