No. 04-74

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In *Nevada v. Hicks*, 533 U.S. 353, 362 (2001), this Court stated that it is "well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed . . . off the reservation." The Court therefore held that state officers may enter a reservation to serve process on a tribal member who is being investigated for an off-reservation crime. *Id.* at 363-64. In doing so, the Court observed 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." *Id.* at 364 (internal citation and quotation marks omitted).

As the petition demonstrated, the South Dakota Supreme Court failed to adhere to that holding. In ruling that federal Indian law principles prohibit a deputy sheriff who observed a tribal member committing an off-reservation crime from pursuing the tribal member onto his reservation, the South Dakota Supreme Court opted instead to abide by one of its own precedents. This is not a matter of mere error correction, where a lower court arguably misapplied a rule announced by this Court. Rather, the South Dakota Supreme Court expressly chose not to follow *Hicks*, on the ground that this Court did not really mean what it said. Given the importance of this issue – the prospect that South Dakota reservations will become "an asylum for fugitives" – a grant of certiorari is warranted.

Respondent's defense of the South Dakota Supreme Court's decision is entirely unpersuasive. And his assertion that the case is unimportant because of Public Law 280, 67 Stat. 588 (1953), *amended in pertinent part*, 82

Stat. 73, 80 (1968), because of the potential for agreements between tribes and various units of government, and because of the possibility of direct congressional intervention reflects a fundamental misapprehension of the current relationship between states, Indian tribes, and Congress.

1. Respondent's contention (Opp. 13) that the South Dakota Supreme Court correctly ruled that *Hicks* does not control this case is without merit. As an initial matter, Respondent does not even attempt to defend the South Dakota Supreme Court's conclusion (Pet. App. 9) that "only two Justices" joined the portion of the *Hicks* opinion discussing the extent of state jurisdiction. Six Justices joined the opinion of the Court in its entirety. By declining to defend this conclusion of the court below, Respondent virtually admits that the decision was wrong in this important respect.

Respondent instead emphasizes another argument offered by the South Dakota Supreme Court, *viz.*, that *Hicks* is distinguishable from this case because it decided only the question of whether "tribal sovereignty required that a Tribe be empowered to hear a claim against a state officer for civil damages." Opp. 13. Respondent, however, does not even attempt to respond to the petition's discussion of this issue. As the petition explained, *Hicks* concluded that because the tribes "lacked legislative authority to restrict . . . the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties." 533 U.S. at 374. The conclusion of *Hicks* regarding tribal civil jurisdiction over state officers was thus explicitly dependent on the conclusion regarding the authority of

state officers to enforce laws against tribal members on their reservations. Accordingly, this Court's ruling on the authority of state officers is a holding of the Court fully binding on the lower courts. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) (binding precedent is established not only by the results the Court reaches, "but also [by] those portions of the opinion necessary to that result").

Respondent's other attempts to distinguish *Hicks* are equally unavailing. Respondent relies on the fact that *Hicks* "involved a search approved by the tribal court and conducted by state officers in concert with tribal officers" (Opp. 14), yet *Hicks* explicitly disclaimed any reliance on that tribal warrant (533 U.S. at 359 n.3), calling the warrant "unnecessary." *Id.* at 372. Respondent likewise fails in his attempt to distinguish this case on the grounds that the officer in *Hicks* had obtained a state warrant whereas the deputy sheriff in this case was involved in a hot pursuit situation. Opp. 14-15. To be sure, Fourth Amendment cases on occasion turn on whether a law enforcement officer obtained a search warrant. But Respondent can point to no relevant difference – for Indian law purposes – between a state's authority to execute a search warrant of a tribal member's home on a reservation and a state's authority to pursue, stop, and take a statement from a tribal member whom an officer observed committing an off-reservation crime. Indeed, as the petition noted (Pet. 12) and the Opposition failed to rebut, the intrusion in this case was *less* than that in *Hicks*. It is hornbook criminal procedure law that searches of homes impose greater intrusions on privacy interests than traffic stops.

Hicks plainly controls the outcome of this case. The South Dakota Supreme Court's unwillingness to adhere to *Hicks* should not be countenanced.

2. Respondent attempts to downplay the importance of the question presented by arguing that the most effective means of addressing any problems created by the South Dakota Supreme Court decision is not review by this Court but through Public Law 280, through agreements between the states and the tribes, or through other congressional legislation. Opp. 2, 9-13. The sovereignty, jurisprudential, and public safety ramifications of the decision below are not in any way ameliorated, however, by the mechanisms proposed by Respondent.

Public Law 280 – which gave states the option of assuming civil and criminal jurisdiction in Indian country – is, as a practical matter, entirely irrelevant to any future developments in Indian country jurisdiction. As revised in 1968, Public Law 280 allows jurisdictional concessions by a tribe, including concessions allowing fresh pursuit by state officers onto reservations,[1] *only* by way of a special election of the tribal membership. 25 U.S.C. § 1326. *See also* 25 U.S.C. §§ 1321-22. To our knowledge, no tribe has ceded any jurisdiction under this statute since 1968. Bowing, presumably, to the "actual state of things" in

[1] The Oglala Sioux Tribe of the Pine Ridge Reservation (to which the Respondent fled) would presumably agree. It recently told a federal district court that an agreement to allow the service by the state of its criminal process on the reservation could be made only under 25 U.S.C. § 1326; in such a case, said the Tribe, consent must be expressed "in a special referendum election called by the Secretary of the Interior." Oglala Sioux Tribe's "Amicus Curiae Brief in Opposition to South Dakota's Motion for a Preliminary Injunction" in *State of South Dakota v. Mueller*, Civ. No. 03-3002 (D.S.D. Feb. 18, 2003), at 11.

Indian country (*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832)), even Respondent does not make the audacious argument that a South Dakota tribe, or any tribe, is today willing to yield any jurisdiction through Public Law 280.[2] Not surprisingly, then, this Court found Public Law 280 to be irrelevant to its analysis in *Hicks*, even though the state involved, Nevada, is also not a Public Law 280 jurisdiction. *See* 533 U.S. at 365-66.

Respondent also references the agreements of what he describes as "scores of Tribes" which address "fresh pursuit issues." Opp. 10 & n.4. Given a lack of consent of the tribal membership under Public Law 280, any such agreement would surely be of suspect validity. The agreements identified, in any event, hardly live up to their billing. Only two even mention fresh pursuit by a local or state authority.[3] Given that there are over 330 recognized

[2] Respondent's assertion (Opp. 9) that South Dakota, prior to 1968, "steadfastly refused" to accept jurisdiction on the terms Congress offered is incomplete and misleading. South Dakota did, in fact, accept civil and criminal jurisdiction over roads through the reservations in 1961. S.D. Codified Laws §§ 1-1-18, 1-1-21. This assumption of partial jurisdiction was initially disapproved by the state courts but later approved by both the South Dakota Supreme Court (*State v. Onihan*, 427 N.W.2d 365 (S.D. 1988)) and the federal district court (*Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502 (D.S.D. 1989)). The Eighth Circuit, however, found that the State could not take partial jurisdiction in the manner in which it did. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990). The State Supreme Court, apparently under the mistaken impression that it was virtually compelled to follow the decisions of the Court of Appeals, then reversed its prior decision. *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990). This Court ultimately denied certiorari. *South Dakota v. Spotted Horse*, 500 U.S. 928 (1991); *South Dakota v. Rosebud Sioux Tribe*, 500 U.S. 915 (1991).

[3] *See* Agreement by and between the Confederated Tribes of the Umatilla Indian Reservation and the State of Oregon Regarding Fresh Pursuit and Extradition (October 17, 1981); Law Enforcement Agreement

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tribes in the continental United States (68 Fed. Reg. 68180 et seq. (Dec. 5, 2003)) and potentially thousands of governmental units which could make agreements with such tribes, this is a remarkably paltry showing. The larger reservations in South Dakota (Pine Ridge, Rosebud, Cheyenne River, Standing Rock, Lower Brule, and Crow Creek) certainly have expressed no interest in allowing fresh pursuit by the State. Indeed, a tribal leader who supported such an agreement might well be courting political suicide. Respondent makes no claims to the contrary, nor could he.

Finally, Respondent cites a number of statutes which, he claims, indicate that Congress has "not hesitated to define jurisdictional boundaries in Indian country when it thought such definition appropriate." Opp. 10 n.3. Nine statutes are cited. Five were enacted in the 1940s. It is enough to say that Indian law and policy have under gone several permutations since then. The remaining four are restoration acts. They cannot fairly be construed as congressional intervention defining jurisdictional boundaries in a situation parallel to that presented here.

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among the Eastern Shoshone and Northern Arapaho Tribes, the City of Riverton and the Bureau of Indian Affairs (Dec. 18, 2000). The former agreement was clearly part of the retrocession process of the same year and is hardly indicative of what could occur outside of that process. The latter agreement between a tribe and a small city appears to allow fresh pursuit at Section 10, but states in Section 1 that it does not make any "substantive law applicable to a certain person" which would not otherwise be applicable. If it is true, as the opinion below states, that the "State had no jurisdiction on the reservation" (Pet. App. 5), then the Riverton Agreement is meaningless because it *does* attempt to do just that.

Congress may well be the most appropriate forum for a party who wants to overturn long-settled Indian law jurisprudence. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 758-760 (1998) (deferring to Congress on the issue of whether to overrule the "settled" doctrine of tribal sovereign immunity). But this Court is the most appropriate forum for a party seeking relief from a lower court decision that failed to abide by this Court's rulings on the extent of state authority on reservations.

In the end, Respondent has failed to demonstrate that the State has any ready means of alleviating the significant negative consequences of the South Dakota Supreme Court's decision. The legal issue presented has been fully considered, the facts are essentially uncontested, and this Court's jurisdiction to hear the matter is not in doubt. The case is well-postured for, and merits, a grant of certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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