*United States v. Cooley*, 919 F.3d 1135 (9th Cir. 2019), *reh'g en banc denied*, 947 F.3d 1215 (9th Cir. 2020)

- **Holding:** Evidence seized from a non-Indian by tribal officer during roadside stop was subject to exclusion in federal court criminal proceeding because (1) the officer lacked jurisdiction to make the seizure under federal common law standards, (2) the seizure violated the Fourth Amendment counterpart in the Indian Civil Rights Act, and (3) the exclusionary rule applies to such violations. This summary contains an analysis of the opinions concurring and dissenting from the denial of rehearing and rehearing en banc.
- **Summary:** In the early morning hours, a Crow Tribe law enforcement officer (Saylor) came across Defendant Cooley's truck parked on the shoulder of a highway within the Crow Reservation. Saylor had no reason to believe that Cooley was engaged in criminal conduct but stopped to check on the truck's status. A somewhat extended discussion then began with Saylor's assumption, based on Cooley's appearance when he first lowered the truck's driver-side window, that he was non-Indian and the fact that Saylor did not subsequently inquire as to such status. After observing conduct by Cooley indicating that he might become violent, Saylor began a process that resulted in detaining Cooley and escorting him and his child, who was also in the truck, to the officer's vehicle. There, Cooley took a "few small, empty plastic bags" that, Saylor knew, "are commonly used to package methamphetamine. Saylor then requested assistance from other Reservation and county law enforcement officers. Prior to their arrival, Saylor returned to the truck and found drug paraphernalia and a plastic bag containing methamphetamine-like substance. At the direction of a Bureau of Indian Affairs officer, Saylor conducted a second search and discovered additional methamphetamine. Cooley was charged with federal drug- and firearm-related offenses, and he moved to suppress all evidence seized during the stop. The district court granted the motion, reasoning that Saylor had assumed Cooley's non-Indian status at the stop's commencement; that he lacked jurisdiction to detain a non-Indian "on a state or federal right-of-way unless it is apparent at the time of the detention that the non-Indian has been violating state or federal law[;]" and that "ICRA, which contains language mirroring the Fourth Amendment, requires suppression in federal court of evidence obtained by tribal officers in violation of ICRA." The Government appealed, and the Ninth Circuit affirmed.

  The panel first determined that the tribal officer lacked authority to detain Cooley. After summarizing general Indian law jurisdictional principles, it stated:

  > [T]ribal authorities may stop those suspected of violating tribal law on public rights-of-way as long as the suspect's Indian status is unknown. In such circumstances, tribal officials' initial authority is limited to ascertaining whether the person is an Indian. … The detention must be "a brief [and] limited" one; authorities will typically need "to ask one question" to determine whether the suspect is an Indian. … If, during this limited interaction, "it is apparent that a state or federal law has been violated, the [tribal] officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities."

  The panel then added that prior circuit authority, *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009), "made clear that the power to detain non-Indians on public rights-of-way for 'obvious' or 'apparent' violations of state or federal law does not allow officers to search

a known non-Indian for the purpose of finding evidence of a crime." Here, despite "not having ascertained whether Cooley was an Indian, Saylor detained Cooley and twice searched his truck. Continuing to detain—and searching—a non-Indian without first attempting to ascertain his status is beyond the authority of a tribal officer on a public, nontribal highway crossing a reservation."

The panel next agreed with the district court that the exclusionary rule applies to searches and seizures violating ICRA's Fourth Amendment counterpart in 25 U.S.C.A. §1302(a)(2). It reasoned:

> Congress enacted language in ICRA that mirrors the Fourth Amendment's protections, and it expressed concern that tribal authorities were violating the protections of that Amendment. The exclusionary rule would play the identical safeguarding function for subsection (a)(2) of ICRA, as it does for the Fourth Amendment. Given that the exclusionary rule applied in federal court to both state and federal Fourth Amendment violations at the time ICRA was enacted and was understood as essential to the effective functioning of the Fourth Amendment, the most reasonable inference is that the substantive parallelism between the Fourth Amendment and ICRA continues at the remedy level. The exclusionary rule therefore applies in federal court prosecutions to evidence obtained in violation of ICRA's Fourth Amendment counterpart.

The panel expressly declined in a footnote, however, to "decide whether the exclusionary rule also applies in tribal court proceedings to evidence obtained in violation of ICRA's Fourth Amendment analogue."

The panel then cut to the chase; *i.e.*, did the absence of jurisdiction for Saylor constitute an unreasonable search or seizure in violation of the ICRA provision? The analysis on this issue was the decision's most detailed and began with the predicate proposition that "a tribal officer does not *necessarily* conduct an unreasonable search or seizure for ICRA purposes when he acts beyond his tribal jurisdiction. But the tribal authority consideration is highly pertinent to determining whether a search or seizure is unreasonable under ICRA." The panel turned to "[t]he common law of the founding era" for guidance. Relying on Blackstone, it stated that "[a]t the time of the Fourth Amendment's adoption, private individuals who personally observed the commission of a felony could lawfully seize the perpetrator" and that "[o]fficers had this same power when operating outside their sovereign's jurisdiction." That common law rule, the panel observed, "roughly comports with our holding in *Bressi* — that tribal officers can seize non-Indians on a state highway within Indian territory who have *obviously* committed a crime, even when the officers have no authority to exclude the perpetrator from Indian territory." The proper conclusion was thus clear:

> Under the law of the founding era, Saylor would not have had authority as a private citizen to seize Cooley and detain him in his patrol car until state or federal officers arrived on the scene, as it was not obvious to that point that a crime had been or was being committed. In any event, Saylor lacked authority, by analogy to a private person, to return to Cooley's truck and enter the car to retrieve the rifles still in the truck, or to search the truck a second time.

- **Relevant (2018) Deskbook Sections:** 4:10 n.6; 4:19 nn.6, 7, 8; 7:5 n.9

- **Comment:** The application of ICRA in a federal court criminal proceeding as a basis for suppression of evidence is an interesting and, prior to this case, not definitively determined in the Ninth Circuit. Other than in habeas corpus proceedings initiated under 25 U.S.C. §1302, tribal courts are responsible for enforcing its provisions. It would have been helpful for the panel to have addressed directly why ICRA controls. The most relevant Ninth Circuit decision, *United States v. Becerra-Garcia*, 397 F.3d 1169, 1171 (9th Cir. 2005), relied upon the panel, assumed ICRA's relevance based on two earlier cases that did not analyze the issue rigorously.
- **Denial of Rehearing:** The Ninth Circuit denied panel rehearing and rehearing en banc on January 24, 2020. *United States v. Cooley*, 47 F.3d 1215. Two members of the panel (Berzon and Hurwitz, JJ.), concurred in the denial with a detailed justification of the panel opinion. The concurrence argued in part:

  > This case involves an unusual factual scenario and a technical issue of Indian tribal authority. It certainly does not present a "question of exceptional importance" meriting en banc consideration. ... There is no conflict among the circuits regarding the question presented here, the opinion is not in conflict with a Supreme Court decision, and the practical implications are limited. The opinion recognizes that tribal officers can stop non-Indians on state and federal rights-of-way across Indian reservations long enough to determine whether they are Indians, and also can detain them long enough to turn them over to state or federal authorities if they were obviously—apparently—violating state or federal law when stopped. So in the case of a speed demon or a drunk driver, Indian authorities can intervene. The issues in this case arise only when a tribal officer, as here, who is not cross-deputized on non-Indian lands, takes it on himself to investigate whether a non-Indian on a federal or state highway right-of-way committed some crime that is not apparent—in other words, a crime that has nothing to do with demonstrated danger on the highway.

  Judge Collins, joined by three circuit judges, dissented from the denial at length. They would have extended the tribal officer's inherent authority to include "*Terry*-style" investigations:

  > For more than 40 years, we have held that, when a non-Indian is reasonably suspected of violating state or federal law anywhere within the boundaries of an Indian reservation (including state or federal highways traversing the reservation), tribal police officers have the authority to conduct on-the-spot investigations of the sort authorized under *Terry v. Ohio*, 392 U.S. 1 (1968). *See Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180–81 (9th Cir. 1975). Under this well-settled law, the tribe's conceded lack of criminal jurisdiction over such non-Indians ... does not deprive the tribe of the authority to conduct *Terry*-style investigations of non-Indians and, if probable cause arises, to then turn the non-Indian suspect over to the appropriate state or federal authorities for criminal prosecution. ... Over the intervening years, numerous courts have expressly endorsed *Ortiz-Barraza*'s conclusion that tribes may detain and investigate non-Indians for suspected violations of state and federal law, correctly recognizing that "the power to maintain public order by investigating violations of state law on the reservation ... is clearly an incident of general tribal sovereignty."

The tribal officer's authority aside, the dissent took further issue with the panel opinion's determination that the Fourth Amendment prohibited his investigation. It reasoned that the opinion's "analogy to a geographically extra-territorial arrest is wrong. Here, [the tribal officer] did not act outside his *territorial* jurisdiction, because all of his actions took place *within* the reservation and in Indian country." Under these circumstances,

> [t]he proper analogy is thus not to an official acting outside his or her territorial jurisdiction. ... Rather, the proper analogy is to an officer acting without the necessary *state-law authorization* to take certain investigatory actions *within* that officer's geographic jurisdiction. And under settled Supreme Court and Ninth Circuit precedent, an officer's lack of authorization under state law to conduct an otherwise reasonable search and seizure within that officer's territorial jurisdiction does not violate the Fourth Amendment.

Finally, the dissent noted the panel opinion's "novel holding that violations of ICRA warrant the remedy of suppression to the same extent as a Fourth Amendment violation. ... The Government, however, conceded this issue in its opening brief, and it has not raised that issue in its petition for rehearing." This issue is mentioned in the comment to the panel opinion above.