No. ______

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

PETITION FOR WRIT OF CERTIORARI

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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 is also the elected District Attorney of Inyo County. He has been sued in his individual capacity, as well as in his official capacity as the District Attorney. Petitioner Dan Lucas is an individual, and is also the elected Sheriff of Inyo County. He also has been sued in his individual capacity, as well as in his official capacity as Sheriff. 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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Petitioners respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The January 4, 2002, opinion of the Ninth Circuit (App., infra, pages 9a-43a) is reported at 975 F.3d 893. The May 20, 2002, order of the Ninth Circuit (App., infra, pages 1a-8a) amending the 1/4/02 opinion, and denying the petition for rehearing *en banc*, was ordered to be published. The November 22, 2000, order of the District Court (App., infra, 44a-66a) granting petitioners' motion to dismiss, and the judgment entered thereon in favor of petitioners, is unreported.

The January 4, 2002, opinion as amended by the May 20, 2002, order has been republished at 291 F.3d 549.

JURISDICTION

The original opinion of the Ninth Circuit was filed January 4, 2002. Petitioners' timely petition for rehearing *en banc* was denied on May 20, 2002, and the Ninth Circuit's order amending the original opinion, and denying the petition for rehearing *en banc*, was filed and entered on that same date.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

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. 42 U.S.C. § 1983.

This statute concerns and is entitled "Civil action for deprivation of rights." It is set forth in App. D, infra, page 67a.

3. 18 U.S.C. § 1152.

This statute concerns crimes and Indians, and is commonly known as the "General Crimes Act." It is set forth in App. D, infra, pages 67a-68a.

4. 18 U.S.C. § 1153.

This statute also concerns crimes and Indians, and is commonly known as the "Major Crimes Act." It is set forth in App. D, infra, pages 68a-69a.

5. 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 App. D, infra, pages 69a-71a.

STATEMENT OF THE CASE

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 sent to the County administering the public assistance.

The Integrated Fraud Detection System Report sent to Inyo County 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 (herein collectively referred to as "Paiute-Shoshone"), 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.

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, asking that the income discrepancies be reconciled. Again these requests for reconciliation were ignored.

Thereafter, in what may in part be a disputed factual background (which is not controlling, however, with regard to the matters before the Court), Investigator Nixon sent a letter-request to the Paiute Palace Casino, asking for the relevant payroll information for the three casino employees who were the subject of the State's Integrated Fraud Detection System Report.

Although Paiute-Shoshone had in the past honored such informal requests without a search warrant, on this occasion, it advised that it would not release the requested

payroll information unless a search warrant was obtained.[1] This request did not appear entirely extraordinary, even though the informal letter-requests for information had been honored in the past, because on at least one other occasion, within the preceding year, the District Attorney's office had, after receiving an earlier California State IEVS/Integrated Fraud Detection System Report, requested similar payroll information from another tribal office, for a different employee, and been told that a search warrant would be required. In that case, the District Attorney's office had then obtained and served a similar search warrant, and the payroll records then at issue were obtained pursuant to the warrant.[2]

In any event, after her request to the casino for the subject payroll information was denied, Investigator Nixon submitted an affidavit in support of a petition for a search warrant to the California Superior Court. In summary, the affidavit advised of the IEVS/Integrated Fraud Detection System Report, and further provided that overpayment of benefit amounts in excess of $400.00 appeared to be in issue. The conduct being investigated, theft of public funds, was within the parameters of several California criminal statutes,

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[1] Paiute-Shoshone has not acknowledged that this representation of the need for a search warrant was made by its personnel.

[2] These facts appear to be in dispute in the following regard, but again, the disputed facts are not controlling: Respondent Paiute-Shoshone has not acknowledged the prior providing of similar payroll information pursuant to informal letter-request, nor has it acknowledged its prior honoring of a similar search warrant. Paiute-Shoshone alleges in its complaint that it had a long-standing policy not to release the information without a signed authorization from the employee involved. (ER 010).

including grand theft, a felony, in violation of California Penal Code § 487(a).[3]

Based on the affidavit, a search warrant was issued by the California Superior Court on March 23, 2000. 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:
>
> > "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;

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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). . . ."

> 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"
> (Excerpts of Record ("ER") 138-140)

Investigator Nixon then attempted to execute the search warrant at the casino. Upon arrival, however, she was told by Paiute-Shoshone that the 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 located in an out-building behind the casino, she (Investigator Nixon) was prohibited from searching for the records, and was being denied access to the out-building.

In order to mitigate the potential for disturbance, Investigator Nixon asked that the Sheriff's Department be called. Sheriff's deputies responded, and after reviewing the warrant, advised that it appeared proper. Paiute-Shoshone continued to deny the request for the key to the padlock securing the out-building, and accordingly, bolt cutters were used to cut the padlock. Investigator Nixon then searched the out-building, and the records described in the search warrant were located and obtained. (ER 267-328). Those 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 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. [4]

Paiute-Shoshone thereafter filed this action in District Court, seeking declaratory and injunctive relief, and also

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[4] 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 listed 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 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." (App. page 58a; ER 217; and ER 267-328, consisting of a copy of each of the actual pages seized.)

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. (ER 005-023).

In August 2000, petitioners Inyo County, Mr. McDowell and Sheriff Lucas filed their motion for dismissal of the complaint pursuant to F.R.C.P. § 12(b)(6).

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. (App., infra, pages 44a-66a).

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

Inyo County, Mr. 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. (App., infra, pages 1a-8a).

REASONS FOR GRANTING THE PETITION

The opinion of the Ninth Circuit in this case establishes at least hundreds, and perhaps many more, Indian tribal enclaves that are now sanctuaries where evidence 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 are tribal commercial gambling casinos, which are proliferating throughout the nation,[5] other tribal operated businesses such as ski resorts, the offices of Indian tribal agencies, and other tribal offices and properties, located throughout the various reservations and other Indian country within the States of the Ninth Circuit. These include, of course, legal cases of the Ninth Circuits California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, and Hawaii, as well as within Guam and the Northern Mariana Islands.

The asserted legal basis of the Ninth Circuit's opinion which is *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), is so broad that it includes within its parameter the prohibition of even federal law-enforcement officers from obtaining search warrants for tribes, tribal businesses and tribal offices when investigating and prosecuting State crimes under the General Crimes Act, and under the Major Crimes Act, which are set forth at 18 U.S.C. Sections 1152 and 1153, respectively.

The effect of the Ninth Circuit's opinion regarding tribal sovereign immunity on federal law enforcement, investigation of federal crimes, is unclear, but this may also be impacted.

In issuing this opinion, the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. The Ninth Circuit has also decided an important federal question in a way that conflicts

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[5] According to its Website, even Harroh's Entertainment, Inc., a major corporation traded on the New York Stock Exchange, now operates large Indian gambling casinos and resorts on Indian reservations in the Ninth Circuit, and well as elsewhere in the nation.

in principle, if not directly, with relevant decisions of this Court. Moreover, the decision below is incorrect.

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The primary question presented concerns whether the doctrine of tribal sovereign immunity 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 pursuant to a search warrant issued on probable cause in accordance with Fourth Amendment standards. [6] This important question of federal law has not been, but should be, settled by this Court.

Tribal sovereign immunity is "immunity from suit." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757 (1998). *Turner v. United States*, 248 U.S. 354 (1919). It developed "almost by accident." *Kiowa Tribe of Oklahoma, supra*, page 756. The *Turner* case, *supra*, which is the authority upon which tribal sovereign immunity relies for its existence, has recently been described by the Court as "but a slender reed for supporting the principle of tribal sovereign immunity." *Kiowa Tribe of Oklahoma, supra,* page757.

There is no Supreme Court or other Court of Appeals precedent known to petitioners that has ever extended the

[6] To the extent that any decision and supporting analysis by the Supreme Court is also applicable to on-reservation State crimes, that question may also be answered.

doctrine of tribal sovereign immunity - immunity from suit - to immunity from search for criminal evidence pursuant to a search warrant where the state has the jurisdiction to prosecute the crime involved. Indeed, there is no Supreme Court precedent known to petitioners that has ever even intimated such.

Further, even the continued viability of the doctrine of tribal sovereign immunity, with regard to immunity from suit, in today's "wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities," is being questioned. *Kiowa Tribe of Oklahoma, supra*, page 757-758.

> The Supreme Court recently observed:
>
> "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *Potawatomi*, *supra*; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have

> no choice in the matter, as in the case of tort victims." *Kiowa Tribe of Oklahoma, supra*, page 758.

Despite this current questioning of the continued viability of tribal sovereign immunity, even in its traditional role of immunity from civil suit, the Ninth Circuit's opinion herein has decided an important question of federal law in such a manner as to extend the principle of tribal sovereign immunity to non-civil, that is, criminal matters, and thereby enable the multitude of Indian tribes in the Ninth Circuit, and their gambling casinos and other businesses, to prohibit the searching of their property for criminal evidence pertaining to off-reservation (and on-reservation) commission of State crimes, even when the search is pursuant to a search warrant, issued upon probable cause, satisfying the Fourth Amendment standards for the same. (App., infra, pages 21a-24a).

This opinion by the Ninth Circuit is broad enough to include within its parameters the holding that Indian tribes, their casinos and businesses are immune from search for criminal evidence even when the search is undertaken by federal law-enforcement officers in their investigation of State crimes committed on a reservation, in States subject to the General Crimes Act and Major Crimes Act (18 U.S.C. Sections 1152 and 1153, respectively).

This breadth of scope of the Ninth Circuit's opinion flows from its analysis which led to its decision in this case. The Ninth Circuit's analysis is, in summary, as follows: In 1992, the Ninth Circuit decided the case of *United States v. James*, 980 F.2d 1314 (9th Cir. 1992). In *James*, the Ninth Circuit held that the Quinault Indian Nation was immune from service of a federal subpoena, for a tribal-clinic's psychological records of an Indian victim/patient, when that subpoena was requested by the Indian defendant being

prosecuted for the on-reservation rape of the Indian victim/patient. The defendant was being prosecuted by the federal government, for violation of the State's criminal law, pursuant to the Major Crimes Act, 18 U.S.C. § 1153.

In *James*, *supra*, the Ninth Circuit held that the tribe could assert tribal sovereign immunity against the federal subpoena, and thereby avoid having to comply with the federal subpoena.

In this case, the Ninth Circuit used the *James*-case proclaimed right that a tribe could assert sovereign immunity to refuse to honor a federal subpoena, in connection with a federal prosecution under 18 U.S.C. 1153, of an on-reservation State crime and held that this obviously means that tribes also have the right to assert tribal sovereign immunity in order to bar a search pursuant to a State (not federal), search warrant (not subpoena), issued in connection with a State (not federal), prosecution or investigation under State law (not 18 U.S.C. 1153), to search for evidence of off-reservation (not on-reservation), State crime.

Thus, the Ninth Circuit's analysis jumps from allowing tribal prohibition of federal subpoenas regarding State crime prosecution by the federal government for on-reservation crime; through tribal prohibition of federal search warrants regarding State crime prosecution by the federal government for, apparently, both on-reservation and off-reservation crime; and then to tribal prohibition of State search warrants regarding State crime prosecution by the State for off-reservation crime.

The Ninth Circuit's opinion in this case is so broad that it includes within its prohibitions searches, pursuant to a search warrant, of tribes and their casinos and other businesses in Public Law 280 States (18 U.S.C. Section 1162), by State law enforcement officers investigating

on-reservation State crimes. In Public Law 280 States, of course, congress has statutorily returned State criminal law jurisdiction on the reservation to the States identified in the statute. California is one of the States identified in the statute.

In summary, the decision of the Ninth Circuit in this case has such far reaching consequences, and is of such national importance, that the rule of law regarding immunity from search pursuant to search warrant must be settled by this Court.

There are nine Western states, along with Guam and the Northern Mariana Islands, now known to be geographical areas where tribal storage of books, records, and other evidence and instrumentalities of crime are protected from search by law enforcement investigators, even when a search warrant has been obtained. At present, such storage is subject only to whatever private arrangements might be made with the managing personnel of the tribe storing the same.

This state of affairs cannot, respectfully, be allowed to stand. A society that declines to protect itself and its citizens from off-reservation (as well as on-reservations) crimes, by establishing hundreds of enclaves which may be used as sanctuaries for criminal evidence, will not long survive as one supported by its citizens.

There is no precedent calling for or supporting the Ninth Circuit's extension of the doctrine of tribal sovereign immunity to enable tribes, their gambling casinos and other businesses to prohibit searches of their property for evidence of off-reservation crimes, especially when that search is pursuant to a search warrant issued upon probable cause.

It is respectfully urged that this petition be granted, and this important question of federal law be settled by this Court.

II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS IN PRINCIPLE, IF NOT DIRECTLY, WITH RELEVANT DECISIONS OF THIS COURT.

Additionally, the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. These include *Nevada v. Hicks,* 533 U.S.353 (2001), the "Montana analysis" as presented in *Montana v. United States*, 450 U. S. 544 (1981), and *United States v. Wheeler*, 435 U.S. 313 (1975).

Petitioners Inyo County, Mr. McDowell and Sheriff Lucas filed their answering brief with the Ninth Circuit in this case on June 21, 2001. This was just four days prior to this Court's decision in *Nevada v. Hicks, supra*.

In their pre-*Nevada v. Hicks*, brief, petitioners argued extensively that the correct framework for decision in this matter was the analysis set forth in *Wheeler* and *Montana supra*, and the line of cases related thereto. Petitioners argued that the inherent sovereignty of Indian tribes is limited, and quoted the following:

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty'... Their incorporation within the territory of the United States and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States v. Wheeler*, 435 U.S. 313, 323 (1978)

"In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by [1] treaty or [2] statute, or [3] by implication as a necessary result of their dependent status. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L.Ed.2d 209." *United States v. Wheeler, supra,* 323.

"These limitations [of sovereignty] rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. _______ (2001), at p. 5 of the Opinion of the Court; *United States v. Wheeler, supra,* 326; *Montana v. United States, supra*, 564.

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. *Montana v. United States, supra*, 564; *United States v. Wheeler, supra*, 326.

"Although physically within the territory of the United States and subject to ultimate federal control, [Indian tribes] ... remain 'a separate people, with the power of regulating their internal and social relations.' *United States v. Kagama, supra*, 118 U.S., at 381-382...." *United States v. Wheeler, supra*, 322 .

"... 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. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 ...; *United States v. Kagama*, 118 U.S. 375, 381-382...." *Montana v. United States, supra,* 564.

"... The powers of self-government [of Indian tribes] ...involve only the relations among members of a tribe." *Montana v. United States, supra,* 564 (Emphasis by Court); *United States v. Wheeler, supra*, 326.

"... the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, 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." *Oliphant v. Suquamish Indian Tribe, et al., supra,* 208 (1978).

"Indian reservations are 'a part of the territory of the United States.' [Citation.] Indian tribes 'hold and occupy [the reservations] with the assent of the United States and under their authority.' [Citation.] Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as <u>not to conflict with the interests of this overriding sovereignty</u>." *Oliphant v. Suquamish Indian Tribe, et al., supra*, 208-209 (1978). (Emphasis added.)

In their pre-*Nevada v. Hicks* brief to the Ninth Circuit, petitioners went on to state that when applying the foregoing principles of inherent sovereignty to the question in this case, which is whether the Paiute-Shoshone have retained sovereignty to enable them to bar the execution of a search warrant for evidence pertaining to crimes against the people of the State of California (here, again, theft of public funds), it was respectfully urged that it was clear that the Paiute-Shoshone did not have such retained sovereignty.

Then, four days after petitioners' filed their answering brief, this Court released the decision in *Nevada v. Hicks, supra*, which employed the same analysis of *Montana* and *Wheeler* as did petitioners to reach the conclusion that States have the inherent jurisdiction to enter a reservation, for criminal law enforcement purposes, regarding crimes committed off the reservation, and to serve process (specifically search warrants) in connection therewith.

The Supreme Court stated in *Hicks*:

> "[T]he principal that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.' *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 156, 100 S.Ct. 2069 . . .
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> * * * *
>
> "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 . . . .
>
> * * * *
>
> "We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process [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." *Nevada v. Hicks*, 533 U.S. 353, 364. (emphasis added)

The forgoing analysis and holding of the Supreme Court was brought to the attention of the Ninth Circuit in written briefing prior to oral argument, and was even addressed by Paiute-Shoshone in its reply brief. *Nevada v. Hicks* was also specifically brought to the attention of the Ninth Circuit at oral argument. Notwithstanding this, however, the Ninth Circuit declined to address or even mention *Nevada v. Hicks* in its opinion (App., 9a-43a).

In fact, in its opinion, the Ninth Circuit appears, at least to petitioners, to hold directly contrary to the Supreme Court in *Nevada v. Hicks*, when the Ninth Circuit holds:

> "We conclude 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.'" (emphasis added) (App., 20a).

The Ninth Circuit then asserts that *United States v. James, supra*, 980 F.2d 1314 (9th Cir. 1992), affirming the quashing of a federal subpoena, is authority for this holding. Again, there is no attempt to reconcile or distinguish *Nevada v. Hicks*.

Subsequently, in their petition for rehearing *en banc* to the Ninth Circuit, petitioners presented extensive briefing on *Nevada v. Hicks,* and on the *Montana* analysis leading to the *Hicks* decision. The Ninth Circuit was also briefed on the statements made by the Supreme Court in *Hicks* at page 365 of the decision, that although the states' inherent jurisdiction on reservations could be stripped by Congress, that has not happened with regard to the service of search warrants for criminal evidence pertaining to off-reservation crime, and further, 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." *Nevada v. Hicks, supra,* page 366.

The Ninth Circuit was also briefed on the Supreme Court's holding that:

> "'[T]he State's interest in execution of process is considerable' enough to outweigh the tribal interest in self-government' even when it relates to Indian-fee lands.'" *Nevada v. Hicks, supra*, page 370;
>
> and that:

> "We do not say State officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Nevada v. Hicks, supra,* page 373. (emphasis added)

Despite this extensive briefing, however, once again, in its decision to deny the rehearing *en banc*, and otherwise amend its prior opinion, the Ninth Circuit declined to comment upon the holdings of *Nevada v. Hicks.*

By way of the foregoing, the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Accordingly, the Court should grant the petition herein, and address the issue of the propriety of service of search warrants on Indian tribes, their gambling casinos and other tribal businesses.

III. THE DECISION BELOW IS INCORRECT.

The opinion of the Ninth Circuit is incorrect in several key areas with respect to the questions presented by this petition.

A. Incorrect on Search Warrant Issue.

1. <u>States have inherent jurisdiction to serve process on the reservation with regard to off-reservation State crimes.</u>

As discussed above, in *Nevada v. Hicks, supra*, this Court recognized that States have inherent jurisdiction to serve process (search warrant) upon a reservation with regard to off-reservation crimes, and that congress has not taken this jurisdiction away. Specifically, the Court stated:

> "The States' inherent jurisdiction on reservations can of course be stripped by Congress, *see Draper v. United States*, 164 U.S. 240, 242-243, 17 S.Ct. 107, 41 L.Ed. 419 (1896). But with regard to the jurisdiction at issue here that has not occurred … 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. To the contrary, 25 U.S.C. § 2806 affirms that 'the provisions of this chapter alter neither … the law enforcement, investigative, or judicial authority of any … State, or political subdivision or agency thereof….'"
>
> *Nevada v. Hicks, supra*, 365-366.

Accordingly, the Ninth Circuit is in error by failing to similarly recognize this inherent jurisdiction of the States.

2. The Supreme Court has held that execution of a search warrant upon a reservation, with regard to evidence of off-reservation State crimes, does not infringe upon a tribe's right to self-governance.

The Ninth Circuit held in its opinion that the execution of a search warrant against the tribe interfered with "the right of reservation Indians to make their own laws and be ruled by them." (App., 20a).

However, the Supreme Court has held that:

> ". . . tribal authority to regulate state officers in executing process [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." *Nevada v. Hicks*, 533 U.S. 353, 364.

There is, of course, a factual distinction in the *Hicks* case, when reviewed in light of the Ninth Circuit's opinion below. That distinguishing fact is that in *Hicks*, the search warrant was served at the on-reservation residence of a tribal member, and in this case, the search warrant was served at the tribe's on-reservation commercial gambling casino.

However, given that (1) this Court has declared that there is no "tribal authority to regulate state officers in executing process [search warrants] related to the violation, off reservation, of state laws," and (2) that States have inherent jurisdiction to do so, and that such jurisdiction has not been taken away by congress, and (3) that heretofore tribal sovereign immunity (to suit) has never been extended so as to enable a tribe to prohibit the search of its property for criminal evidence of off-reservation State crime, it is submitted that there is no tribal sovereign immunity to bar law enforcement's search, pursuant to search warrant, of tribal and tribal casino and other business property, for criminal evidence of off-reservation (or on-reservation, for that matter) State crime.

B. Incorrect on Holding that Tribe as a Sovereign has Actionable claim Under 42 U.S.C § 1983.

1. The tribe, as a sovereign and in its sovereign capacity, is not a "citizen or other person", Under 42 U.S.C. § 1983.

The tribe is of course suing as a sovereign. Indeed, it's whole suit is based on asserted tribal sovereignty immunity. The Ninth Circuit has recently acknowledged that a tribe is not a citizen of any state of the United States. *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1092, 1096-1097 (9th Cir. 2002). In that case, the Ninth Circuit also cited with its approval the opinion of Ninth Circuit Judge Betty Fletcher in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16, (9th Cir 1987) that:

> **"[I]t is doubtful whether [a] Tribe qua sovereign would qualify as a 'citizen of the United States or other person' eligible to bring an action under § 1983 for deprivation of rights, privileges or immunities. [citations.]"** *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16 (9th Cir 1987); *American Vantage Companies, Inc. v. Table Mountain Rancheria*, *supra*, n. 4, 1097. (emphasis added)

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.

2. The rights of the tribe allegedly violated - the right to self governance, and 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.

Neither the right to self-governance, nor the claimed right to assert sovereign immunity as a bar to the execution of the search warrant, are statutory or constitutional rights. As such, they cannot support a Section 1983 claim. This is because it is well established that in order to prevail in a Section 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 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 Section 1983, and will not support a claim for Section 1983 damages. This is, again, because a tribal right to self-governance is not based upon federal constitutional or statutory law.

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 supports a § 1983 claim, by stating that since the search was unlawful as a violation of tribal sovereign immunity (which will not support a § 1983 claim), it was an unlawful search, and therefore, it was a Fourth Amendment violation, that in turn supports a § 1983 claim.

However, even accepting the panel's view that the search was unlawful, the only thing that makes the search

unlawful (for it was with search warrant, and there was probable cause for its issuance, etc.) is that the search was made in violation of the alleged "primary right" of tribal sovereign immunity, or the right to self governance, neither of which itself will support a § 1983 claim.

3. California law does enable the issuance of a search warrant by a superior court judge or other magistrate for a search of property outside the jurisdiction of the county where the magistrate sits.

Finally, the Ninth Circuit is incorrect in its explanation that California law prohibits a magistrate from issuing a search warrant for a search outside of the county where he/she sits (and in any event, it is not disputed that the Paiute Palace Casino is in Inyo County).

California Penal Code § 1528 permits the magistrate to issue a search warrant to "a peace officer in his or her county" which includes, of course the County Sheriff or his deputies or District Attorney Investigators who are peace officers (such as in the case here).

Further, the California Supreme Court has held, after a complete examination and analysis of Penal Code §§ 1528, 1529, 830.1, and other applicable statutes, that a magistrate has jurisdiction even to issue an out-of-county search warrant when he/she "has probable cause to believe that the evidence sought relates to a crime committed within his county." *People v. Fleming* (1981) 29 Cal.3d. 698, 703-706.

The Fleming Court further held that pursuant to Penal Code § 830.1, the authority of the peace officer "extends to any place within the state ... [a]s to any public offense committed or which there is probable cause to believe has been committed within the political subdivision which employs him." *People v. Fleming, supra*, page 704.

Thus, contrary to the believe of the Ninth Circuit, there is no extraterritorial jurisdiction being asserted by the Sheriff, or District Attorney Investigator, all of whom are peace officers employed by the County of Inyo, and whose authority extends to "any place within the state" with regard to the grand theft crime committed, or for which there was probable cause to believe had been committed, in Inyo County.

C. Incorrect in Denial of Qualified Immunity Defense to District Attorney and Sheriff - The Law, if it is Held to Exist, Prohibiting the Execution of Search Warrants on Tribal Property, was not Clearly Established so as to Deny the Defense of Qualified Immunity.

Finally, with regard to the Ninth Circuit's denial of the defense of qualified immunity, it is, as previously stated, 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). If there is no such clearly established right, the officer is entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Here, even if there was § 1983 cognizable violation of a tribe's right to self-governance or tribal sovereign immunity be free from search, such right was not so clearly established so as to deny the defense of qualified immunity.

The following serve as examples of the state of the law re search warrants and subpoenas regarding Indian tribes at the time of the execution of the warrant in this case: In *Crow Tribe of Indians, et al. v. Racicot, et al.*, 87 F.3d 1039 (9th Cir. 1996), the service of a search warrant upon the Crow Tribe's casino was challenged and upheld as lawful; in *United*

States v. James, 980 F.2d 1314 (9th Cir. 1992), the service of a FRCRP 17 subpoena by a defendant to his alleged rape victim was quashed as being in violation of the tribe's sovereign immunity; in *United States v. Snowden*, 89 F.Supp. 1054 (D. Oregon 1995), under almost identical circumstances as *James*, the District Court 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, and the subpoena **was not** quashed; and in *United States v. Verlarde,* 40 F.Supp.2d 1314 (D. New Mexico 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.

Further, all of these cases, leading to inconsistent results, were similar in that they all involved alleged violations of federal and/or state law occurring on the reservation. This would be confusing enough to a peace officer on the street; let alone add the fact that there was no case that, like this one, addressed the issue of off-reservation State crime.

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 Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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