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No. _____

In The
Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

NICHOLAS CUMMINGS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the South Dakota Supreme Court contravened this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), when it held that a Deputy Sheriff who observes a tribal member committing a crime off-reservation may not, as a matter of federal law, pursue the tribal member onto his reservation, detain him there, and take a statement from him there.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of South Dakota.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court is reported at 2004 S.D. 56, 679 N.W.2d 484 and is reprinted at App. 1.

The Findings of Fact and Conclusions of Law and the Order of the Magistrate Court of the Seventh Judicial Circuit were dated July 10, 2003, and filed July 16, 2003. Neither is reported. The documents are reprinted at App. 16 and 23 respectively.

JURISDICTIONAL STATEMENT

The decision of the South Dakota Supreme Court was rendered on April 21, 2004. This Court has jurisdiction to review the judgment of a state supreme court pursuant to 28 U.S.C. 1257(a).

FEDERAL CONSTITUTIONAL PROVISION AND STATE STATUTORY PROVISION INVOLVED

Article I of the United States Constitution states in pertinent part as follows:

> Section 8. The Congress shall have power . . . [t]o regulate commerce . . . with the Indian tribes.

SDCL 32-33-18 states in pertinent part as follows:

Any driver of a motor vehicle who intentionally fails or refuses to bring a vehicle to a stop, or who otherwise flees or attempts to elude a pursuing law enforcement vehicle, when given visual or audible signal to bring the vehicle to a stop, is guilty of eluding. The signal given by the law enforcement officer may be by . . . emergency light, or siren.

STATEMENT OF THE CASE

1. Respondent Nicholas Cummings is a member of the Oglala Sioux Tribe who resides on his reservation, known as the Pine Ridge Reservation, in Shannon County, South Dakota. App. 1-2. All of Shannon County is included in the reservation. *See* App. 2, 18. By contrast, none of Fall River County, which adjoins Shannon County and the reservation, lies within the reservation.

On March 4, 2003, a Fall River County Deputy Sheriff observed Respondent traveling 71 miles per hour in a 65-mile-an-hour zone on U.S. Highway 18, off-reservation, in Fall River County. App. 2. The deputy began to follow respondent who then drove his vehicle across the yellow line. The deputy activated his lights and Respondent increased his speed to 90 miles per hour, still outside the reservation in Fall River County. *Id.*

Respondent led the chase into Shannon County and the reservation, where he began to slow down. *Id.* Respondent stopped about one mile within the reservation. *Id.* The deputy drew his duty weapon as Respondent began to emerge from his car; he then placed Respondent on his knees to enable him to handcuff Respondent. *Id.* Respondent identified himself as Nicholas Cummings, and the deputy thereupon removed Respondent's handcuffs. App. 2. Respondent Cummings, in fact, had previously served himself as a Shannon County deputy sheriff. App. 32. *See also* App. 41.

The deputy's audio recorder captured a field interview between the deputy and the Respondent in which the Respondent admitted to drinking four beers, the last within 30 minutes. App. 39. This field interview was suppressed by the courts below. App. 11, 22. Respondent in the interview was told that he "should have stopped." App. 40. The Respondent replied "Well, would you have?. . . . If you had four beers?" App. 40-41. Respondent also told the officer that he did not "see your [police] lights until I got by the Casino." App. 42. Respondent refused to perform the DUI tests saying "I'm not going to make it. I mean I already know. . . . I done what you're doing for ten years." App. 41.

At the hearing before the magistrate court, the deputy testified that the tribal authorities had been advised through the dispatcher that the deputy was entering into the reservation. App. 2. The deputy also acknowledged that he did not have a warrant to enter the reservation from the tribal authorities nor did he request permission from tribal authorities to do so. *Id.* The Respondent was charged in state court with speeding and eluding. App. 16.

2. The charge was scheduled to be heard before the magistrate court. The Respondent moved the court to suppress statements taken during the field interview. App. 3. The Respondent argued that, based on a prior state court case, *State v. Spotted Horse*, 462 N.W.2d 463 (S.D.

1990), *cert. denied*, 500 U.S. 928 (1991), state officers lacked authority to gather evidence against a tribal member with regard to an off-reservation offense after the tribal member enters onto the reservation. App. 34-35.

In opposing the motion, the state prosecutor relied on *Nevada v. Hicks*, 533 U.S. 353 (2001). App. 35-37. The prosecutor argued that *Hicks* had found that the State could "go onto the reservation and make an arrest" of a tribal member for an off-reservation crime. App. 37. Based on *Hicks*, the prosecutor argued, the State does have the jurisdiction in question and that the contrary state authority should be "should be disregarded." App. 37.

The magistrate court found that the evidence should be suppressed and adopted verbatim the "Defendant's Proposed Findings of Fact and Conclusions of Law." AR 16-22. The magistrate thus held that because *State v. Spotted Horse* had found that the "arrest and detention" of Respondent within a reservation was "illegal," that the gathering of evidence was likewise illegal, and that the evidence had to be suppressed. AR 22. *See also* AR 23. The effect of the suppression of the evidence was that the prosecutor would be unable to use the evidence gathered in the field interview (*see* AR 39-42) in which the Respondent essentially admitted that he did not stop because he had just drunk four beers. App. 40-41. Because the eluding statute under which he was charged, SDCL 32-33-18, applies to a driver who "intentionally fails" to stop his vehicle after being given a visual or audio signal, the evidence was highly relevant to the prosecution. The magistrate's decision made no reference to *Nevada v. Hicks*.

3. The South Dakota Supreme Court granted the State's petition for permission to take a discretionary appeal and affirmed the magistrate court, relying squarely on *State v. Spotted Horse*. App. 11.

The state supreme court first found that, under *Spotted Horse*, the State's attempt to take jurisdiction over reservations under Public Law 280 had been unsuccessful. App. 4-5. (No PL 280 issues are raised before this Court). The court then turned to the broader issue of whether, lacking PL 280 jurisdiction, the state had jurisdiction to enter onto the reservation to arrest a resident tribal member for an off-reservation violation. The court concluded that since "the State had no jurisdiction on the reservation, we held [in *Spotted Horse*] that our fresh pursuit statute 'could not reach onto the reservation,'" that the arrest of the defendant in that case "was illegal" and the evidence seized from him on the reservation had to be suppressed as the fruit of an illegal arrest. App. 5-6.

The court then rejected the applicability of *Hicks* to the present situation. First, the court found that "[b]y its own terms, the holding of *Hicks* does not apply in this case." App. 6. In support of that proposition, the court quoted this Court's rendition of the "issue" in *Hicks* as whether the "'tribal court may assert jurisdiction over civil claims against state officials. . . .'" App. 6 (quoting *Hicks*, 533 U.S. at 355) (emphasis by S.D. court removed). The court below distinguished the statement of this issue from the issue of whether a state officer may pursue a tribal member onto the reservation. *See also* App. 6-7.

Second, the court found that statements it quoted from *Hicks*, 533 U.S. at 362-363, regarding state jurisdiction on the reservation (see App. 8-9) "cannot be deemed

'holdings' or conclusions necessary to the decision in *Hicks*. The statements are dicta." App. 9. Third, the court stated that "it appears that only two Justices joined that portion of Justice Scalia's reasoning" regarding state jurisdiction and that "[s]ix justices disagreed with the reasoning in the portion of Hicks" regarding state jurisdiction on the reservation. App. 9-10.

The court thus concluded that the question of whether a "state officer in fresh pursuit for a crime committed off the reservation has jurisdiction to enter the reservation without trial permission or a [tribal] warrant was not squarely before the Court." App. 10. It followed, to the South Dakota Supreme Court, that its own prior decision in *Spotted Horse* controlled the issue. App. 11.

Justice Zinter, concurring specially, joined the court's *Hicks* analysis insofar as it "points out the legal and factual distinctions" between *Hicks* and present case. App. 12. Justice Zinter, however, "concede[d] that much of the language of Justice Scalia's opinion . . . suggests that . . . *Spotted Horse* was wrongly decided." App. 12. To Justice Zinter this was "hardly surprising" because other states had found that the state had jurisdiction in cases analogous to this case even prior to *Hicks*. App. 13.

Justice Zinter also disagreed with the majority observation that "only two Justices joined Justice Scalia's 'reasoning' in *Hicks*," finding instead that six justices had joined Justice Scalia's reasoning. App. 13. Justice Zinter added that "the State is correct that much of *Hick's* reasoning foreshadows an eventual reversal of the second underpinning of *Spotted Horse*." App. 14.

Justice Zinter nonetheless joined in the majority decision because of the "fundamental distinction between

the core issue" in *Hicks* and the case at issue before him. *Id.* Justice Zinter finally noted that the court's own jurisdictional views have not been a "model of stability" and for this reason also *Spotted Horse* should not be disturbed. App. 14.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Essential Reasoning Articulated in This Court's Decision in *Nevada v. Hicks*.

This case raises the question of whether a state officer who observes a tribal member committing a crime off-reservation has the right to pursue the tribal member onto the reservation, to detain that tribal member on a road on the reservation, and to take a statement from him. The reasoning underlying *Nevada v. Hicks* conclusively established that a state officer has that authority. In reaching the opposite conclusion, the South Dakota Supreme Court has improperly disregarded this Court's teachings.

A. The Reasoning of *Hicks*.

Hicks arose from a state officer's search of a tribal member's home on a reservation for evidence of an off-reservation crime. The decision resolved the specific question of "whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribal member suspected of having violated state law outside the reservation." 533 U.S. at 355.

To answer the question posed to it, *Hicks* "first inquire[d] whether the . . . Tribes . . . as part of their inherent sovereignty . . . can regulate state wardens executing a search warrant for evidence of an off-reservation crime." 533 U.S. at 358. Examination of this question required the Court to consider whether the right claimed by the tribe was "connected to that right of the Indians to make their own laws and be governed by them." *Id.* at 361. In answering this subsidiary question in the negative, the Court answered the question at issue in this case.

This Court in *Hicks* stated that "State sovereignty does not end at a reservation's border." 533 U.S. at 361. The Court further noted that it had "'long ago'" departed from the view that state laws could have no force within a reservation. *Id.* "'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'" *Id.* at 361-362. Consequently, the Court explained, it had been held that the process of state courts could run onto the reservation where the state court otherwise had subject matter jurisdiction. *Id.* at 363 (quoting *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28, 31 (1885)).

Hicks explained that this made "perfect sense, since . . . the reservation of state authority to serve process is necessary 'to prevent [such areas] from becoming an asylum for fugitives from justice.'" 533 U.S. at 364 (quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885)). The Court further illustrated the point by identifying the "risk" of a contrary holding raised by a 1969 case emanating from the Ninth Circuit; in that case the circuit court had held that the state authorities could not enter the reservation to seize a tribal member suspected of an

off-reservation crime. *Hicks*, 533 U.S. at 364, n.6 (analyzing *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969).

Hicks thus "conclude[d] today, *in accordance with these prior statements*, that tribal authority to regulate state officers in executing process" related to off-reservation crimes, "is not essential to tribal self-government or internal relations . . . " 533 U.S. at 364 (emphasis added). This subsidiary holding was vital to the Court's ultimate holding that "[b]ecause the . . . Tribe lacked legislative authority to . . . regulate the ability of state officials to investigate off-reservation violations of state law," the tribal courts also lacked the adjudicative authority to hear a claim that the officers "violated tribal law in the performance of their duties." *Id.* at 374.

B. The Reasoning Underlying *Hicks* Is Binding on the Lower Courts.

1. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996), this Court stated that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." The *Hicks* findings with regard to the extent of **state** jurisdiction constituted a "necessary" part of the opinion regarding **tribal** jurisdiction. Indeed, as set forth above, *Hicks* explicitly relied on its "prior statements" regarding the extent of **state** authority on the reservation in determining that **tribal** authority over state officers was not "essential to tribal self-government or internal relations." *Hicks*, 533 U.S. at 364. Therefore, the language was binding on the state courts.

The South Dakota Supreme Court, however, labeled the *Hicks*' discussion of state authority as a simple series of "statements" which could not "be deemed 'holdings' or conclusions necessary to the decision in Hicks." App. 9. As demonstrated in §I(A), *supra*, that label is incorrect. *Hicks*' discussion of state authority on reservation land was not a mere series of "statements," but rather formed a "necessary" part of the reasoning of the Court. The decision of the Court in *Hicks* regarding tribal jurisdiction was inextricably dependent on the Court's "conclusions" and reasoning regarding state jurisdiction.

2. The decision of the court below was also tainted by its finding that "it appears that only two Justices joined" in the part of the majority opinion discussing the extent of state jurisdiction. App. 9. According to the lower court, "[s]ix justices disagreed with the reasoning in the portion of *Hicks* from which these quotes originate." App. 10. This finding was manifestly erroneous.

Justice Scalia wrote the majority opinion, which five other Justices joined in its entirety. The Chief Justice joined without further comment. Justice Souter, joined by Justices Kennedy and Thomas, filed a concurring opinion which stated that "I agree with the Court's analysis as well as its decision. . . . " 533 U.S. at 375 (Souter, J., concurring). Justice Ginsburg also filed a concurring opinion, which stated, inter alia, "I join the Court's opinion." *Id.* at 386. (Ginsburg, J., concurring). Thus, as Justice Zinter correctly noted in his special concurrence below, "six members of the Court joined Justice Scalia's language." App. 14.

C. The Decision Below Is in Conflict With *Hicks*.

In *Hicks*, this Court found that general principals of Indian law legitimized a search by a state officer of the home of a tribal member on the reservation. *Hicks* further found that "State sovereignty does not end at a reservations' border," 533 U.S. at 361, and discredited the Ninth Circuit decision in *Arizona ex rel. Merrill v. Turtle*, which prohibited a sheriff from entering a reservation to seize a tribal member for an off-reservation crime. *Hicks*, 533 U.S. at 364, n.6. *Hicks* found, in a statement particularly pertinent to this case, that "the reservation of state authority to serve process [on the reservation] is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice.'"

Hicks leaves no doubt that – contrary to the decision of the South Dakota Supreme Court – the state has authority as a matter of federal law to enter a reservation in pursuit of a fleeing perpetrator, detain the perpetrator, and take a statement from him. Only in this way will the South Dakota reservations be prevented "'from becoming . . . asylum[s] for fugitives from justice,'" 533 U.S. at 364, and only in this way will this Court's finding that "State sovereignty does not end at a reservation's border" be honored. 533 U.S. at 361. There is no tenable basis upon which to distinguish a state's authority to execute a search warrant of a tribal member on a reservation and a state's authority to pursue, detain, and take a statement from a tribal member whom an officer observed committing an off-reservation crime.

Indeed, the intrusion in this case is less than that in *Hicks,* which recognized the propriety of a state search of a tribal member's home on a reservation. This Court has often recognized the high constitutional protection afforded to a home. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 610 (1999). In the case now before this Court, the Respondent was detained on a road on a reservation; stops on roads raise far fewer constitutional questions than do searches of homes. *See, e.g., Maryland v. Wilson*, 519 U.S. 408, 411 (1997). Finally, the claim to exclude state jurisdiction on reservations in general is at its nadir on public roads. *See Strate v. A-1 Contractors*, 520 U.S. 438, 455-456 (1997).

II. The Issues Raised Are Important to State Law Enforcement and State Sovereignty

1. Lacking, in its view, a "clear holding by a majority of the Supreme Court," the court below refused to budge from the position it had taken in *Spotted Horse* that the state lacked authority to pursue a fleeing tribal member onto the reservation and detain and question him. App. 6. But as the South Dakota Supreme Court itself acknowledged in *Spotted Horse*, "[w]hen a crime is committed off the reservation and criminals can flee unimpeded onto the reservation, both Indians and non-Indians alike are harmed." 462 N.W.2d at 469. This Court addressed that precise concern in *Hicks*. 533 U.S. at 364 (citing *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. at 533).

The negative effects of allowing reservations to become sanctuaries for tribal members fleeing justice are manifest and manifold. Such a rule erodes the deterrent effect of the law, allows wrongdoers to remain at large and free to commit more crimes, and generates an abiding contempt for the law among non-members and members alike. Moreover, the very act of a driver speeding up to beat a state officer to the reservation border is a hazardous one that will almost inevitably lead to injury or loss of life.

These concerns are especially pronounced in South Dakota, where the state's seven reservations are within reach of many of those who might choose to flee from police. It is now well known in the State that a tribal member committing a traffic offense (or a more serious offense) need merely speed up and beat the state officer to the border to have "sanctuary." South Dakota's interest is emphasized by the already high fatality rate on roads on the state's reservations: Shannon County, where this case arose, experienced seven percent of the state fatalities in a recent three-year period, although the county accounts for only 1.7 percent of the state's population.[1] These problems will not, of course, be limited to South Dakota. The South

[1] *See* United States Census, South Dakota: 2000; Population and Housing Counts, p. 2; South Dakota Department of Transportation, Accident Records Office, 1999 South Dakota Motor Vehicle Traffic Accident Summary, Table 3-8; South Dakota Department of Transportation, Accident Records Office, 2000 South Dakota Motor Vehicle Traffic Accident Summary, Table 3-8; Department of Transportation, Accident Records Office, 2001 South Dakota Motor Vehicle Traffic Accident Summary, Table 3-8.

Dakota Court's decision will prompt similar challenges in other states, along with similar dangers to life and property.

2. The states have a strong interest, generally, in the proper demarcation of their sovereignty *vis a vis* Indian tribes and tribal members. All of the states of the Union, including South Dakota, have long been recognized as having a certain measured jurisdiction on the reservation.[2] *Hicks*, of course, confirmed this. *See Hicks*, 533 U.S. at 361 ("State sovereignty does not end at a reservation's border"). The core reason for this is that reservations are part of the territory of the state within which it is situated. Reservation residents, Indian and non-Indian alike, are entitled to services provided by the state and, indeed, are often provided them at a rate significantly higher than other citizens of the state.[3] Tribal members vote in state and local elections and tribal members serve on local units of government and in the state legislature.

[2] Several state courts anticipated the *Hicks*' ruling, albeit sometimes with restrictions not adopted in *Hicks* itself. *See City of Cut Bank v. Bird*, 38 P.3d 804, 807-808 (Mont. 2001); *State v. Mathews*, 986 P.2d 323, 337 (Idaho 1999); *State v. Lupe*, 889 P.2d 4, 7 (Ariz. Ct. App. 1995); *Fournier v. Roed*, 161 N.W.2d 458, 461 (N.D. 1968). A leading treatise states, moreover, "Even before Hicks, most courts reviewing" arrests of tribal members arising from hot pursuits starting off-reservation and ending on reservation had "upheld their validity." Clay Smith, ed., *American Indian Law Deskbook*, 3d ed. 133 (2004).

[3] State-generated statistics indicate that the state expended, on education, $6,958 per Average Daily Membership (ADM) in Shannon County in fiscal year 2001 and $4,785 in Todd County, another reservation county. The average county ADM payment for the state, however, was only $518 per student.

The South Dakota Supreme Court below relied upon its erroneous holding that "the State had no jurisdiction on the reservation." App. 5; *Spotted Horse*, 462 N.W.2d at 467 ("South Dakota had no jurisdiction on the reservation."). That holding significantly – and erroneously – diminishes the State of South Dakota's sovereignty on a substantial portion of the land in the state. Intervention by this Court is merited.

CONCLUSION

For the foregoing reasons, the state respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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