No. 02-281

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

PAUL N. BRUCE
COUNTY COUNSEL
COUNTY OF INYO
P.O. BOX M
INDEPENDENCE, CA 93526
(760) 878-0229

JOHN DOUGLAS KIRBY
Counsel of Record

LAW OFFICES OF JOHN D. KIRBY
A PROFESSIONAL CORPORATION
9747 BUSINESS PARK AVENUE
SAN DIEGO, CA 92131
(858) 621-6244

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

3. Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners

Petitioner Inyo County is a public entity and a County of the State of California. Petitioner Phil McDowell is an individual, and has been sued in both his individual capacity, as well as in the official capacity of the elected District Attorney of Inyo County. Petitioner Dan Lucas is also an individual, and has also has been sued in both his individual capacity, as well as in the official capacity of the elected Sheriff of Inyo County. Petitioners were the defendants in the District Court, and the appellees in the Ninth Circuit Court of Appeals.

Respondents

Respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony is a federally-recognized Indian tribe. It uses the pseudonym "Bishop Paiute Tribe." The tribe is the sole owner of the respondent Bishop Paiute Gaming Corporation, a tribal corporation formed to conduct the business of a commercial gaming casino in Inyo County, California. The commercial gaming casino does business under the name of the "Paiute Palace Casino." Respondents were the plaintiffs in the District Court, and the appellants in the Ninth Circuit Court of Appeals.

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 9a-43a) is reported at 975 F.3d 893. The subsequent May 20, 2002 order of the court of appeals (Pet. App. 1a-8a) amending the original opinion, and denying the petition for rehearing *en banc,* was ordered published, and the final opinion of the court of appeals, as amended, is published at 291 F.3d 549. J.A. 145-179. The ruling of the district court granting petitioners' motion to dismiss (Pet. App., 44a-66a; J.A. 120-141) is unreported.

JURISDICTION

The original opinion of the Ninth Circuit was entered on January 4, 2002. Petitioners' timely petition for rehearing *en banc* was denied on May 20, 2002 (Pet. App. 1a-8a), and entered on that same date. The petition for writ of certiorari was filed on August 19, 2002, and was granted on December 2, 2002. J.A. 180. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. U.S. Constitution, Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

3. U.S. Constitution, Amendment XIV, Section 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 42 U.S.C. § 1983.

This statute concerns and is entitled "Civil action for deprivation of rights." Its text is set forth in the petition appendix. Pet. App. 67a.

5. 18 U.S.C. § 1152.

This statute concerns crimes and Indians, and is commonly known as the "General Crimes Act." Its text is set forth in the petition appendix. Pet. App. 67a-68a.

6. 18 U.S.C. § 1153.

This statute also concerns crimes and Indians, and is commonly known as the "Major Crimes Act." Its text is set forth in the petition appendix. Pet. App. 68a-69a.

7. 18 U.S.C. § 1162.

This statute concerns State criminal law jurisdiction over criminal offenses committed by or against Indians in the Indian country within the six states identified in the statute. It does not address state criminal jurisdiction over criminal offenses committed off the reservation or otherwise outside of Indian country. This statute is commonly known as "Public Law 280," and its pertinent text is set forth in the petition appendix. Pet. App. 69a-71a.

STATEMENT

A. Fact Background

In March 1999, the California State Department of Social Services sent to the Inyo County Department of Health and Human Services a report known as the "IEVS/Integrated Fraud Detection System Report." Excerpts of Record ("ER") 136-A and 266.

This report is generated by the state from payroll information submitted by employers throughout the state. In order to generate the report, the California Department of Social Services "matches" the employer-reported income against the income being reported by persons receiving state public welfare assistance. When a "mismatch" is discovered, that is, when the amount of wages being reported by employers is in excess of that being reported by the public assistance recipients, the "Integrated Fraud Detection System Report" is generated and sent to the county administering the public assistance.

The Integrated Fraud Detection System Report which was sent to Inyo County in March 1999 advised that the Paiute Palace Casino, which is a gambling casino operated in Inyo County by respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, and by respondent Bishop Paiute Gaming Corporation[1] had reported on its state employer's quarterly payroll tax returns that it had paid certain income to three employees identified in the report, and that these three employees, who were recipients of California public assistance welfare benefits for the time period involved, had not reported such income on their welfare application forms.

In short, these three employees, identified in the Integrated Fraud Detection System Report as Patricia Dewey, Clifford Dewey, and Tinya Hill, were reported as having earned income from Paiute-Shoshone, but had not reported that income to the state and county in connection with their (the employees') applications for public assistance welfare benefits, and in connection with the determination of the amount of their entitlement to those benefits.

After receipt of this information, the Inyo County Department of Health and Human Services notified the three employees of the discrepancies, and made requests that the employees reconcile the same. These requests were ignored.

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[1] The complaint alleges that the Bishop Paiute Gaming Corporation is a political subdivision of the tribe (J.A. 98), and that the sovereign status of the tribe is therefore shared by the Bishop Paiute Gaming Corporation (J.A. 100). Accordingly, both respondents are collectively referred to herein as the "Paiute-Shoshone."

The Department of Health and Human Services then forwarded the matter to the Inyo County District Attorney's Office for review, and the matter was assigned to DA Investigator Leslie Nixon, a California peace officer employed at the District Attorney's Office. After reviewing the files and matter, Investigator Nixon submitted her own requests to the three employees, again asking that the income discrepancies be reconciled. Again these requests for reconciliation were ignored.

Subsequent to these failed efforts to deal directly with the employees, Investigator Nixon attempted to obtain the relevant payroll information from their employer, the casino.[2]

After these requests to the casino for the subject payroll information were denied, Investigator Nixon submitted an affidavit in support of a petition for a search warrant to the California Superior Court. The affidavit advised the Court of the IEVS/Integrated Fraud Detection System Report, and further provided that overpayment of benefit amounts in

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[2] In what is at least in part a disputed factual background (which is not controlling, however, with regard to the matters before the Court), Investigator Nixon sent her office's standard-form informal letter-requests to the Paiute Palace Casino, asking for the relevant payroll information for the three casino employees who were the subject of the investigation. On numerous prior occasions, Paiute-Shoshone had honored such informal requests for similar information without a search warrant (this is disputed by respondents). On this occasion, as it had on at least one prior occasion within the preceding year in connection with a different tribal agency – and in which case a search warrant had been obtained and honored – Paiute-Shoshone advised that it would not release the requested information unless a search warrant was obtained (this is also disputed by respondents).

excess of $400.00 appeared to be in issue. ER 136, 136A-137. The conduct being investigated, theft of public funds, was within the parameters of several California criminal statutes, including grand theft, a felony, in violation of California Penal Code § 487(a), and Welfare Fraud, a felony, in violation of Welfare & Institutions Code § 10980(c).[3]

Based on the affidavit, a search warrant was issued by the Superior Court on March 23, 2000. ER 138-141. The search warrant provided in pertinent part as follows:

> "The people of the State of California to any sheriff, constable, marshal, police officer, or to any other peace officer in the County of Inyo.
>
> "Proof by affidavit having been made this day before me . . . that the following ground or grounds for issuance of a search warrant exist:

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[3] California Penal Code § 487(a) provides: "Grand theft is theft committed in any of the following cases: (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400). . . ." Welfare & Institutions Code § 10980(c) provides: "Whenever any person has, willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material fact... or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows: ... (2) If the total amount of the aid obtained or retained is more than four hundred dollars ($400), by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($5,000)...."

> "The property or things to be searched for consist of an item or items or constitute evidence which tend to show a felony has been committed or tend to show that a particular person has committed a felony,
>
> "YOU ARE THEREFORE COMMANDED to make a search in the daytime (7:00 a.m. to 10:00 p.m.) on and of the premises described as: Paiute Palace Casino located at 2742 North Sierra Highway 395, Bishop, Inyo County, California, for the following property: Payroll records for Patricia Dewey, date of birth 9-20-59, social security number 556-33-3889; Clifford Dewey, date of birth 11-27-54, social security number 558-98-0356; and Tinya Hill, date of birth 2-23-79, social security number 571-55-4327, for the period of April 1998 through June 1998, and if you find the same or any part thereof, to bring it forthwith as required by law before this court at 301 West Line Street, Bishop, California.
>
> "Given under my hand and dated, 3/23/00,
>
> "/s/ Patrick C. Canfield"
> (ER 138-141.)

Investigator Nixon then called the personnel at the administrative office of the casino, who she knew, advised that she had obtained the search warrant, and gave courtesy notice that she would be coming over to obtain the payroll

records.[4] Upon arrival at the casino, however, Investigator Nixon was told by casino management personnel, who were accompanied by several casino security guards, that the search warrant would not be recognized, that the casino was immune from search because Paiute-Shoshone was a sovereign government, and that although the records being sought by the search warrant were on-hand and located in an out-building behind the casino, on "the advice of counsel" Paiute-Shoshone was prohibiting her (Investigator Nixon) from searching for the records, and she was being denied access to the out-building.

During the foregoing conversation, Investigator Nixon had requested the key to the padlock securing the out-building were the records were stored. She was advised by Paiute-Shoshone that they had the key, but that again, on the advice of counsel, they were denying her request for the key.

In order to mitigate the potential for any disturbance, Investigator Nixon then asked that the Sheriff's Department be called. Sheriff's deputies responded, and after reviewing the warrant, advised that it appeared proper.[5] Investigator Nixon once again requested the key to the padlock, was denied, and accordingly, a bolt-cutter was used to cut the padlock. Investigator Nixon then searched the out-building, with the

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[4] The complaint alleges that although Investigator Nixon placed this call, she did not advise she would be executing a search warrant. J.A. 103-104.

[5] The search warrant (ER 138-141) is a command issued by the Court, not to the person or business being searched, but rather to all peace officers to search the premises described in the warrant, for the items described therein, and to bring any of the items found before the Court. Sheriff's deputies are, of course, peace officers.

casino's administrative staff showing which of the boxes contained the relevant records, and the records described in the search warrant were located and seized. ER 267-328.

At the request of Paiute-Shoshone, a copy of the records being taken was made on-premises, and was left with casino personnel. The seized records were then made the subject of a proper Return on the search warrant, and the same was filed with the Superior Court. ER 263-264.

The records obtained were of two types. The first type consisted of individual pages of computer records showing the hours worked, and compensation paid, for each of the three persons identified in the search warrant, for the time period specified in the warrant. The second type consisted of the portion of Paiute-Shoshone's employer's payroll tax returns that involved the reported wages of the three subject casino employees, as submitted to the State of California, for the time period specified in the search warrant. Care was taken by Investigator Nixon to obtain only the specific pages of records that actually contained the name and information pertaining to at least one of the three subjects identified in the search warrant. Thus, each page of information obtained contained information for one or more of the three subjects. [6]

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[6] Respondents have contended that the scope of the search exceeded that allowed by the warrant, because the computer lists of names on the pages seized contained information pertaining not only to the three subjects of the warrant, but also to other employees whose names were close in alphabetical order to the subjects' names, and therefore printed on the same page. Paiute-Shoshone therefore claimed that the "personnel records" of the other employees listed on these pages were improperly seized. The District Court rejected this argument, and stated: "Having reviewed

Paiute-Shoshone thereafter filed this action in District Court, seeking declaratory and injunctive relief, and also seeking monetary damages for violation of its claimed Fourth Amendment rights pursuant to 42 U.S.C. § 1983. Attorneys fees and costs pursuant to 42 U.S.C. § 1988 were also sought.

In August 2000, petitioners Inyo County, District Attorney McDowell and Sheriff Lucas filed their motion for dismissal of the complaint pursuant to F.R.C.P. § 12(b)(6). J.A. 1. On November 22, 2000, the District Court filed its Order Granting Defendants' Motion to Dismiss, and judgment was entered in favor of petitioners Inyo County, Mr. McDowell and Sheriff Lucas on that same date. Pet. App. 44a-66a; J.A. 120-141.

Respondent Paiute-Shoshone timely appealed the District Court's order and judgment entered thereon, and on January 4, 2002, the Ninth Circuit filed its original opinion, reversing the District Court's judgment entered in favor of petitioners. Pet. App. 9a-43a.

Inyo County, District Attorney McDowell and Sheriff Lucas then timely filed a petition for rehearing *en banc*, and on May 20, 2002, the Ninth Circuit entered its order denying the petition for rehearing, and amending its earlier opinion. Pet. App. 1a-8a.

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the payroll records that were seized during the execution of the warrant, the court finds that the execution of the search warrant was within the warrant's scope because each page contained at least one reference to the employees that were under investigation." (Pet. App. 58a; ER 217; and ER 267-328, consisting of a copy of each of the actual pages seized.)

B. District Court Proceedings And Entry Of Judgment In Favor Of Inyo County, District Attorney McDowell And Sheriff Lucas

The complaint filed by Paiute-Shoshone in the District Court set forth five claims. The first claim sought declaratory relief and a judicial determination that Public Law 280 (18 U.S.C. § 1162) "cannot be interpreted in a manner that provides the State...the ability to exert criminal jurisdiction over the Bishop Paiute Tribe," and that any interpretation of Public Law 280 that would enable the execution of search warrants such as that in this case "acts as an infringement upon the Bishop Paiute Tribe's right to remain free from state interference with the Tribe's right to self-governance as proscribed (sic) by federal law." J.A. 106. The first claim also alleged that "Defendants lack any jurisdiction whatsoever to apply or enforce California laws regarding search and seizure of documents pertaining to criminal investigations against the Bishop Paiute Tribe and its political subdivisions." J.A. 106. In its prayer, the first claim also requested a judicial declaration and determination that the execution of the subject search warrant "violated federal laws and Plaintiffs' right to remain free from state interference with Plaintiffs' right to self-governance." J.A. 115.

The second claim sought declaratory relief and a judicial determination that the Indian Gaming Regulatory Act, set forth at 25 U.S.C. §§ 2701, et seq., ("IGRA") pre-empts "whatever jurisdiction the State of California otherwise might have to directly apply and enforce California's laws against Plaintiffs' their officers, agents, employees, contractors and patrons in any manner within the Paiute Palace Casino." J.A. 115.

The third claim alleged a violation of the claimed Constitutional rights of Paiute-Shoshone under the Fourth and Fourteenth Amendments, and also a violation of Paiute-Shoshone's claimed federal statutory rights under the IGRA, and sought monetary damages and attorneys fees under 42 U.S.C. §§ 1983 and 1988. J.A. 108-110, 117.

The fourth and fifth claims requested injunctive relief, and additional declaratory relief in the form of a judicial determination that Public Law 280 is "defective" because its enactment by Congress was in violation of the Tenth Amendment to the U.S. Constitution (J.A. 114); and that Public Law 280 is ineffective in California because the California legislature never enacted legislation accepting the jurisdiction described in Public Law 280 J.A. 111-114.

In response to the complaint, defendants (petitioners here) Inyo County (the "County"), District Attorney Phil McDowell (herein the "District Attorney" or "Mr. McDowell"), and Sheriff Dan Lucas (herein the "Sheriff" or "Sheriff Lucas"), filed a motion to dismiss the complaint under Federal Rules of Civil Procedure, Rule 12(b)(6). ER 24-25. In their motion, the County, Mr. McDowell and Sheriff Lucas addressed each of Paiute-Shoshone's claims, and also asserted various immunity defenses, including the defense of qualified immunity

2. In ruling on the 12(b)(6) motion, the District Court took judicial notice of a number of documents submitted by the moving parties. These documents were (1) the search warrant affidavit; (2) the search warrant; (3) the return to the search warrant; (4) the State of California IEVS/Integrated Fraud Detention System report; (5) the documents obtained in the search warrant; (6) the Deed to the casino property; (7) the Tribal-State Compact pursuant to the

IGRA between the State of California and Paiute-Shoshone; and (8) notice of the approval of the Compact in the Federal Register. Pet. App. 48a-49a; J.A. 124-125. On November 22, 2000, the District Court issued its order granting the motion to dismiss. Pet. App. 44a-66a; J.A. 120-141.

The District Court held that: (1) the tribe's sovereign immunity did not prohibit the execution of the search warrant against the tribe or its property (Pet. App. 62a; J.A. 138); (2) the IGRA did not preempt Public Law 280 because the investigation and warrant involved welfare fraud, and not gaming violations (Pet. App. 63a; J.A. 139); (3) Public Law 280 was enforceable in California by the executive branch without need of an enabling act being passed by the California Legislature (Pet. App. 65a; J.A. 140-141); (4) the passage of Public Law 280 did not violate the Tenth Amendment (Pet. App. 65a; J.A. 141); (5) District Attorney McDowell and Sheriff Lucas acted as state officers, and not county officers, and thus the County is not liable for their conduct or § 1983 damages (Pet. App. 53a-54a; J.A. 129-130); and (6) both the District Attorney and Sheriff were entitled to qualified immunity (Pet. App. 58a; J.A. 133-134).

Judgment was thereupon entered in favor of the County, Mr. McDowell and Sheriff Lucas. J.A. 1.

C. Court of Appeals' Reversal

Paiute-Shoshone appealed to the Ninth Circuit. In their answering brief, the County, District Attorney and Sheriff argued that the correct framework for the decision in this case was the line of Supreme Court decisions involving the nature and character of retained sovereignty possessed by tribes.

Those cases included *United States v. Kagama,* 118 U.S. 375, 381 (1886) ("*Kagama*") (Indian tribes are no longer "possessed of the full attributes of sovereignty"); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 (1978) ("*Oliphant*") ("Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status'"); *United States v. Wheeler,* 435 U.S. 313, 323 (1978) ("*Wheeler*") (Indian tribes still retain "…those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status"; and "…the areas in which such implicit divesture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326); and *Montana v. United States,* 450 U.S. 544, 564 (1981) ("*Montana*") ("…exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"; and "…the powers of self-government…involve *only the relations among members of a tribe.*" *Id.* at 564, quoting *Wheeler,* 435 U.S. at 326 (italics by Court)).

The Ninth Circuit dismissed this line of cases as being inapplicable (Pet. App. 18a-19a), and reversed the District Court's rulings on three of the above-enumerated issues. The reversals were as to issue (1) above: the court of appeals held that tribal sovereign immunity does enable Indian tribes and businesses to prohibit the search of their property for evidence of off-reservation state crime, even when the search is pursuant to a search warrant issued on probable cause; issue (5) above: the court of appeals held that the District Attorney and Sheriff were acting as county and not state officers for § 1983 liability purposes, thus enabling § 1983 damages against

the individual defendants and Inyo County for the alleged violation of the Fourth Amendment); and issue (6) above: the court of appeals held that the District Attorney and Sheriff are not entitled to qualified immunity. Pet. App. 42a-43a.

In connection with the foregoing, the Ninth Circuit stated that as an Indian tribe, Paiute-Shoshone "is possessed of sovereign immunity which bars execution of the warrant" against the tribe and tribal property (Pet. App. 24a; J.A. 160). The court of appeals also stated that neither the District Attorney nor the Sheriff was entitled to qualified immunity because "as a matter of law a reasonable county officer would have known, at the time the warrant was executed against the Tribe, that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction." Pet. App. 7a; J.A. 179.

D. *Nevada V. Hicks* Not Addressed In Reversal

The County, District Attorney McDowell and Sheriff Lucas filed their answering brief with the court of appeals on June 21, 2001. At that time, this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001) ("*Hicks*") had not been issued. The *Hicks* decision was issued four days later, however, on June 25, 2001. In that decision, this Court stated:

> We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process [including search warrants] related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them.' The State's interest in execution of process is considerable, and even

> when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government. *Id.* at 363, 364.

The *Hicks* decision was brought to the attention of the Ninth Circuit before oral argument was held, and Paiute-Shoshone addressed the *Hicks* decision in its reply brief. The County, District Attorney and Sheriff also presented the *Hicks* decision to the Ninth Circuit during oral argument in October 2001.

In its original opinion issued January 4, 2002, however, the Ninth Circuit omitted any discussion of or reference to *Hicks*.

The County, District Attorney, and Sheriff again presented and extensively briefed the *Hicks* decision and its preceding line of cases (*Kagama, Oliphant, Wheeler,* and *Montana*) to the Ninth Circuit in a petition for rehearing *en banc*. Once again, however, in its order denying the petition for rehearing *en banc*, and amending its original opinion in other areas, the Ninth Circuit declined to address, or even mention, this Court's decision in *Hicks*. Pet. App. 1a-8a; J.A. 174-179.

SUMMARY OF THE ARGUMENT

1. The core question before this Court is whether the execution of the March 23, 2000 search warrant violated Paiute-Shoshone's claimed "sovereign immunity." The alleged violation of that immunity provided the basis for the Ninth Circuit's conclusion that, even though the search and seizure was pursuant to a search warrant issued upon probable cause, the search and seizure nonetheless constituted a

violation of the Fourth Amendment. The grounds for the court of appeals' view that the execution of the search warrant violated the tribe's sovereign immunity vacillated between reliance on the interest-balancing test attendant to application of the principles of *Williams v. Lee*, 358 U.S. 217 (1959) ("*Williams*"), and invocation of a tribe's immunity from unconsented civil suit. The court ultimately conflated the two doctrines. While the doctrines are separate and might best be considered separately, it matters not whether they are considered jointly or separately; for the correct analysis of both doctrines leads to the same conclusion: Neither the retained inherent sovereignty of the tribe (under the *Williams v. Lee* interest-balancing principles), nor the sovereign immunity of the tribe (immunity from unconsented suit), has been violated.

a. This Court recognized in *Williams* that, absent governing Acts of Congress, application of a state law to a tribe or its members is not permitted where "the right of the Indians to govern themselves" is infringed upon. 358 U.S. at 271. Determination of whether impermissible infringement has occurred requires an identification and, if necessary, a balancing of affected federal, state and tribal interests. The required analysis in this case, however, is simplified greatly by virtue of this Court's subsequent decisions in *Montana* (the pathmarking case on the subject of tribal civil authority over the conduct of nonmembers – such as the law enforcement officers here), and this Court's recent decision in *Hicks* where, under strikingly similar facts, the Court held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'" 533 U.S. at 364.

b. The court of appeals' reliance on notions of tribal sovereign immunity from suit also missed the mark widely. Tribal sovereign immunity is immunity from civil suit. There is no precedent by this Court that holds or even intimates that this Court's judicially established doctrine of sovereign immunity from civil suit was originally intended, or should now be extended, to include immunity from state criminal process. Indeed, a contrary conclusion would raise grave questions under the Tenth Amendment because of interference with California's inherent police powers with respect to controlling unlawful conduct occurring outside of Indian country.

The search warrant here was not even directed to the tribe or to any official of the tribe in his or her official capacity. It was instead directed "to any sheriff, constable, marshal, police officer, or to any other peace officer in the County of Inyo." The warrant did not require Paiute-Shoshone to affirmatively do anything, but instead "commanded" the therein described law enforcement officers to conduct a search for specified items and to seize them if found. In contrast to all prior decisions from this Court applying the tribal sovereign immunity doctrine, Paiute-Shoshone was not being haled coercively into court for the purpose of claimed civil liability for monetary damages or for injunctive or other relief being sought by a suing plaintiff.

In view of the doubts expressed by this Court in *Kiowa Tribe* as to the tribal sovereign immunity doctrine's efficacy generally, even with respect to civil lawsuits, that doctrine should not be expanded judicially to reach state process outside its previously settled reach pertaining to civil lawsuits and the efforts by suing plaintiffs to hold tribes accountable for monetary damages or injunctive or other already-proscribed relief.

2. The court of appeals found that tribal governments, as sovereign government bodies, may themselves maintain a civil action under 42 U.S.C. § 1983.[7] The court of appeals erred for two reasons. First, § 1983 provides a remedy to "any citizen of the United States or other person within the jurisdiction thereof" who is deprived of "any rights, privileges, or immunities secured by the Constitution and laws" by any person acting under color of state law. Tribal government bodies are neither "citizens" of the United States, nor "other persons" as described in the statute. In the latter regard, this Court has held that the term "person" in federal statutes presumptively does not include sovereigns. This presumption may be disregarded only upon affirmative showing of statutory intent to the contrary. There is none with respect to § 1983.

Second, in order to bring an action under § 1983, a plaintiff must not only be a "citizen" or "other person" within the meaning of the statute, but must also have a constitutional or federal statutory right subject to protection under the statute. The sovereign rights of an Indian tribe, however, are not such rights. They are not secured to the tribes by the constitution; and there is no federal statute that provides the tribes with such rights. Those rights instead arise from this Court's decisional law or from treaty.

3. District Attorney McDowell and Sheriff Lucas are entitled to qualified immunity with respect to the 42 U.S.C. § 1983 claim, and any other retroactive relief, regardless of how the first two questions are answered. The

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[7] There is no issue here involved as to whether individual Indians whose Constitutional or federal statutory rights have been violated may maintain an action under 43 U.S.C. § 1983; individual Indian tribal members clearly may maintain such an action.

determination on qualified immunity must be made with reference to whether, at the time the warrant was executed, it was clearly established law that the warrant's execution infringed upon Paiute-Shoshone's sovereign immunity. The *Hicks* decision, although issued some fifteen months later, controls with respect to the retained sovereignty/sovereign immunity analysis and the state of the law at the time the warrant was executed. The authority relied upon by the Ninth Circuit for the contrary is inapposite. In particular, *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) ("*James*"), involved a subpoena served by a criminal defendant in a federal criminal proceeding under the Major Crimes Act, and did not consider the question whether state officers may execute a search warrant on tribal property only at the pleasure of the tribe.

ARGUMENT

The opinion of the Ninth Circuit in this case establishes at least hundreds, and likely many more, Indian tribal enclaves that are now sanctuaries where evidence and proceeds of off-reservation (as well as on-reservation) criminal enterprise may rest, immune from search by law enforcement officers who are investigating the violation of off-reservation state crimes, even when those law enforcement officers have obtained a search warrant satisfying the probable cause requirements of the Fourth Amendment.

These enclaves include tribal commercial gambling casinos, which are proliferating throughout the nation, and which are generating billions of dollars in revenue, much of which is in cash,[8] as well as other tribal owned businesses

[8] According to its Website, even Harrah's Entertainment, Inc., a major corporation traded on the New York Stock Exchange, now

such as resorts, hotels,[9] golf courses,[10] motorcycle/motocross parks of hundreds of acres themselves, recreational vehicle parks, ski resorts, manufacturing and distribution facilities where consumer products – such as bottled water plants – are operating, and the offices of Indian tribal agencies and other tribal offices and properties of all types.

There are currently over 560 federally recognized Indian tribes in the nation. *Indian Entities Recognized and*

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operates large Indian gambling casinos and resorts on Indian reservations in the Ninth Circuit, as well as elsewhere in the nation. See <http://harrahs.com/our_casinos/index.html>. The National Indian Gaming Commission reports that in 2001 Indian gaming generated 12.7 billion dollars in revenue. See <http://www.nigc.gov>.

[9] According to the San Diego Union-Tribune, October 3, 2002, page 1, the Viejas Indian Band of San Diego County, California, along with 3 other tribes, are in the process of building a $43,000,000.00 Marriott Residence Inn in Washington, D.C., only a few blocks from the Capital. See also the Viejas website, <http://www.viejas.com>.

[10] The Sycuan Band of Indians (consisting of 66 enrolled tribal members, according to the *2002 Field Directory of the California Indian Community, Department of Housing and Community Development, State of California*, *Revised March 2002*), of San Diego County, California, has recently purchased the well-known Singing Hills golf course and resort in San Diego County, to go along with its gaming resort and other businesses. It is now known as the Singing Hills Resort at Sycuan, and according to Sycuan, it "includes more than 425 acres of lush, picturesque mountain terrain, and offers guests two 18-hole championship courses, a challenging par-3 course" and other resort accommodations, to accompany its large gambling operation and resort hotel. See <http://www.sycuan.com>.

Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002). The number is increasing. In California alone, there are now over 100 tribes, some with as few as four or five members, and several having between seven and thirteen members. *2002 Field Directory of the California Indian Community, Department of Housing and Community Development, State of California*, *Revised March 2002*. The California tribes alone occupy over one million acres of territory. *Id.* According to information provided by the State of California, et. al. in their *Amici Curiae* brief herein, there are 398 Indian tribes within the states of the Ninth Circuit, occupying approximately 36 million acres of territory. All of these tribes and their tribal properties are, at least in the Ninth Circuit, now enclaves immune from search, even pursuant to a search warrant issued upon probable cause.

If the decision of the Ninth Circuit is allowed to stand on a nationwide basis, it will establish and confirm thousands of enclaves for the sanctuary of evidence, as well as sanctuaries for the proceeds and perpetrators of off-reservation state crime, immune from search, seizure and apparently arrest, until, and if and only if, the Indian tribe upon whose property the evidence, proceeds of crime or criminals reside decides to allow law enforcement officials access. One can only imagine the effect of such a state of affairs.

What if the recent Washington D.C. area sniper suspects had taken refuge in a tribal hotel or casino? What if a solo or serial murderer or rapist, child molester, money launderer, drug dealer, or other perpetrator of state crime seeks refuge for himself or the bounty or evidence of his crime in tribal hotels, resorts, or casinos, or within the acreage of tribal casinos or tribal motocross, RV, or other

parks? State search and arrest warrants will be meaningless and useless in the search for the suspects, and in searching for the bounty, evidence and instrumentalities of the crimes – making state sovereignty and state law enforcement activities regarding investigation and prosecution of off-reservation state crimes against our citizens subject to the approval of a multitude of various tribal governments, and further subject to the changing desires and views of tribal members who constitute tribal governments, tribal officials, or designated representative.

What if tribal government allowed access, but conditioned access (that is, regulated the performance of law enforcement officers in performing law enforcement duties) only upon certain tribal-dictated conditions – such as allowing only an unsafe and limited number or type of law enforcement officers onto the hotel or resort or other business or tribal property, and only at specified times, with only specified protective gear or weapons, or no protective gear or weapons, so as not to disturb guests, as the tribe deemed appropriate? Might the suspects slip away during "negotiations" between tribal personnel and law enforcement officials, and escape investigation and prosecution, or worse, continue committing crimes? What if the appropriate tribal personnel were not available to decide on whether to give consent to the search – yet a search warrant was in hand? What if there was intra-tribal dispute as to who had final authority to give consent to the search or whether there was in fact authorized consent?

The court of appeals' decision thus threatens to interfere, enormously, with the orderly investigation and prosecution of criminal conduct by states. It does so on the basis of reasoning that cannot be squared with this Court's Indian law jurisprudence or its precedents applying 42 U.S.C. § 1983.

I. NEITHER THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY NOR THE PRINCIPLE OF RETAINED TRIBAL SOVEREIGNTY ENABLES TRIBES AND THEIR ENTITIES TO PROHIBIT OR OTHERWISE REGULATE STATE OFFICERS IN EXECUTING PROCESS RELATED TO THE OFF-RESERVATION VIOLATION OF STATE LAW

The primary question presented concerns whether the doctrine of tribal sovereign immunity, or the principle of retained inherent tribal sovereignty, enables Indian tribes and their gambling casinos and other tribal businesses to prohibit searches of their property for criminal evidence of off-reservation state crimes, when the search is by state law enforcement officers pursuant to a search warrant issued on probable cause.[11] The answer to this question, based upon this Court's prior analysis and findings in *Hicks*, and this Court's earlier decisions in *Oliphant, Wheeler, Montana, Strate* and *Atkinson* leading to *Hicks*, is no – there is no tribal authority to regulate state officers in executing state process, be it a search warrant issued upon probable cause or other

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[11] The court of appeals referred to Public Law 280 throughout its decision. However, Public Law 280 does not apply in this case, in that Public Law 280 applies to crimes committed "by or against Indians" in the Indian country. See also, *Hick*s, 533 U.S. at 365 (Public Law 280 is limited to "crimes on a reservation"). However, to the extent that the decision or analysis by the Supreme Court in this case is also applicable to the execution of state process arising from and related to the investigation or prosecution of on-reservation state crime under Public Law 280, the propriety of execution of a search warrant or other process for on-reservation state crime could also be answered.

lawful state process related to the off-reservation violation of state law.

The core question before this Court is, of course, whether the execution of the March 23, 2000 search warrant violated the tribe's "sovereign immunity." *See* Pet. App. 24a. The alleged violation of that immunity provided the basis for the Ninth Circuit's conclusion that, even though the search and seizure was pursuant to a search warrant issued upon probable cause, the search and seizure nonetheless constituted a violation of the Fourth Amendment. Pet. App. 6a; J.A. 177-178. The grounds for the court of appeals' view that the execution of the search warrant violated the tribe's sovereign immunity vacillated between reliance on the interest-balancing test attendant to application of the principles of *Williams v. Lee*, 358 U.S. 217 (1959) (Pet. App. 16a, 20a), and invocation of a tribe's immunity from unconsented civil suit (*id.* 20a-21a). The court ultimately conflated the two doctrines. *Id.* 22a-23a. While the doctrines are separate and might best be considered separately, it matters not whether they are considered jointly or separately; for the correct analysis of both doctrines leads to the same conclusion: Neither the retained inherent sovereignty of the tribe (under the *Williams v. Lee* interest-balancing principles), nor the sovereign immunity of the tribe (immunity from unconsented suit), has been violated.

A. Indian tribes and their entities do not possess retained inherent sovereignty to prohibit the execution of process relating to off-reservation violations of state law

This Court recognized in *Williams* that, absent governing Acts of Congress, application of a state law to a tribe or its members is not permitted where "the right of the Indians to govern themselves" is infringed upon. 358 U.S. at 271; *see, e.g., Nevada v. Hicks*, 533 U.S. at 361; and *Strate v. A-1 Contractors,* 520 U.S. at 459. Where state law might infringe on a tribe's conduct, a determination of whether impermissible infringement has occurred requires identification and, if necessary, balancing of affected federal, state and tribal interests. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980) ("*Colville*"). As the decisions in *Strate* and *Hicks* also indicate by their use of the *Williams* standard, the scope of state authority is often related directly to whether the challenged action involves activity over which a tribe may exercise jurisdiction by virtue of its inherent authority. That activity here is the execution of a search warrant by a state or county officer issued by a state court with respect to investigation of an off-reservation crime. It is therefore, respectfully, appropriate to begin analysis of the *Williams* infringement issue with a brief review of this Court's jurisprudence dealing with inherent tribal authority.

As explained by this Court in *Wheeler*, Indian tribes are "no longer 'possessed of the full attributes of sovereignty'" (435 U.S. at 323, quoting *United States v. Kagama*, supra, 118 U.S. at 361). The sovereignty that Indian tribes retain "is of a unique and limited character" (*Id.* at 323), and "by virtue of their dependent status" tribes have

been divested of sovereignty in areas "involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* 326. An Indian tribe's powers of self-government "involve only the relations among members of the tribe." *Id.* at 326.

The principles of *Williams, Colville* and *Wheeler* were further advanced in *Montana v. United States,* 450 U.S. 544 (1981), which this Court has since recognized as the "pathmarking case" on the subject of tribal regulatory authority over the conduct of nonmembers – such as the law enforcement officers here. *Strate*, 520 U.S. at 445. In *Strate*, Justice Ginsburg, writing for a unanimous Court, explained that the Court in *Montana* had said that its decision in *Oliphant* (435 U.S. 191) holding that Indian tribes lacked criminal jurisdiction over non-Indians (*Id.* 211-212) rested on principles that support a more "general proposition," and that "In the main…'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – "do not extend to the activities of nonmembers of the tribe." *Strate*, 520 U.S. at 445-446. The Court in *Montana* did, however, add that there are two exceptions to this general proposition (that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe). These two exceptions are, first, that a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and second, a "tribe may also 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 political integrity, the economic security, or the health or welfare of the tribe." *Strate, Id.* 446 (quoting from *Montana* at 565-566 (italics added)).

The character of *Montana* as being the pathmarking case was further explained four years later, in 2001, when Justice Souter in a concurring opinion in *Atkinson* (532 U.S. 645), in which Justices Kennedy and Thomas joined, stated that "If we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be *Montana* v. *United States*, 450 U. S. 544 (1981)" (*Atkinson*, 532 U.S. at 659). Justice Souter then acknowledged the general proposition of *Montana* as being that "'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' *Id.*, at 565" and that this "general proposition is...the first principle, regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe." *Atkinson*, 532 U.S. at 560.

Just four weeks after this Court's decision in *Atkinson* the Court released its decision in *Hicks*. 533 U.S. 353. In *Hicks*, under strikingly similar facts to this case, the Court held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'" 533 U.S. at 364.

The only distinction between *Hicks* and this case lies in the fact that the location searched and the property seized belonged to a tribe or a tribal corporation. This distinction does not assist Paiute-Shoshone here because, first, this Court has not distinguished between tribal members and tribes for interest-balancing purposes. Thus, in *Colville*, the Court applied the interest-balancing test in determining the validity of a state's regulation of retail smokeshops operated by several tribes. 447 U.S. at 147; *see also California v.*

Cabazon Band of Mission Indians, 480 U.S. 202, 214-15 (1987)

Further, in *Hicks*, this Court has already performed an interest balancing test regarding a state's right to serve process on the reservation, and in so doing, acknowledged that states have "inherent jurisdiction on reservations" (*Hicks,* 533 U.S. at 365), and that "Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian fee-land) to investigate or prosecute violations of state law occurring off the reservation." *Hicks*, 533 U.S. at 366. The conclusion reached by this Court in *Hicks*, and a finding leading to that conclusion, are:

> While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian fee lands) for enforcement purposes, several of our opinions point in that direction . . . .
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> * * * *
>
> We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them.' The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government

than federal enforcement of federal law impairs state government. *Hicks*, at 364. [12]

The finding by the Court that "the State's interest in execution of process is considerable" (*Hicks*, at 364) is consistent with the prior findings of this Court that in our federal system, it is well established that "The States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Engle v. Isaac*, 456 U.S. 107, 128 (1981).

In addition to all of the foregoing, the acknowledgement by this Court in *Hicks* that the states have inherent jurisdiction on reservations (*Hicks*, 533 U.S. at 365) is consistent with the principles of federalism and states' rights that existed and served as the premise for the states joining the Union in the first place. All states entered the Union with their sovereignty intact. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779 (1991). "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239, n. 2 (1985); *accord Edelman v. Jordan*, 415 U.S. 651, 660 (1974). "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45*, at 260 (James Madison) (Clinton Rossiter ed. 1961). Further, as is provided by the Tenth Amendment to the Constitution: "The powers not

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[12] The Ninth Circuit's decision below held to the contrary, concluding explicitly "that the execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own laws and be ruled by them.'" Pet. App. 20a.

delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Accordingly, in that a reservation is part of the state in which it lies (*New York ex rel. Ray v. Martin*, 326 U.S. 496 (1945); *Draper v. United States*, 164 U.S. 240 (1896), and because the states have never ceded their police power to the federal government in the constitution, nor are they prohibited by the constitution from exercising such power, the exercise of inherent state police power by executing process on the reservation, relating to off-reservation state crime, is a valid exercise of the states' retained and inherent police power.

B. The doctrine of tribal sovereign immunity does not enable tribes and their entities to prohibit the execution of process relating to off-reservation violations of state law

The court of appeals' reliance on notions of tribal sovereign immunity from suit also missed the mark widely. Tribal sovereign immunity is immunity from civil suit. *See, e.g.,. Turner v. United States*, 248 U.S. 354, 357-358 (1919); *United States v. United States Fidelity & Guaranty Co. et al.*, 309 U.S. 506, 513 (1940); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759-760 (1998) ("*Kiowa Tribe*"). There is no precedent by this Court that holds, or even intimates, that this Court's judicially established doctrine of tribal sovereign immunity from civil suit is or should be extended to include immunity from state criminal process. In fact, the continued viability of that doctrine in even its traditional and customary role (of immunity from civil lawsuit) has been seriously questioned by this Court, in light of the entrance of and participation by tribes and their businesses in the nation's commerce, in a

manner clearly not contemplated at the time of the tribal sovereign immunity doctrine's original creation. *Kiowa Tribe*, 523 U.S. at 757-758 ("There are reasons to doubt the wisdom of perpetuating the doctrine…In our interdependent and mobile society, however, tribal immunity [already] extends beyond what is needed to safeguard tribal self-government.")

Indeed, the very doctrine of tribal sovereign immunity from suit was created "almost by accident." *Kiowa Tribe, Id.* at 756. The case upon which the doctrine relies for its existence, *Turner* (248 U.S.354) has recently been described by this Court as "but a slender reed for supporting the principle of tribal sovereign immunity." *Kiowa Tribe supra,* page 757.

The Ninth Circuit also erroneously employed the doctrine of tribal sovereign immunity from suit in a manner that infringes on the retained sovereign rights of the states. When states joined the Union, they joined as complete sovereigns themselves, and gave up to the constitution and federal government only the enumerated powers set forth in the constitution. U.S. Constitution, Amendment X; *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact"). Thus, the states have the sovereign right to exercise their police power, and possess their own inherent sovereign right to repel others (here the tribe) who seek to limit or restrict the state in its exercise or those police powers, e.g., with respect to the enforcement and prosecution of violations of state criminal laws occurring off-reservation. State police power – the "sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people" (*Allied Structural Steel v. Spannus*, 438 U.S. 234, 241 (1978)), has never been ceded to the federal

government, and certainly not to the tribe. Accordingly (and in accordance with what this Court has already acknowledged in *Hicks*, 533 U.S. at 365), states continue to possess the sovereign right to exercise that sovereign power. This is a result of the constitutional bargain and relationship between the states and the federal government. It is a constitutional doctrine, founded in our federalism form of government. Under our federal system, it is the states – not the federal government – and not the tribes, which are domestic dependent sovereigns having a relationship to the federal government similar to that of a ward to his guardian (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) – which "possess primary authority for defining and enforcing the criminal law" in this country. *Brecht v. Abrahamson*, *supra*, 507 U.S. at 635; *Engle v. Isaac*, *supra*, 456 U.S. at 128.

Additionally, here, the search warrant was not even directed to the tribe or to any official of the tribe in his or her official capacity. It was instead directed "to any sheriff, constable, marshal, police officer, or to any other peace officer in the County of Inyo." ER 138-141. The warrant did not require Paiute-Shoshone to affirmatively do anything, but instead "commanded" the therein described law enforcement officers to conduct a search for specified items and to seize them if found. *Id.* In contrast to all prior decisions from this Court applying the tribal sovereign immunity doctrine, Paiute-Shoshone was not being haled coercively into court for the purpose of being required to respond to a claim of civil liability for monetary damages or for injunctive or other relief being sought by a suing plaintiff.

In view of the doubts expressed by this Court in *Kiowa Tribe* as to the tribal sovereign immunity doctrine's efficacy generally, even with respect to civil lawsuits, the doctrine

should not be expanded judicially to reach state criminal process or any other process outside its previously settled reach pertaining to civil lawsuits.

II. THE TRIBE MAY NOT MAINTAIN AN ACTION UNDER 42 U.S.C. § 1983 BECAUSE THE TRIBE IS NEITHER A CITIZEN OF THE UNITED STATES, NOR A "PERSON" WITHIN THE MEANING OF THAT TERM AS USED IN THE STATUTE, AND BECAUSE THE ALLEGED RIGHT THAT WAS VIOLATED WILL NOT SUPPORT THE ACTION

A. The tribe is neither a citizen of the United States, nor an "other person" within the meaning of that term as used in the statute

The court of appeals found that tribal governments, as sovereigns, may themselves maintain a civil action under 42 U.S.C. § 1983.[13] Pet. App. 6a; J.A. 177-178. The court of appeals' ruling is incorrect, and this Court should, respectfully, address this matter and put it to rest.

First, § 1983 provides a remedy to "any citizen of the United States or other person within the jurisdiction thereof" who is deprived of "any rights, privileges, or immunities

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[13] There is no issue here involved as to whether individual Indians whose constitutional or federal statutory rights have been violated may maintain an action under 43 U.S.C. § 1983; the right of individual Indian tribal members to bring such an action is not being disputed - or at issue.

secured by the Constitution and laws" by any person acting under color of state law. Tribal government bodies are not citizens of the United States. See *Elk v. Wilkins*, 112 U.S. 94 (1884) ("Under the Constitution of the United States, as originally established…[t]he "Indian tribes being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit.") Thus, if tribal governments are to have any § 1983 rights to sue, the tribal government, as a sovereign in its own right, must somehow be held to be an "other person" as described in the statute.

Sovereigns, however, are not "other persons" as described in § 1983 for purposes of having rights to sue for alleged violations of constitutional or federal statutory rights. *Vermont Agency of Natural Res. v. United States ex re. Stevens*, 529 U.S. 765, 780 (2000) (there is a "longstanding interpretive presumption that 'person' does not include the sovereign" and this presumption "may be disregarded only upon some affirmative showing of statutory intent to the contrary."); *Will v. Michigan Dep't of State Police*, 491 U.S. 63 (1989) (states, as sovereigns, as well as state officials, are not "persons" for purposes of being sued as the term "person" is intended in 42 U.S. § 1983). In *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir.1976), the Court held that a municipality is not an "other person" entitled to bring suit under § 1983; relying on the ruling in *Monroe v. Pape*, 365 U.S. 167 (1961), that a municipality is not a "person" for purposes of being sued under § 1983, and on the fact that Congress' purpose in passing § 1983 was to create a federal remedy for private parties, not government bodies.

Although *Monroe v. Pape* was partially overturned in *Monell v. Department of Social Services*, 436 U.S. 658

(1978), where this Court held that, under certain circumstances, municipalities could be liable as "persons" under § 1983, it did not affect the conclusion in *City of Safe Harbor* that governmental entities could not sue under § 1983. *See Rockford Board of Education v. Illinois State Bd of Education*, 150 F.3d 686, 688 (7th Cir.1998) (" a city or other municipality cannot bring suit under" § 1983) (dictum); *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), cert. denied, 479 U.S. 1085 (1987); *Randolph County v. Alabama Power Co.*, 784 F.2d 1067 (11th Cir.), modified, 798 F.2d 425 (11th Cir.1986), cert. denied 479 U.S. 1032 (1987); *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir.), cert. denied 449 U.S. 1015 (1980). "These courts reasoned that *Monell's* holding that municipal entities may be proper § 1983 defendants does not render them proper § 1983 plaintiffs. These courts further noted that *City of Safety Harbor's* reliance on congressional intent remains valid after *Monell*. These opinions also rely on the Supreme Court authority discussed above holding that a municipality may not seek relief under the Fourteenth Amendment. *See Coleman v. Miller*, 307 U.S. 433, 441 (1939). See also *Illinois v. City of Chicago,* 137 F.3d 474 (7th Cir.1998) (state is not a "person" entitled to sue under § 1983)." *City of New Rochelle v. Town of Mamaroneck*, 111 F.Supp.2d 353, 368.

This view is even taken by other panels of the Ninth Circuit. In *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1092, 1096-1097 (9th Cir. 2002), the Ninth Circuit cited with approval the opinion by Judge Betty Fletcher regarding the rights of a tribe to bring a § 1983 action in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16, (9th Cir 1987). The *White Mountain Apache Tribe v. Williams* opinion of Judge Fletcher (dissenting on other grounds) is as follows:

> However, it is doubtful whether the Tribe qua sovereign would qualify as a "citizen of the United States or other person" eligible to bring an action under section 1983 for deprivation of its rights, privileges, or immunities. *See City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1253-55 (5th Cir.1976) (municipality is not a "person" entitled to bring section 1983 action); *Buda v. Saxbe,* 406 F.Supp. 399, 403 (E.D.Tenn.1974) (a "state is not a '… citizen of the United States or other person within the jurisdiction thereof …' within the contemplation of 42 U.S.C. § 1983."); *Spence v. Boston Edison Co.,* 390 Mass. 604, 459 N.E.2d 80, 83-84 (1983) (city housing authority cannot bring section 1983 action to enforce due process or equal protection rights); *see also City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231, 233 (9th Cir.) (" '[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."), *cert. denied,* 449 U.S. 1039, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980). *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16 (9th Cir 1987).

Accordingly, the tribe, as a sovereign and in its sovereign capacity (which is clearly the capacity in which it brings this suit and asserts sovereign immunity) is not a citizen or other person within the meaning of 42 U.S.C. § 1983, and therefore it does not qualify as a “citizen” or “other person” eligible to bring an action under 42 U.S.C. § 1983.

B There has been no violation of any constitutional or federal statutory rights actionable under 42 U.S.C. § 1983

The rights of the tribe allegedly violated – the right to self governance, and the right to tribal sovereign immunity – are not constitutional or federal statutory rights, and thus any violation of them would not support a cause of action under 42 U.S.C. § 1983. Stated differently, neither the claimed right to regulate or prohibit state law enforcement officers in executing a search warrant relating to off-reservation violations of state law, nor the claimed right to assert sovereign immunity as a bar to the execution of the search warrant, are constitutional or federal statutory rights. As such, they cannot support a § 1983 claim.

The Ninth Circuit has already acknowledged this in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), where the Ninth Circuit holds that interfering with or impairing an Indian tribe's right to self-governance is *not* a protected interest under § 1983, and will not support a claim for § 1983 damages. This is, again, because a tribal right to self-governance is not based upon constitutional or federal statutory law. *Id.* at 662-663.

The Ninth Circuit attempts, however, in its opinion below, to "bootstrap" the service of the search warrant into a "Fourth Amendment violation" that in turn will support a § 1983 claim. It does this by asserting that since the search was unlawful in the first instance as a violation of tribal sovereign immunity – which itself will not support a § 1983 claim, it was an unlawful search, and therefore in the second instance becomes a Fourth Amendment violation.

The Ninth Circuit's attempt to find a Fourth Amendment violation to the tribe, even when the search is pursuant to a search warrant issued upon probable cause, by first finding that the tribe had a judicially-determined sovereign right to be free from any search at all, does not elevate the search, even if found to be subject to bar by the tribe, to a Fourth Amendment violation. Simply put, the core federal right allegedly offended here is Paiute-Shoshone's sovereign immunity or sovereignty – not their entitlement, if any, to be free from unreasonable searches and seizures. The panel's approach was, respectfully, nothing more that an attempt to escape the prior holding in *Hoopa Valley Tribe* and its binding nature as prior circuit authority.

Additionally, even if this Court was to accept the Ninth Circuit's analysis of the conversion of a violation of a sovereign tribal government right into a Fourth Amendment violation, there can be no § 1983 action on this account. This is because it is well established that in order to prevail in a § 1983 claim, the government official must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The conversion of a violation of a tribal government sovereign right was not, at the time of the execution of the warrant, a "clearly established statutory or constitutional right of which a reasonable person would have known."

Finally, there simply is no prior authority for finding that the sovereign government of a tribe is included within the concept and meaning of "the people" as that term is used in the Fourth Amendment, or "person" as that term is used in the Fourteenth Amendment. Consequently, a constitutional violation arising from violation of a tribal right of

sovereignty, even if it is held to have occurred here, was not a "clearly established statutory or constitutional right of which a reasonable person would have known."

III. IN THE EVENT THAT QUESTIONS PRESENTED 1 AND 2 ARE ANSWERED IN A MANNER HOLDING THAT THE TRIBE WAS ENTITLED TO PROHIBIT THE SEARCH, THE DISTRICT ATTORNEY AND THE SHERIFF ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE, AT THE TIME OF THE EXECUTION OF THE WARRANT, THE LAW REGARDING EXECUTION OF SEARCH WARRANTS ON TRIBAL PROPERTY WAS NOT CLEARLY ESTABLISHED

District Attorney McDowell and Sheriff Lucas are entitled to qualified immunity with respect to the 42 U.S.C. § 1983 claim and any other retroactive relief regardless of how the first two questions are answered. The determination on qualified immunity must be made with reference to whether the warrant's execution infringed upon Paiute-Shoshone's sovereign immunity, or retained inherent sovereignty, and the analysis set forth above regarding the first and second questions presented establishes that, at the time of the challenged search and seizure, no settled authority foreclosed the District Attorney and Sheriff from effecting execution of the warrant. The *Hicks* decision, although issued some fifteen months later, is particularly telling with respect to the retained sovereignty/sovereign immunity analysis and the state of the law at the time the warrant was issued.

As this Court acknowledged in *Hicks*, even at the time of that decision's issuance in June 2001, it was "not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation...for enforcement purposes." 533 U.S. at 363. However, as the Court further stated "... several of our decisions point in that direction." *Id*. at 363. The Court then went on, of course, in *Hicks* to find that state officers *did have* authority to execute process – search warrants – on the reservation, which related to off-reservation violations of state law. *Hicks, Id*. at 364-365.

Additionally, because the *Hicks* decision was predicated on then-established precedent, and because that precedent drew no distinction between tribal and tribal-member owned premises or property, there was no clearly established law such that any reasonable officer would have known – even if the Court so establishes in this case – that the execution of a state search warrant on the reservation as to tribal property was prohibited and constituted a violation of constitutional or federal statutory rights. Indeed, a prior circuit decision — *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989) — had rejected explicitly the contention that violation of tribal self-government rights could form the basis for § 1983 liability.

The district court's decision in *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498 (S.D. Cal. 1992), *aff'd on other grounds*, 54 F.3d 535 (9th Cir. 1995), adds nothing in this regard, since it involved execution of a search warrant with respect to on-reservation gaming activities at a time when only the federal government had the right, under 18 U.S.C. § 1166, to enforce state gaming laws on the reservation. Thus, the reason that execution of the state search warrant in *Sycuan* was outside of the jurisdiction of county officers was

because only the federal government had the right – the jurisdiction – to enforce state gaming laws on the reservation at that time. The federal statute, 18 U.S.C. § 1166, had thus preempted state authority to enforce state gaming law on the reservation. Such is not the case here.

The Ninth Circuit authority relied upon by the court below, with respect to tribal immunity from suit, was also not dispositive: *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), involved a subpoena, not a search warrant. It also involved the federal government prosecuting under the Major Crimes Act, and not the state investigating pursuant to its inherent and sovereign right to exercise its own police power. *James* thus did not address the question of whether a state search warrant's execution, which does not require any response by the party whose property is searched or seized, and which is an exercise of state sovereign police power, violates claimed tribal sovereign immunity.

The following cases further show that even if it is held that there was § 1983 cognizable violation of a tribe's right to self-governance or tribal sovereign immunity to be free from search, and that execution of the warrant violated that right, such right was not so clearly established so as to deny the defense of qualified immunity. Thus, while the service of a FRCRP Rule 17 subpoena by a defendant to his alleged rape victim was quashed in *James* as being in violation of the tribe's sovereign immunity, a district court in *United States v. Snowden*, 89 F.Supp. 1054 (D. Oregon 1995), under almost identical circumstances as *James*, refused to follow *James*, finding that the constitutional rights of the accused were not considered in *James*, and that the constitutional rights of the accused outweighed the tribe's claim of sovereign immunity in the counseling records (the subpoena was not quashed). Moreover, in *United States v. Verlarde,* 40 F.Supp.2d 1314

(D. N. M. 1999), once again under almost identical circumstances as *James*, the court again went through an extensive analysis of *James,* and *Snowden*, and found that the constitutional rights of the accused, and the federal government's overriding sovereign authority, "trumped" the tribe's claim of sovereign immunity in the counseling records, and once again the subpoena was not quashed. These district court decisions stand for the general proposition that, even with respect to subpoenas, a tribe's sovereign immunity was not absolute but had to be balanced against competing interests. Here, California had a similar weighty interest in enforcing its criminal laws with respect to off-reservation conduct – as *Hicks* made clear.

All of the above cases, leading to inconsistent results, were similar in that they all involved violations of criminal law occurring on the reservation. None concerned, as does this case, the off-reservation violation of state law, and the effect of the state's sovereignty, and exercise of the state's police power, on the right (or lack thereof) to execute process relating to the off-reservation violation of state law.

Under these varied circumstances, it respectfully and simply cannot be said that all reasonable officers would have known that obtaining and/or execution of a search warrant, issued by a magistrate on probable cause, was unlawful under the circumstances alleged.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,
JOHN DOUGLAS KIRBY
Counsel of Record

LAW OFFICES OF JOHN D. KIRBY
A Professional Corporation
9747 Business Park Avenue
San Diego, California 92131
(858) 621-6244

PAUL N. BRUCE,
County Counsel
County of Inyo
P.O. Box M
Independence, CA 93525
(760) 878-0229

Counsel for Petitioners