

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

ERIC BRUCE FOWLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A state trooper stopped, detained, and searched Eric Fowler, an Indian within the boundaries of his reservation. Did the state trooper have jurisdiction, absent federal approval of the cross-deputization agreements, to arrest Mr. Fowler, an Indian, within his reservation boundaries?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were petitioner Eric Bruce Fowler and respondent United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Eric Bruce Fowler respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

I. OPINIONS AND ORDERS BELOW

The opinion of the Ninth Circuit Court of Appeals is a published decision entered in *United States v. Fowler*, 48 F. 4th 1022 (9th Cir. 2022). (Appendix (App.) A.)

II. JURISDICTION

The court of appeals entered judgment on September 13, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment protects the “right of people to be secure in their persons... against unreasonable searches and seizures. U.S. Const. amend. IV.

Indian country is subject to exclusive federal or tribal jurisdiction, pursuant to 18 U.S.C. §1152 which provides:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Jurisdiction can be acquired by states, but only in compliance with 25 U.S.C.A. § 1321 and 25 U.S.C.A. § 1326, which provide:

25 U.S.C.A. § 1321:

(a) Consent of United States

(1) In general

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed

within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(2) Concurrent jurisdiction

At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of Title 18 within the Indian country of the Indian tribe.

25 U.S.C.A. § 1326:

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Fowler was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. §922 (g)(1) which provides that it is unlawful to possess a firearm if:

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

IV. STATEMENT OF THE CASE

I. Course of Proceedings in the Trial Court

Mr. Fowler was charged by Indictment on May 27, 2020 with one count of prohibited person in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), one count of possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d), and a forfeiture allegation pursuant to 18 U.S.C. § 924(d). Mr. Fowler was arraigned on July 7, 2020, at which time he pled not guilty and was detained. On July 31, 2020, Mr. Fowler filed a Motion to Suppress Evidence and Brief in Support, seeking to exclude evidence gathered as a result of an illegal search. Specifically, the motion sought to exclude evidence gathered during a Montana Highway Patrol Trooper's search of a vehicle Mr. Fowler was driving on the Fort Peck Reservation. The government responded to the Motion in opposition and a suppression hearing was held on December 11, 2020. The Court issued a written order denying Mr. Fowler's motion in its entirety on January 25, 2021. (A copy of the district court order denying Mr. Fowler's motion to suppress is attached as App. B.)

Mr. Fowler pled guilty to Count I of the Indictment on April 14, 2021, pursuant to a conditional plea agreement with the United States in which he reserved the right to appeal the adverse ruling on the motion to suppress. On

July 21, 2021, Mr. Fowler was sentenced to 48 months imprisonment in the Federal Bureau of Prisons, followed by 3 years of supervised release. (A copy of Mr. Fowler's Judgment is attached as App.C.)

II, Relevant Facts

The factual proceedings of this matter are, for the most part, undisputed. On May 5, 2019, Montana Highway Patrol Trooper David Moon was patrolling U.S. Highway 2 within the boundaries of the Fort Peck Indian Reservation in northeastern Montana. Trooper Moon observed a truck traveling without a license plate or temporary tag, so he stopped the truck near the town of Wolf Point, Montana. The stop took place entirely within the bounds of the Fort Peck Indian Reservation. When the truck pulled over, the driver immediately got out of the truck, and Trooper Moon was recognized the driver as Eric Fowler because, he "knew of Mr. Fowler prior to the stop."

While Trooper Moon was standing by the driver's side door, he looked into the truck and observed an alcohol container and a rifle. After running Mr. Fowler's driver's license, and determining that he did not have insurance, Trooper Moon issued Mr. Fowler tribal citations for no seatbelt, no financial responsibility, and no driver's license. Trooper Moon confirmed Mr. Fowler was a member of the Assiniboine or Sioux Tribes of the Fort Peck Indian

Reservation. He issued tribal citations “because he [Mr. Fowler] is a tribal member, and the offense took place on the tribal reservation.”

After Trooper Moon issued the tribal citations, Mr. Fowler left the scene, but Trooper Moon seized the truck. Trooper Moon ran a K-9 search on the vehicle because he had seen a marijuana grinder inside when retrieving Mr. Fowler’s coat for him. The K-9 alerted, and Trooper Moon then sought and obtained a tribal search warrant for the truck. Mr. Fowler was indicted on the evidence (the firearm in the truck) obtained as a result of Trooper Moon’s search that day.

Trooper Moon testified that he believed to have the authority to issue tribal citations on tribal land because he “[h]ad to go through four steps. Initially, did a background check, they did a background check on me. Then had to go to criminal jurisdiction in Indian Country training. Then I went through a cultural awareness training put on by Captain Summers. And then I went in front of the tribal council.” After going through these four steps, Trooper Moon “was told by my sergeant I was authorized to make stops on the reservation for tribal and nontribal members, and cite them into whatever court was appropriate.” Trooper Moon testified he believed he was entitled to make such arrests because of a cross-deputization agreement with the Fort

Peck Tribe.

The cross-deputization agreements referenced by Trooper Moon refer to two agreements, titled, respectively, “Cooperative Agreement Providing for Cross-Deputization of Law Enforcement Officers of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the City of Wolf Point, the City of Poplar, the Montana Highway Patrol, and Roosevelt County”, executed in 2000 and 2003 “Amendment of Cooperative Agreement Providing for Cross-Deputization of Law Enforcement Officers of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the City of Wolf Point, the City of Poplar, the Montana Highway Patrol, Roosevelt County and Valley County” (collectively, “the Agreements”). There are two differences between the 2000 Agreement and the 2003 Amendment. The 2003 Agreement was designed to include Valley County. However, of significance, is that the 2003 Amendment lacks the signature of one of the parties, Ed Naranjo, District Five Commander and BIA (Bureau of Indian Affairs) Designee of the U.S. Secretary of the Interior. (A copy of the 2003 Agreement is attached as App. D.)

The basic intent of the Agreements is to “establish a mechanism whereby citation and arrest authority of the Tribes over Indians on the

reservation is extended to commissioned law enforcement officials of the State of Montana...”. The Agreements state that “all such commissioned law enforcement officers shall be treated as federal employees in accordance with the Indian Law Enforcement Reform Act, 25 U.S.C. § 2804, and with the Federal Tort Claims Act, 28 U.S.C. §§ 2401, 2671 – 2680, when performing duties under their commission.” The parties to the Agreements include: Chairman of the Assiniboine and Sioux Tribes of the Fort Peck Reservation; the County Commissioners of each party county; the Mayor of each party city, Attorney General of the State of Montana for the Montana Highway Patrol; and the District Five Commander as the BIA Designee of the U.S. Secretary of the Interior. The 2000 Agreement is signed by all of these parties.

The 2003 Amended Agreement is signed by all parties except the BIA Designee. On February 16, 2016, Douglas Noseep, the Special Agent in Charge of the BIA District Five wrote a letter to the Chairman of the Fort Peck Executive Board addressing the 2003 Agreement. (A copy of Agent Noseep’s letter is attached as App. E.) The letter points out that despite the statement that all law enforcement officers shall be treated as federal employees under the Agreement, the Tribe “failed to gain the BIA’s signatory approval.” The letter states that the 2003 Agreement, the version in place to-date, does not

meet the requirements of a BIA deputization agreement.

Direct appeal

Mr. Fowler filed a Notice of Appeal to the Ninth Circuit on August 4, 2021. The Ninth Circuit affirmed Mr. Fowler's conviction in a published opinion. *United States v. Fowler*, 48 F. 4th 1022 (9th Cir. 2022).

V. REASONS FOR GRANTING THE WRIT

A state trooper has no jurisdiction to arrest an Indian, within reservation boundaries, absent federal approval of any cross-deputization agreements.

In *United States v. Cooley*, 141 S. Ct. 1638 (2021), this Court addressed the question of whether a tribal officer can stop and detain a non-Indian traveling through reservation boundaries. In the converse, this case raises the question of whether a state trooper can stop and detain an Indian, within reservation boundaries, without a cross-deputization agreement that strictly comports with statutory mandates and without federal approval. Trooper Moon exceeded his authority when he instigated a criminal investigation into Mr. Fowler after realizing that Mr. Fowler was a tribal member. The Cross-Deputization Agreements (referenced collectively as the "CDAs") were invalid as a matter of law since they were instated without strict statutory compliance.

As this Court has recognized, Indian tribes are “distinct, independent, political communities,” exercising sovereign authority. *Cooley*, 141 S. Ct. at 1642 (citation omitted). However, the “sovereignty that the Indian tribes retain is of a unique and limited character.” *Cooley*, 141 S. Ct. at 1642 *citing United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). “Tribes lack any ‘freedom independently to determine their external relations’ and cannot, for instance, ‘enter into direct commercial or governmental relations with foreign nations.’” *Cooley*, 141 S. Ct. at 1641 *quoting Wheeler*, 435 U.S. at 326. Tribal authority remains subject to the plenary authority of Congress. *Cooley*, 141 S. Ct. at 1643.

Without explicit approval, state law enforcement officers do not have author to arrest tribal members. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020). “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation’s history.” *McGirt*, 140 S. Ct. at 2476 *citing Rice v. Olson*, 324 U.S. 786, 789, 65 S. Ct. 989, 89 L. Ed. 1367 (1945). Thus, pursuant to 25 U.S.C. §§ 1321, 1326, states can only acquire jurisdiction over tribal land with the consent of the tribe by special election called by the Secretary of the Interior. For criminal offenses, it must be by a majority vote of the adult Indians, voting at a special election held for that

specific purpose, and instituted by the Secretary of Interior and at the request of the tribal council twenty percent of the enrolled adults. 25 U.S.C. § 1326.

While the Tribes of the Fort Peck Reservation did accept the jurisdiction of the State of Montana via the CDAs, and the CDAs were approved by a Tribal Resolution, the Secretary of the Interior, represented by the BIA, did not call a special election as required by the statute, did not sign the most recent CDA, and disavowed its validity. The Federal Government, via the BIA, was a party to both Agreements. When it came time to approve the latest version, the 2003 version, the BIA declined. Instead, the Federal Government explicitly disavowed the CDAs. (*See*, App. E.) The legitimacy of the CDAs is dependent upon that approval.

The State of Montana has a compact with the United States that plainly indicates “Indian tribes shall remain under the absolute jurisdiction and control of the United States.” Mont. Const., art. I, sec. I. The CDAs do not provide a valid exception to that compact. The CDAs cite as authority for their own existence the “Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801 – 2804 [which] provides the Secretary of the Interior with the authority to enter into and approve such cooperative law enforcement agreements.” The parties clearly intended to condition the Agreements upon

the approval of the Secretary of the Interior. They failed to obtain such approval, making the Agreements invalid.

Despite the CDAs being in place for more than twenty years, “the magnitude of a legal wrong is no reason to perpetuate it.” *McGirt*, 140 S. Ct. at 2480. The CDAs relied upon by Trooper Moon were invalid, and thus his authority to detain and search Mr. Fowler.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,


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December 5, 2022

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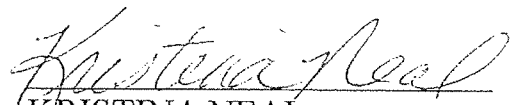
ERIC BRUCE FOWLER, Petitioner,

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CERTIFICATE OF COMPLIANCE

I, Kristina Neal, certify that the petition for a writ of certiorari filed simultaneously is proportionally spaced, has a typeface of 12 points or more, and contains 2523 words.



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DATED: December 5, 2022

No. _____

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SUPREME COURT OF THE UNITED STATES

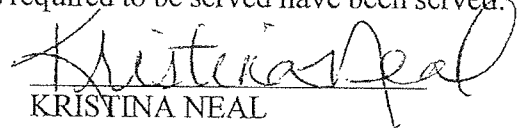
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CERTIFICATE OF SERVICE

I, Kristina Neal, a member of the Bar of this Court, hereby certify that on DECEMBER 5, 2022, a copy of the Petition of Writ of Certiorari and Motion to Proceed in Forma Pauperis in the above-entitled case were mailed, first class postage prepaid to: Jeffrey K. Starnes, Assistant United States Attorney, United States Attorney's Office, P.O. Box 3447, 119 1st Avenue North, Suite 300, Great Falls, Montana 59403-3447 and Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N.W., Washington D.C. 20530-0001, counsel for all the respondents herein. I further certify that all parties required to be served have been served.



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DATED: December 5, 2022