IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29010

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

MORGAN CUMMINGS,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
BENNETT COUNTY, SOUTH DAKOTA

THE HONORABLE BOBBI RANK
Circuit Court Judge

APPELLANT'S BRIEF

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Order Granting Petition for Allowance of Appeal from Intermediate Order
filed June 28, 2019

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant State of South Dakota is referred to as "the State." Appellee Morgan Cummings is referred to as "Morgan." Documents from the record of the Sixth Circuit Clerk of Court is cited as "R." The Appendix is cited as "App."

Morgan's Motion to Suppress and Memorandum in Support filed on July 30, 2018, and which is found at R. 91-94, is referred to as "Suppression Motion." The Transcript of Motions Hearing held on December 17, 2018 is referred to as "MT." The circuit court's Findings of Fact, Conclusions of Law, and Order on Motion to Suppress, filed on April 8, 2019 and which is found at R. 129-37 (App. 1-9), is referred to as "Suppression Order."

The State's Motion to Reconsider Order on Motion to Suppress and Memorandum in Support, filed on April 18, 2019 and which is

found at R. 138-43, is referred to as "Reconsideration Motion." The circuit court's Order Denying Motion for Reconsideration filed on May 9, 2019, and which is found at R. 154-55 (App. 10-11), is referred to as "Reconsideration Order." All references will be followed by appropriate page and paragraph designations.

JURISDICTIONAL STATEMENT

On April 8, 2019, the circuit court filed the Suppression Order. R. 129-37 (App. 1-9). Notice of Entry for the Suppression Order was filed on May 28, 2019. R. 161. On April 18, 2019, the State filed the Reconsideration Motion. R. 138-43. The circuit court filed the Reconsideration Order on May 9, 2019 and Notice of Entry for the Reconsideration Order was filed on May 16, 2019. R. 154-55 (App. 10-11), 156. Both Orders were entered by the Honorable Bobbi Rank, Circuit Court Judge, Sixth Judicial Circuit, in Bennett County Crim. No. 17-0265 (03CRI17-000265). R. 129-37 (App. 1-9), 154-55 (App. 10-11).

On May 31, 2019, the State filed a Petition for Permission to Appeal Intermediate Order of Circuit Court. R. 176-86. This Court granted the State's Petition on June 28, 2019. R. 174-75.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER A STATE LAW ENFORCEMENT OFFICER MAY ENTER INDIAN COUNTRY AND OBTAIN VOLUNTARY STATEMENTS FROM AN INDIVIDUAL REGARDING A STATE CRIME COMMITTED OUTSIDE OF INDIAN COUNTRY?

> The circuit court granted the defendant's motion to suppress his voluntary statements made to a state law enforcement officer on Indian country regarding a state crime committed outside of Indian country.

Fischer v. Commonwealth, 506 S.W.3d 329 (Ky. Ct. App. 2016)

Nevada v. Hicks, 533 U.S. 353 (2001)

State v. Cummings, 2004 S.D. 56, 679 N.W.2d 484

State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990)

STATEMENT OF THE CASE

On December 8, 2017, Morgan Cummings was indicted for Third-Degree Burglary (a Class 5 felony), Grand Theft (a Class 5 felony), and Intentional Damage to Property (a Class 6 felony). R. 1-2. Morgan moved to suppress evidence and a hearing was held before the circuit court on December 17, 2018. R. 91-94; *see generally* MT. On April 8, 2019, the court entered its Suppression Order, which granted the motion in part and denied the motion in part. R. 129-37 (App. 1-9). Relevant to this appeal, the court concluded that certain statements made by Morgan to South Dakota Division of Criminal Investigation Special Agent (SA) Dane Rasmussen while on Indian country must be suppressed "[b]ecause [SA] Rasmussen was without authority to

conduct the investigation in Indian [c]ountry[.]"[1] R. 133-34, Conclusion of Law ¶ 8 (App. 5-6).

The State moved the court to reconsider suppression of Morgan's statements to SA Rasmussen. R. 138-43. After a hearing, the court denied the State's Reconsideration Motion. R. 154-55 (App. 10-11). However, the court made an additional finding in its Reconsideration Order that the statements by Morgan to SA Rasmussen were voluntarily given. R. 154 (App. 10).

The State sought this Court's permission to appeal the circuit court's intermediate order, which was granted on June 28, 2019. R. 174-86. The State now appeals the circuit court's Suppression Order and Reconsideration Order pursuant to SDCL 23A-32-5.

STATEMENT OF FACTS

On January 9, 2017, SA Rasmussen, SA Patterson, and United States Department of Interior, Bureau of Indian Affairs Special Agent (BIA Agent) Justin Hooper went to a residence owned by Charlie Cummings in Sunrise Housing, a development on Indian country located on the east side of Martin, South Dakota.[2] R. 129-30, Findings of Fact ¶¶ 1, 3 n.1, 4- 5 (App. 1-2). At the residence, the agents were

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[1] The State only appeals the portion of the Suppression Order granting the motion to suppress the statements made by Morgan to SA Rasmussen in SA Rasmussen's vehicle. *See* R. 136, Order (App. 8).
[2] For purposes of this case, the State does not dispute that the Sunrise Housing development qualifies as "Indian country." *See* 18 U.S.C. § 1151 (defining "Indian country").

greeted by Charlie, who is Morgan's father. R. 130-31, Findings of Fact ¶¶ 4, 16 (App. 2-3). SA Rasmussen identified himself and the other agents to Charlie and explained that they were assisting with an investigation of stolen property in Martin, South Dakota. R. 129, 131, Findings of Fact ¶¶ 1, 16 (App. 1, 3). SA Rasmussen informed Charlie that he would like to speak to Charlie's eighteen-year-old son, Morgan, regarding the items in question. R. 130-31, Findings of Fact ¶¶ 4, 16 (App. 2-3). Charlie invited the agents into the residence and went to get Morgan from his room. R. 131, Findings of Fact ¶¶ 16-17 (App. 3).

When Morgan came out of his room, SA Rasmussen identified himself to Morgan and indicated that he would like to visit with Morgan. R. 131, Finding of Fact ¶ 18 (App. 3). Morgan agreed to talk with SA Rasmussen and accompanied him to SA Rasmussen's vehicle, while BIA Agent Hooper remained in the home and spoke to Charlie. R. 131-32, Findings of Fact ¶¶ 18-19, 23 (App. 3-4). Prior to asking any questions, SA Rasmussen informed Morgan that Morgan did not have to speak with SA Rasmussen and was free to exit the vehicle at any time. R. 131, Finding of Fact ¶ 20 (App. 3). Subsequently, during a twenty-minute conversation, Morgan admitted that he had stolen one of the items (a saddle) and that it was in the basement of Morgan's home. R. 132, Finding of Fact ¶ 22 (App. 4). Morgan and SA Rasmussen re-entered the home, where the officers were provided the saddle as well as the other stolen items. R. 132, Findings of Fact ¶¶ 24-28 (App. 4).

ARGUMENT

THE CIRCUIT COURT ERRED IN SUPPRESSING AN INDIVIDUAL'S VOLUNTARY STATEMENTS TO A STATE LAW ENFORCEMENT OFFICER ON INDIAN COUNTRY REGARDING A STATE CRIME COMMITTED OUTSIDE OF INDIAN COUNTRY.

The issue in this case is whether the circuit court erred in suppressing Morgan's voluntary statements made to SA Rasmussen on Indian country regarding a state crime committed outside of Indian country. This Court reviews suppression orders under a de novo standard of review. *State v. Smith*, 2014 S.D. 50, ¶ 14, 851 N.W.2d 719, 723. While the circuit court's findings of fact are reviewed under the clearly erroneous standard, no deference is given to the circuit court's conclusions of law. *Id.* ¶ 14, 851 N.W.2d at 723-24.

The court suppressed Morgan's statements to SA Rasmussen in SA Rasmussen's vehicle "[b]ecause [SA] Rasmussen was without authority to conduct the investigation in Indian [c]ountry[.]" R. 133-34, Conclusion of Law ¶ 8 (App. 5-6). However, Morgan's statements to SA Rasmussen were validly obtained through a "knock and talk" consensual encounter between Morgan and SA Rasmussen. Therefore, the circuit court erred in suppressing these statements.

I. The interaction between Morgan and SA Rasmussen met the requirements of a "knock and talk."

A "knock and talk," which has been recognized by the United States Supreme Court and routinely upheld by the Eighth Circuit Court of Appeals, is "an investigatory technique in which law enforcement officers approach the door of a dwelling seeking voluntary conversation and consent to search." *United States v. White*, 928 F.3d 734, 739 n.5 (8th Cir. 2019) (quoting *United States v. Crisolis-Gonzalez*, 742 F.3d 830, 833 n.2 (8th Cir. 2014)); *see also Carroll v. Carman*, 574 U.S. 13 (2014); *Florida v. Jardines*, 569 U.S. 1 (2013); *Kentucky v. King*, 563 U.S. 452 (2011); *United States v. Bausby*, 720 F.3d 652 (8th Cir. 2013). *Cf. State v. Boll*, 2002 S.D. 114, ¶ 4, 651 N.W.2d 710, 713, *and State v. LaPlante*, 2002 S.D. 95, ¶ 7, 650 N.W.2d 305, 308 (both mentioning a "knock and talk"). Given the consensual nature of a "knock and talk" encounter, there is no seizure for purposes of the Fourth Amendment. *See Oglesby v. Lesan*, 929 F.3d 526, 532 (8th Cir. 2019) ("Consensual encounters between law enforcement officers and citizens that do not involve coercion or restraint are not seizures."); *see also United States v. Young*, 347 F. Supp. 3d 747, 779 (D.N.M. 2018) ("Law enforcement officers who merely approach individuals and pose questions to them do not implicate the Fourth Amendment if the individuals are willing to listen and voluntarily answer."). Similarly, voluntary statements provided to a law enforcement officer in a noncustodial interrogation

during a "knock and talk" do not implicate the Fifth Amendment. *See Beckwith v. United States*, 425 U.S. 341, 342-44 (1976); *Gore v. United States*, 145 A.3d 540, 545-46 (D.C. 2016).

There are two requirements under the "knock and talk" technique: 1) the officer must be lawfully present; and 2) the interaction between the officer and the individual must be consensual. *See King*, 563 U.S. at 463 ("officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs."); *see also Jardines*, 569 U.S. at 8; *White*, 928 F.3d at 739-41; *Fischer v. Commonwealth*, 506 S.W.3d 329, 334-36 (Ky. Ct. App. 2016). In this case, both requirements of a "knock and talk" were met.

A. SA Rasmussen was lawfully present at Morgan's home because SA Rasmussen, as a member of the public, had a right to approach Morgan's home and knock on the door.

The crux of this case revolves around the first requirement of the "knock and talk" – whether SA Rasmussen was lawfully present at Morgan's home. Although the circuit court did not explicitly refer to the "knock and talk" method, the circuit court's grant of Morgan's suppression motion seemingly hinged on this requirement. R. 133-34, Conclusions of Law ¶¶ 5, 8 (App. 5-6); R. 154 (App. 10). As noted above, the court concluded that although Morgan's statements to SA Rasmussen were voluntary, these statements must be suppressed because SA Rasmussen "had no authority to go into Indian [c]ountry to

conduct an investigation of a state criminal offense." R. 133-34, Conclusions of Law ¶¶ 5, 8 (App. 5-6); R. 154 (App. 10). However, the circuit court erred in considering SA Rasmussen's authority as a state law enforcement officer. "Whether a police officer is outside his jurisdiction is not the consideration for whether a knock and talk is proper. Rather, the consideration is whether the officer was where a member of the public would have a right to be."[3] *Fischer*, 506 S.W.3d at 335 ("When a police officer is acting outside his jurisdiction, he becomes akin to a member of the public.").

Generally, a member of the public has an implied license to approach a home and knock upon its front door. *See Jardines*, 569 U.S. at 8; *Fischer*, 506 S.W.3d at 335 ("[T]he public has a right to approach the front door of someone's home and ask if they would speak

[3] This analysis aligns with the Tenth Circuit Court of Appeals, which has noted on a number of occasions that "the legal parameters of [an officer's] jurisdictional authority under state law" is not a factor when determining whether an individual's Fourth Amendment rights were violated. *See United States v. Sawyer*, 441 F.3d 890, 894-98 (10th Cir. 2006) (in upholding a defendant's consent to search his home, rejecting defendant's argument that the consent was invalid because it was obtained in Oklahoma by a Kansas state officer); *see also United States v. Jones*, 701 F.3d 1300, 1308-12 (10th Cir. 2012) (rejecting defendant's argument that "a Fourth Amendment violation [occurred] simply because [the police officers] were acting outside of their jurisdiction and without authority under [state] law"); *United States v. Green*, 178 F.3d 1099, 1104-06 (10th Cir. 1999) (in upholding a warranted search of the defendant's home, rejecting the defendant's argument that the investigation and warrant must be suppressed because Wichita police officers "who investigated [the defendant], obtained warrants to search [the defendant's] residence, and executed that warrant were acting outside their jurisdiction").

with them."). According to the United States Supreme Court, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Jardines*, 569 U.S. at 8 (quoting *King*, 563 U.S. at 469); *see also United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006) ("[O]fficers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just [as] any private citizen may."). "And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak." *King*, 563 U.S. at 469-70.

Here, nothing indicates that an implied license to approach Morgan's front door and knock did not exist. SA Rasmussen testified that he, SA Patterson, and BIA Agent Hooper walked up to the residence and knocked on the front door. MT. (15:4-6); *cf.* MT. (47:21-48:19). When Charlie (Morgan's father) answered the door, SA Rasmussen introduced himself and the other officers and explained that they were investigating a theft. R. 131, Finding of Fact ¶ 16 (App. 3); MT. (15:7-18). Charlie then invited them into the home, even though he had no obligation to do so. R. 131, Finding of Fact ¶ 16 (App. 3).

In addition to the proper approach and entrance into Morgan's home, there is no evidence or assertion by Morgan that a tribe has sought to bar SA Rasmussen from entering the Indian country at issue

here. *Compare New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (noting that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established.") *with Strate v. A-1 Contractors*, 520 U.S. 438, 455-56 (1997) (indicating that the tribe could not exclude individuals from a public right-of-way on a state highway running through a reservation). In fact, a BIA agent had accompanied SA Rasmussen to Morgan's home. R. 129-30, Findings of Fact ¶¶ 3-4 (App. 1-2). For these reasons, there is no evidence that SA Rasmussen, as a member of the public, was not permitted at Morgan's front door. SA Rasmussen lawfully approached Morgan's home, just as any other member of the public could have done. Merely because SA Rasmussen approached a home located within Indian country does not render his actions unlawful. Ultimately, SA Rasmussen did not violate Morgan's rights when approaching Morgan's home "*because all are invited to do that.*" *See White*, 928 F.3d at 740 (quoting *Jardines*, 569 U.S. at 9 n.4) (emphasis in original).

B. The interaction between Morgan and SA Rasmussen was consensual.

The second requirement in the "knock and talk" method - that the interaction is consensual – is easily satisfied in this case. Here, the circuit court's findings support that the SA Rasmussen's interaction with Morgan was indeed consensual. As stated above, Charlie invited the officers into the home. R. 131, Finding of Fact ¶ 16 (App. 3). Once inside, "[SA] Rasmussen asked Morgan if he would come outside to his

vehicle and talk. Morgan agreed." R. 131, Finding of Fact ¶ 18 (App. 3). Upon entering SA Rasmussen's unlocked vehicle, SA Rasmussen informed Morgan that Morgan "was free to leave, that the doors were unlocked, and that he did not have to speak to [SA] Rasmussen." R. 131, Findings of Fact ¶¶ 19-20 (App. 3). At no point during the conversation was Morgan placed under arrest or in handcuffs. *See* R. 131, Findings of Fact ¶¶ 19, 21 (App. 3). As properly determined by the circuit court, Morgan's statements to SA Rasmussen were voluntary. *See* R. 154 (App. 10); *cf. State v. Morato*, 2000 S.D. 149, ¶¶ 14-16, 619 N.W.2d 655, 660. Notably, in this appeal, Morgan did not file a notice of review regarding the court's voluntariness determination. Therefore, the second requirement for a "knock and talk" is satisfied.

II. SA Rasmussen has authority to enter Indian country to investigate state crimes.

As stated above, the fact that SA Rasmussen was within Indian country in South Dakota is irrelevant for purposes of a "knock and talk." However, even if SA Rasmussen's scope of authority is relevant in a "knock and talk," and more specifically, under the "lawfully present" requirement of that method, the circuit court erred in broadly concluding that SA Rasmussen "had no authority to go into Indian [c]ountry to conduct an investigation of a state criminal offense." R. 133, Conclusion of Law ¶ 5 (App. 5) (emphasis added). While the court

made no finding that Morgan is an Indian or tribal member,[4] the court relied on *State v. Cummings*, 2004 S.D. 56, 679 N.W.2d 484, which upheld the suppression of evidence of an off-reservation state crime that was obtained from an Indian suspect on a reservation by local law enforcement. *See generally* R. 129-32, Findings of Fact ¶¶ 1-28 (App. 1-4); R. 133, Conclusion of Law ¶ 4 (App. 5). Even though the court relied upon a case involving an Indian suspect, the Suppression Order more broadly requires suppression of evidence obtained by state law enforcement from anyone within Indian country, regardless of whether the evidence was obtained from a suspect or witness, and regardless of whether that individual was a tribal member, Indian, or non-Indian.

Such conclusion is an overly broad interpretation of *Cummings* and is contrary to well-settled law. Highlighting its problematic scope, the court's determination that all state investigative authority ends where Indian country begins will lead to the anomaly where a state officer would have no authority to investigate a state crime allegedly committed by a non-Indian within Indian country, even though the State may have exclusive criminal jurisdiction over that crime. *Cf. State v. Vandermay*, 478 N.W.2d 289 (S.D. 1991) (ruling that the state had criminal jurisdiction over a victimless crime committed by a non-Indian within Indian country, and stating that "[l]ong-standing precedents of

[4] In his Motion to Suppress, Morgan did not allege that he was an Indian. *See generally* R. 91-94.

the United States Supreme Court hold that state courts have exclusive jurisdiction over crimes committed in Indian country involving only non-Indians, or 'victimless' crimes.") (emphasis added). Thus, the State's criminal jurisdiction within Indian country necessitates its investigative authority within Indian country.

In addition to having investigative authority over state crimes committed by non-Indians within Indian country, the State also has investigative authority within Indian country regarding state crimes committed outside of Indian country. In a case involving an off-reservation state crime committed by a tribal member, the United States Supreme Court has made clear that a state has investigative authority within its borders, including within Indian country: "[n]othing 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*, 533 U.S. 353, 366 (2001). This investigative authority is critical because "an Indian reservation is . . . part of the territory of the State." *Id.* at 361-62 ("State sovereignty does not end at a reservation's border."). Upholding the circuit court's overly broad conclusion that a state may not investigate state crimes committed within its borders could lead directly to the result that the United States Supreme Court warned against: it would create "an

asylum [within a state's own borders] for fugitives from justice." *See id.* at 364.

A state's investigative authority of crimes over which it has criminal jurisdiction extends not only to Indian country within the state, but it also extends even further – across state lines. Indeed, confessions and statements relating to a South Dakota crime have been obtained through questioning conducted in another state by South Dakota officers. *See, e.g., State v. Piper*, 2006 S.D. 1, ¶ 11, 709 N.W.2d 783, 792 (incriminating statements made to South Dakota law enforcement during their questioning of a suspect in the state of Alaska). Yet under the rationale of the Suppression Order, any confession obtained outside of South Dakota by State officers may be subject to suppression. Further, if the Suppression Order remains as is, it seemingly calls into question <u>any</u> investigative activity that crosses territorial lines, including phone calls to an individual in another territory.

As stated by the Nebraska Supreme Court in *State v. Wilson*, 261 N.W.2d 376, 379 (Neb. 1978), "[w]e know of no law that prohibits an officer of one state from entering another state to make an investigation." *Wilson* is one example of these cross-territorial investigations. In *Wilson*, a defendant drove from the Pine Ridge Indian Reservation in South Dakota, committed a state crime in Whiteclay, Nebraska, and then returned to the South Dakota reservation. *Id.* at

377-78. After receiving notification of the crime, the Bureau of Indian Affairs (BIA) officers from the reservation drove to Whiteclay to interview a witness to the crime. *Id.* at 378. The defendant was subsequently arrested in South Dakota by the BIA officers. *Id.* Following the defendant's arrest, a Nebraska state patrol officer questioned the defendant in South Dakota and obtained a confession. *Id.* The Nebraska Supreme Court ultimately rejected the defendant's challenges regarding the evidence obtained by the BIA officers in Nebraska and the confession obtained by Nebraska law enforcement on the South Dakota reservation. *Id.* at 768, 769. *Wilson* confirms that a state's investigative authority extends beyond a state's borders. Recognizing that interstate investigative authority, a state certainly has investigative authority in all areas within the state's own borders.

Next, the circuit court seemingly indicated that SA Rasmussen needed to be federally-deputized in order to engage in a consensual conversation with Morgan. In concluding that SA Rasmussen was not authorized to investigate a state crime on Indian country, the court points out that SA Rasmussen had no federal credentials granting this authority. *See* R. 133, Conclusions of Law ¶¶ 5-7 (App. 5). But cross-deputization, which authorizes one government to investigate and otherwise enforce another government's laws, is irrelevant in this case because the state officer was investigating a state crime. *Cf. Hicks*, 533 U.S. at 366 (noting that "25 U.S.C. § 2804, which permits federal-state

agreements enabling state law enforcement agents to act on reservations, applies only to deputizing them for the enforcement of federal or tribal criminal law."); Wash. Rev. Code § 10.92.020(1) (granting tribal police officers the authority to enforce Washington's state laws). Contrary to the court's determination, there is no indication that a state officer must be federally deputized in order to investigate a state crime that was allegedly committed outside of Indian country by an Indian. R. 133-34, Conclusions of Law ¶¶ 5-8 (App. 5-6). Ultimately, through the court's indication that cross-deputization was necessary, the court fails to acknowledge a state's authority to investigate crimes over which it has criminal jurisdiction.

III. Cummings should not foreclose SA Rasmussen's authority to enter Indian country to investigate a state crime allegedly committed by Morgan outside of Indian country.

Continuing to assume *arguendo* that SA Rasmussen's authority is relevant under the "knock and talk" method, *Cummings*' applicability to this case must next be considered. Neither party disputes that Morgan is an Indian. Therefore, after resolving whether SA Rasmussen has any investigative authority in Indian country, the key question is whether *Cummings* prevents that authority from extending to Morgan, an Indian.

A. Cummings and its precursor, Spotted Horse, are distinguishable from this case.

In suppressing Morgan's statements, the circuit court primarily replies upon *Cummings.* However, the uncontroverted voluntariness of

the interaction between Morgan and SA Rasmussen, on its own, materially distinguishes this case from both *Cummings* and its precursor, *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990). In *Spotted Horse*, a city police officer attempted to stop a vehicle off a reservation for failing to display valid license plate stickers - a state law violation. *Id.* at 464. A high-speed chase ensued until the deputy was able to detain the defendant, who was a tribal member, on the Standing Rock Indian Reservation. *Id.* at 464-65. After a struggle, the officer handcuffed the defendant and transported the defendant off the reservation to the city's police station. *Id.* at 465. A field sobriety test and blood alcohol test indicated that the defendant had been drinking and the defendant was subsequently charged under state law for driving under the influence, among other things. *Id.* This Court suppressed the field sobriety test and blood alcohol test because that evidence was obtained as a result of an unconstitutional arrest on the reservation by the city officer. *Id.* at 468-69.

Similarly, in *Cummings*, a county deputy observed a defendant, who was a member of the Oglala Sioux Tribe, speeding on an off-reservation highway. 2004 S.D. 56, ¶ 2, 679 N.W.2d at 485. The deputy pursued the defendant onto the Pine Ridge Indian Reservation, stopped the vehicle, and placed the defendant in handcuffs while confirming his identification. *Id.* ¶¶ 2-3, 679 N.W.2d at 485. Through subsequent questioning in the patrol car, the defendant admitted to

that he had been drinking. *Id.* ¶ 3, 679 N.W.2d at 485. The defendant was charged under state law for speeding and eluding. *Id.* ¶ 4, 679 N.W.2d at 485. This Court affirmed the suppression of the defendant's statements, relying on *Spotted Horse* to conclude that "the state officer was without authority to pursue Cummings [the defendant] onto the reservation and gather evidence without a warrant or tribal consent." *Id.* ¶ 18, 679 N.W.2d at 489.[5]

Today's case requires a different result than *Cummings* and *Spotted Horse* because it involves voluntary statements by an individual not in custody. *See* R. 131-32, Findings of Fact ¶¶ 18-22 (App. 3-4), 154 (App. 10). Unlike *Cummings* and *Spotted Horse*, there was no pursuit or arrest of a suspect here. *Compare* R. 131-32, Findings of Fact ¶¶ 18-22 (App. 3-4), 154 (App. 10), *with Cummings*, 2004 S.D. 56, ¶¶ 1-5, 679 N.W.2d at 485, *and Spotted Horse*, 462 N.W.2d at 464-65. As noted by the circuit court, "Morgan was informed that he was free to leave, that the doors were unlocked, and that he did not have to speak to [SA] Rasmussen." R. 131, Finding of Fact ¶ 20 (App. 3). And unlike the defendants in *Cummings* and *Spotted Horse*, Morgan was not placed

[5] In its Suppression Order, when quoting this language from *Cummings*, the circuit court substitutes "[a defendant"] in place of "Cummings." *See* R. 133, Conclusion of Law ¶ 4 (App. 5). However, this substitution improperly broadens the scope of *Cummings*' statement because Cummings was a tribal member. "A defendant," on the other hand, may include any individual regardless of their status as a tribal member, Indian, or non-Indian.

in handcuffs at any time during his interaction with SA Rasmussen. R. 131, Finding of Fact ¶ 19 (App. 3). For approximately twenty minutes, SA Rasmussen merely asked Morgan some questions in an unlocked vehicle and did not place him under arrest.[6] R. 131-32, Findings of Fact ¶¶ 19, 22 (App. 3-4). Contrary to *Cummings* and *Spotted Horse*, Morgan's encounter was entirely consensual.

The consensual nature of the interaction between Morgan and SA Rasmussen also supports SA Rasmussen's lack of infringement on tribal sovereignty. When analyzing the scope of a state's authority, courts analyze whether the state action unlawfully "infringed on the right of reservation Indians to make their own laws and be ruled by them." *See, e.g., Mescalero Apache Tribe*, 462 U.S. at 332-33 (quoting *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 171-72 (1973)). Importantly, nothing in the record suggests that Morgan's willingness to answer SA Rasmussen's questions infringes on any tribe's right "to make [its] own laws and be ruled by them," especially considering the lack of finding that Morgan was a tribal member or Indian. *See Hicks*, 533 U.S. at 361, 364-65, 370-71 (indicating that "the State [of Nevada's] interest in pursuing off-reservation violations of its laws" outweighs tribal self-governance and tribal land ownership).

B. To the extent this Court concludes that *Cummings* and *Spotted Horse* are not factually distinguishable,

[6] Morgan was not arrested on a warrant until almost seventeen months after providing these statements to SA Rasmussen. *See* R. 66-67.

those cases should be set aside in light of *Nevada v. Hicks* and its progeny.

If this Court concludes that *Cummings* and *Spotted Horse* are not distinguishable and, in turn, prohibit SA Rasmussen from interacting with Morgan on Indian country, the State asks the Court to reconsider those decisions. As discussed above, this Court in *Spotted Horse* applied the exclusionary rule to suppress certain evidence obtained by a state officer through an unlawful arrest of a tribal member on Indian country. *See* 462 N.W.2d at 469. This Court concluded that the arrest was unlawful because "South Dakota does not have jurisdiction over Indian country[.]" *Id.* at 467, 469.

After *Spotted Horse*, the United States Supreme Court decided *Nevada v. Hicks*, 533 U.S. 353 (2001). In *Hicks*, the Supreme Court held that because a tribe could not "restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear [a] claim that those officials violated tribal law in the [officials'] performance of their duties." *Id.* at 374. The Supreme Court reasoned that the tribe lacked regulatory and adjudicatory authority because the state's interests regarding an off-reservation state crime are considerable and do not impair a tribe's right to self-government. *See id.* at 364. Accordingly, the Supreme Court made a number of statements supporting a state's interests regarding the state's

investigative authority over an Indian on Indian country for a state crime committed off reservation. *See id.* at 361-66, 374. *Hicks* expressed that "[s]tates have criminal jurisdiction over reservation Indians for crimes committed . . . off the reservation" and "[n]othing 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[.]" *Id.* at 362, 366.

Three years after *Hicks*, this Court in *Cummings* addressed whether a state officer could "pursue [a tribal member] onto the reservation and gather evidence without a warrant or tribal consent." *Cummings*, 2004 S.D 56, ¶ 18, 679 N.W.2d at 489; *see supra*. The Court declined to give weight to *Hicks*'s statements supporting a state's investigative authority on a reservation, reasoning that a state's investigative authority over an Indian on the reservation for an off-reservation crime was not directly at issue in *Hicks*. *See Cummings*, 2004 S.D. 56, ¶¶ 12, 17, 679 N.W.2d at 487, 489. In light of its dismissal of *Hicks*, the *Cummings* Court concluded that *Spotted Horse* required suppression of the evidence.[7] *Id.* ¶ 18, 679 N.W.2d at 489.

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[7] This Court's conclusion that a state officer cannot pursue an Indian onto a reservation for crimes committed off reservation is contrary to other decisions on this topic: "Almost all courts to confront the issue of whether *state* officers have the authority to engage in fresh pursuit of an Indian suspect into Indian country have determined the state officer *has* the power." *Fresh Pursuit from Indian Country: Tribal Authority to*

(continued . . .)

However, notably in his concurring opinion, Justice Zinter indicated that "much of *Hicks*'s reasoning foreshadows an eventual reversal of the second underpinning in *Spotted Horse* [suppression of evidence obtained from tribal member by a state officer on Indian country]." *Id.* ¶¶ 21-26, 679 N.W.2d at 489-91 (Zinter, J., concurring).

Spotted Horse and *Cummings* must be set aside because they were both premised on the incorrect conclusion that "South Dakota has no jurisdiction on a reservation." *See Spotted Horse*, 462 N.W.2d at 467; *Cummings*, 2004 S.D. 56, ¶¶ 15, 18, 679 N.W.2d at 488, 489. These two decisions improperly shifted the burden to the State to take legislative action in order to obtain jurisdiction over Indian country for state crimes that were committed outside of Indian country by an Indian, rather than recognizing "the State's inherent jurisdiction" on Indian country in those situations. *See Hicks*, 533 U.S. at 365. As in this case, the State unquestionably had criminal jurisdiction to prosecute the Indian defendants in *Spotted Horse* and *Cummings* for the state crimes committed outside of Indian country. *See id.* at 362; *see also* R. 129, Finding of Fact ¶ 2 (App. 1) ("The burglaries happened within the jurisdiction of State authorities."). And significantly, several United States Supreme Court decisions support that a state's "criminal

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(. . . continued)
Pursue Suspects onto State Land, 129 Harv. L. Rev. 1685, 1688-89 (2016) (emphases in original); *see also State v. Harrison*, 238 P.3d 869 (N.M. 2010).

jurisdiction over reservation Indians for crimes committed . . . off the reservation . . . entails the corollary right to enter a reservation for enforcement purposes." *Hicks*, 533 U.S. at 362-63; *see also State v. Harrison*, 238 P.3d 869, 875-79 (N.M. 2010).

Contrary to this inherent authority, the Court in *Spotted Horse* and *Cummings* stated that the State needed to take advantage of the opportunity under Public Law 280 in order to obtain jurisdiction over Indian country and conduct on-reservation investigations of state crimes allegedly committed by an Indian outside of Indian country. *Spotted Horse*, 462 N.W.2d at 466-67; *Cummings*, 2004 S.D. 56, ¶ 15, 679 N.W.2d at 489. But Public Law 280 only involves the assumption of jurisdiction over crimes committed <u>on</u> Indian country. *See* Act of August 15, 1953, ch. 505, 67 Stat. 588-90 (Public Law 280) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360) (providing that states shall have, or may assume, jurisdiction "over offenses <u>committed by or against Indians in [certain] areas of Indian country</u>") (emphasis added). Yet again, as in this case, the state crimes in *Spotted Horse* and *Cummings* were committed <u>outside</u> of Indian country. Any nonaction by the State under Public Law 280 was, and continues to be, irrelevant to the State's jurisdiction in cases like these.

Next, as indicated above, the *Cummings* Court rejected the statements in *Hicks* regarding a state's investigative authority over an Indian on Indian country for a state crime committed outside of Indian

country because the state's authority was not directly at issue in *Hicks*: According to this Court, "the question in *Hicks* was whether the tribal court had jurisdiction over state officers acting in their individual or official capacity on tribal land. *Hicks* should be construed to address that question only." *Cummings*, 2004 S.D. 56, ¶¶ 12, 17, 679 N.W.2d at 487, 489. Yet *Hicks*'s analysis of the state's interests in investigating off-reservation state crimes was necessary to *Hicks*'s conclusion. The United States Supreme Court squarely addressed the magnitude of 1) the state's interests in conducting on-reservation investigations of an Indian for an off-reservation state crime, as compared to 2) the tribal interests in self-government and tribal internal relations. *See Hicks*, 533 U.S. at 364-65. Because such analysis was essential to the Supreme Court's conclusion that the tribe could not "regulate state officers in executing process related to the violation, off reservation, of state laws[,]" the Court's statements regarding the scope of the state's authority in *Hicks* are binding. *See id.* at 364; *see also Harrison*, 238 P.3d at 878 (concluding that "the [*Hicks*'s] Court's analysis of *state criminal investigative jurisdiction* was essential to [*Hicks*'s] holding") (emphasis in original); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) (stating that "[w]hen an opinion issues for the [United States Supreme Court], it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

The *Cummings* Court also rejected the statements in *Hicks* as dicta and noted that "only two Justices joined that portion of Justice Scalia's reasoning." *Cummings*, 2004 S.D. 56, ¶ 16, 679 N.W.2d at 489. However, this Court's designation of *Hicks*'s statements as dicta goes against the rule in *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the United States Supreme Court stated, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Justice Scalia's opinion set forth the narrowest grounds of the *Hicks* decision, and thus, Justice Scalia's statements cannot be disregarded. *See generally Hicks*, 533 U.S. 353; *Marks*, 430 U.S. at 188; *see also Harrison*, 238 P.3d at 878.

Article XXII of the South Dakota Constitution does not dictate a result contrary to *Hicks*. Article XXII provides, in relevant part:

> That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes

> shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation. All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

S.D. Const. art. XXII. (emphasis added). This provision, known as a "disclaimer clause", was included in the South Dakota Constitution "for the purpose of maintaining ample supreme powers on the part of the United States to permit it to fully respond to its legal and moral obligations to the Indians rather than for the purpose of withholding power from the [S]tate[] to exercise jurisdiction over the reservations, and it . . . was intended [that] the [S]tate[] should exercise a limited jurisdiction over Indian reservations within [its] exterior boundaries[.]" *See Anderson v. Brule Co.*, 67 S.D. 308, ___, 292 N.W. 429, 431 (1940); *see also Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 149 (1984) (stating that "specific jurisdictional disclaimers [in enabling acts] rarely [have] had controlling significance in [the United States Supreme Court's] past decisions about state jurisdiction over Indian affairs or activities on Indian lands."); *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 563 (1983) (indicating that the United States Supreme Court has "rarely either

invoked reservations of jurisdiction contained in statehood enabling acts by anything more than a passing mention or distinguished between disclaimer [s]tates and nondisclaimer [s]tates."). Further, reading the disclaimer clause in its entirety reveals that this disclaimer of jurisdiction relates to the land, rather than activities occurring on that land; Article XXII's "disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest." *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 69 (1962) (emphasis added). The context of the disclaimer clause, coupled with the State's undeniable civil and criminal jurisdiction within Indian country in certain instances, verifies that Article XXII does not foreclose all State jurisdiction on Indian country. *See, e.g., supra* II. (citing *State v. Vandermay*, 478 N.W.2d 289 (S.D. 1991)); *Hicks*, 533 U.S. at 362 (discussing a state's authority to regulate tribal members on tribal land"). Considering the foregoing reasons, *Cummings* and *Spotted Horse* must be set aside.

CONCLUSION

The circuit court erred in suppressing Morgan's voluntary statements obtained by SA Rasmussen during a "knock and talk" consensual encounter on Indian country. Further, the State may enter Indian country to investigate state crimes allegedly committed outside of Indian country by an Indian defendant. The State respectfully requests this Court to reverse the circuit court's suppression of Morgan's statements to SA Rasmussen and set aside its decisions in *Cummings* and *Spotted Horse*.

Dated this 12th day of August, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's Brief contains 6,635 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 12th day of August 2019.

/s/ Stacy R. Hegge
Stacy R. Hegge
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of August 2019, a true and correct copy of Appellant's Brief in Appeal No. 29010, *State of South Dakota v. Morgan Cummings* was served via electronic mail upon Terry Pechota at tpechota@1868treaty.com.

/s/ Stacy R. Hegge
Stacy R. Hegge
Assistant Attorney General

APPENDIX

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
:SS		
COUNTY OF BENNETT	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	03CRI17-265
Plaintiff,	)	
	)	
vs.	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON MOTION TO SUPPRESS**
	)	
MORGAN CUMMINGS,	)	
	)	
Defendant.	)	

The above-entitled matter came on for hearing before the Honorable Bobbi J. Rank upon Defendant's Motion to Suppress Evidence on December 17, 2018. The State was represented by the Bennett County State's Attorney Sarah Harris. The Defendant appeared personally and with his attorney Terry Pechota. The Court having heard testimony, received evidence, and reviewed the filings herein, now therefore enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. On January 9, 2017, officers from various law enforcement agencies were investigating some recent burglaries and thefts in Martin, South Dakota.
2. The burglaries happened within the jurisdiction of State authorities. The Bennett County Sheriff provided information that Morgan Cummings was a suspect in the burglaries.
3. The investigating officers included South Dakota Division of Criminal Investigation (DCI) agents Dane Rasmussen and United States Department of the Interior, Bureau of Indian Affairs (BIA) Special Agent Justin Hooper.[1]

[1] DCI Special Agent Patterson was also present. Agent Patterson did not testify, and there was no evidence that Patterson possessed any federal authority beyond that of Rasmussen.

4. The officers went to the house of Charlie Cummings, father of Morgan Cummings. Morgan was eighteen years old and still in high school, so he lived in the house with Charlie.

5. Charlie's house is in Sunrise Housing on the east side of Martin. Sunrise Housing is Indian trust land and Indian Country under 18 U.S.C. 1151.

6. Charlie worked for the Oglala Sioux Tribe for seventeen years and Bennett County for about eight months. He was fifty-seven years old.

7. The officers were only investigating the burglaries and thefts. They were not investigating a drug offense, and they had no information that Morgan possessed or sold drugs.

8. Agent Rasmussen is a member of the Northern Plains Safe Trails Drug Enforcement Task Force ("the task force").

9. As a task force member, Agent Rasmussen is federally deputized by the United States Department of Justice. He is charged with investigating "violations of the drug and criminal laws of the United States as stated in Title 21, United States Code, and Title 28, Federal Code of Regulations." Ex. 1.

10. Title 21 of the United States Code covers drug enforcement, and the Court was cited to nothing in Title 28 which allows federal deputization of state and local officials for reasons unrelated to drug enforcement.

11. Agent Hooper was a member of the task force and was also authorized to "perform other duties as authorized by 25 U.S.C. 2803."

12. Under 25 U.S.C. 2803, Hooper was authorized to "make inquiries of any person ... concerning any matter relevant to the enforcement or carrying out in

Indian country of a law of either the United States or an Indian tribe that has authorized the employee to enforce or carry out tribal laws." 25 U.S.C. 2803(5).

13. Under this authority, Hooper could investigate violations of Oglala Sioux tribal ordinance.

14. Possession or receiving of stolen property would have been a violation of the Oglala Sioux Criminal Code.

15. The State produced no memorandum of understanding (MOU) between any federal, state, or tribal entity regarding shared jurisdiction in Bennett County or Sunrise Housing.

16. The officers identified themselves as with the FBI drug task force. They told Charlie that they were investigating the theft of certain items and wanted to talk to Morgan. Charlie invited them into the house.

17. Morgan was in his bedroom when the officers arrived. Charlie woke him up.

18. Agent Rasmussen asked Morgan if he would come outside to his vehicle and talk. Morgan agreed.

19. Morgan sat in the passenger seat of Agent Rasmussen's unlocked vehicle outside the residence. Agent Rasmussen did not place him under arrest or place him in handcuffs.

20. Morgan was informed that he was free to leave, that the doors were unlocked, and that he did not have to speak to Agent Rasmussen.

21. Agent Rasmussen did not read Morgan his Miranda rights because he had no intention to place him under arrest.

22. During a twenty-minute interview in the vehicle with Agent Rasmussen, Morgan admitted that he took a saddle and that it was in the basement. He agreed to show Agent Rasmussen where it was.

23. While Agent Rasmussen was out in the vehicle with Morgan, Agent Hooper spoke to Charlie.

24. Agent Hooper told Charlie that they were looking for stolen items. After he described the items, he asked Charlie if he would consent to a search of the house. Charlie offered to show them the items.

25. Charlie led them to a saddle and saddle blanket in the basement. These items were brought to the kitchen. Charlie also helped Agent Hooper find other items which were placed in a pile upstairs.

26. Morgan and Agent Rasmussen then returned to the house. Agent Rasmussen asked Morgan to show him where additional stolen items were located. Morgan showed Agent Rasmussen some reins and other items from his bedroom.

27. Agents were at Charlie's house for about an hour collecting items and interviewing Morgan.

28. After all the stolen items were collected, Charlie and Morgan signed a consent to search form.

CONCLUSIONS OF LAW

1. The Court has personal and subject matter jurisdiction in this matter.

2. There is no dispute that the questioning of Morgan and seizure of the evidence occurred within Indian Country.

3. There is also no dispute that Indian Country is subject to exclusive federal or tribal criminal jurisdiction except as otherwise expressly provided by law. State's Response to Defendant's Motion to Suppress at 4.

4. The South Dakota Supreme Court has held, "In the absence of a compact between the Tribe and the State, [a] state officer [is] without authority to pursue [a defendant] onto the reservation and gather evidence without a warrant or tribal consent." State v. Cummings, 2004 S.D.56, ¶ 18. See also State v. Spotted Horse, 462 N.W.2d 463, 469 (S.D. 1990).

5. Agent Rasmussen, in his capacity as an agent of the SD DCI, had no authority to go into Indian Country to conduct an investigation of a state criminal offense. Additionally, the State produced no compact or MOU between the Oglala Sioux Tribe and the State granting Agent Rasmussen such authority.

6. The State claims that Agent Rasmussen's federal deputization as a drug task force member granted him such investigatory authority in Indian Country. If Agent Rasmussen had been investigating a drug offense as part of the burglary investigation, then this would be true.

7. However, it is undisputed that the officers did not suspect Morgan of drug activity and were not investigating drug offenses. They went into Sunrise Housing *solely to investigate a burglary and theft occurring on State ground.* In light of these facts, nothing in Agent Rasmussen's federal credential gave him authority to conduct the investigation.

8. Because Agent Rasmussen was without authority to conduct the investigation in Indian Country, all statements made by Morgan to Rasmussen in the car

must be suppressed. Cummings at ¶ 18. In light of this conclusion, the Court need not address Morgan's voluntariness arguments.

9. Agent Hooper, *in his capacity as a drug task force member*, also had no authority to conduct the investigation in Indian Country.

10. Agent Hooper, however, was not on scene solely as a drug task force member. He was authorized to investigate violations of tribal ordinance. Possession and receiving of stolen property was a violation of *both* state law and tribal law.

11. Resultantly, Agent Hooper had the authority to investigate whether there was stolen property at Charlie and Morgan's house in Sunrise Housing.

12. Before Morgan confessed, while Agent Rasmussen and Morgan were still in the vehicle, Charlie led Agent Hooper to several stolen items in the house. The issue in regard to these items is whether Charlie's consent was valid.

13. "For consent to be valid, the State must prove by a preponderance of the evidence that it was voluntarily given. The voluntariness of consent is a factual question based on the totality of the circumstances [which] includes the conditions wherein the consent was obtained, the officer's conduct, and the duration, location, and time of the event as well as the accused's age, maturity, education, intelligence, and experience." State v. Rolfe, 2018 S.D. 86, ¶ 18 (citation omitted).

14. "Whether the accused knew that he possessed a right to refuse consent also is relevant to determining the voluntariness of the consent. But the State need not prove that defendant knew of the right to refuse consent to show that the consent was voluntary." Id.

15. "Consent need not be explicit—it can be inferred from words, gestures, and other conduct. The standard for assessing whether consent was coerced or voluntary is one of objective reasonableness." Id.

16. Charlie Cummings let the officers into the house and showed Hooper where the stolen items were when asked whether he would consent to a search. Even though he was not specifically told that he could refuse to let them in or show them the items, he was of sufficient age, education, intelligence, and experience to make this a voluntary choice. Moreover, his actions indicate that he was not coerced.

17. Charlie testified that he only consented because he believed the officers were from the FBI. However, he knew they were drug task force and knew Hooper from the area. Based upon the totality of circumstances, he was not misled by the officers such as would make consent invalid.

18. Therefore, the items that Charlie helped Hooper find in the house were pursuant to a valid consent to search provided by Charlie and are admissible.

19. The fact that the officers did not obtain a written consent to search from Charlie and Morgan until *after* they collected the items does not invalidate the consent to search by Charlie as referenced above. The consent is found in Charlie's words and actions before the written consent form was signed, not in the document.

20. The evidence collected by Hooper pursuant to Charlie's consent was also an intervening event which removed the taint of the original interview from

subsequent evidence and statements collected by Morgan. State v. Haney, 2013 S.D. 77, ¶ 12.

21. When Agent Rasmussen and Morgan returned to the house, Morgan was faced with a pile of the stolen items already stacked by the kitchen. Thereafter, he retrieved more items from his bedroom and made incriminating statements regarding the nature of the property. Based upon the totality of the circumstances, Morgan has not met his burden to show that but for the illegality of the initial interview in the car, the State would not have obtained the additional items and his statements in the house. Id. at ¶¶ 12-13. Therefore, the statements and evidence produced by Morgan in the house are not precluded as fruit of the poisonous tree and are admissible.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, which are incorporated into this Order by this reference as if set forth in full, it is hereby

ORDERED that all statements by Morgan Cummings to Agent Rasmussen in Rasmussen's vehicle are SUPPRESSED for the reasons stated in the Findings of Fact and Conclusions of Law; it is further

ORDERED that all statements by Morgan Cummings in the house regarding the nature of the property found in the house are ADMISSIBLE for the reasons stated in the Findings of Fact and Conclusions of Law; it is further

ORDERED that all property located in the house is ADMISSIBLE for the reasons stated in the Findings of Fact and Conclusions of Law.

Dated this 8th day of April, 2019.

BY THE COURT

Bobbi J Rank

Hon. Bobbi J. Rank
Circuit Court Judge

STATE OF SOUTH DAKOTA
COUNTY OF BENNETT
Filed in this office

APR 08 2019

Rebecca J Klaudt
Clerk of Courts

By _____ Deputy

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BENNET	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	03CRI17-000265
Plaintiff,	
v.	**ORDER DENYING MOTION FOR RECONSIDERATION**
MORGAN CUMMINGS,	
Defendant.	

This case came on for a status hearing and hearing on State's motion for reconsideration on the 25th of April, 2019, at the hour of 9:15 a.m. State was represented by States Attorney, Sarah Harris; defendant was present in person as was his attorney, Terry L. Pechota.

The Court heard arguments from the parties on the motion for reconsideration. The Court reviewed the briefs filed by the parties and the record in this case. The Court's oral findings were made on the record at the hearing. After due consideration to all arguments and facts, and for the reasons set forth by the Court at the hearing, the motion for reconsiderationg should be and it hereby is denied.

The Court also at the hearing set forth its findings and conclusions on the voluntariness of the statements given by defendant to DCI Agent Rasmussen. While statements given to Agent Rasmussen are inadmissible for the reasons stated in the Court's written findings and conclusions on the motion to suppress, defendant's statements were otherwise voluntary for the reasons orally set forth on the record at the April 25, 2019, hearing, which is incorporated herein by this reference.

Dated April 29, 2019.

Bobbi J Rank

Bobbie Rank, Circuit Court Judge

Attest:

Rebecca J Klaudt

Clerk of Courts

STATE OF SOUTH DAKOTA
COUNTY OF BENNETT
Filed in this office

MAY 09 2019

Rebecca J Klaudt
Clerk of Courts

By_____ Deputy

(SEAL)

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 29010
STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

V.

MORGAN CUMMINGS,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT OF

SIXTH JUDICIAL CIRCUIT, BENNETT COUNTY, SOUTH DAKOTA

HONORABLE BOBBI RANK

CIRCUIT COURT JUDGE

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APPEAL FROM INTERMEDIATE ORDER FILED JUNE 28, 2019

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TABLE OF AUTHORITIES

Cases

Other Authorities Cited

STATEMENT OF ISSUE

Whether a South Dakota Law Enforcement Officer In His Official Capacity Has Authority To Pursue a Criminal Investigation on the Pine Ridge Indian Reservation Including Taking An Inculpatory Statement in His Police Vehicle From a Young Indian Boy. Judge Rank Ruled That He Did Not and Suppressed the Statement.

State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990)

State v. Cummings, 204 S.D. 56, 679 N.W.2d 484

State v. Anderson, 857 F.Supp. 52 (D.S.D. 1994)

United States v. Alvarez-Machain, 504 U.S. 665 (1992)

PRELIMINARY STATEMENT, JURISDICTIONAL STATEMENT, STATEMENT OF THE CASE, AND STATEMENT OF FACTS

Appellee Morgan Cummings concurs in the above matters as set forth by the State in its Brief. Appellee also concurs in the State's Appendix.

ARGUMENT

I. LOWER COURT DECISION AND STANDARD OF REVIEW

Judge Rank of the Sixth Judicial Circuit properly suppressed the statement of Morgan Cummings to South Dakota DCI Agent Rasmussen given in a police vehicle on the Pine Ridge Indian Reservation because Rasmussen lacked authority to investigate the crime committed outside of Indian Country where neither the Oglala Sioux Tribe or United States authorized or consented to a State officer investigating and gathering evidence pertaining to the crime.

The Court reviews suppression orders under the abuse of discretion standard. State v. Engesser, 2003 S.D. 47, ¶ 15, 661 N.W.2d 739, 746. The trial court's findings of fact are reviewed under the clearly erroneous standard of review, but the application of a legal standard to those facts is a question of law reviewed de novo. State v. Hodges, 2001 S.D. 93, ¶ 8, 631 N.W.2d 206, 209. See State v. Smith, 2014 S.D. 50, ¶ 14, 851 N.W.2d 719, 723-724.

II. POSITION OF MORGAN CUMMINGS

In State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990), the Supreme Court held that a municipal police officer lacked authority to follow a tribal member onto the reservation for violation of State vehicle registration law because the State fresh pursuit statute did not reach into reservation lands and suppressed the results of the sobriety tests as fruits of an unlawful exercise of State jurisdiction.

Following Spotted Horse, in State v. Cummings, 2004 S.D. 56 ¶ 12, 679 N.W.2d 484, 487, the Supreme Court declined to overrule Spotted Horse because of Nevada v. Hicks, 533 U.S. 353 (2001), and in distinguishing Hicks said as follows: "The key distinction is that in Hicks, the Tribe was attempting to extend its jurisdiction over State officials by subjecting them to claims in tribal court. Here, the State is attempting to extend its jurisdiction into the boundaries of the Tribe's Reservation without consent of the Tribe or a tribal-state compact allowing such jurisdiction. In other words, in Hicks, tribal sovereignty was being used as a sword against State officers. Here, tribal sovereignty is being used as a shield to protect the Tribe's sovereignty from incursions by the State." The Cummings Court held at ¶ 18, 489 that "(i)n the absence of a compact

between the Tribe and State, the State officer was without authority to pursue Cummings onto the reservation and gather evidence without a warrant or Tribal consent." This holding is consistent with the holding in United States v. Alvarez-Machain, 504 U.S. 655, 680 (1992), holding that a state may not perform acts of sovereignty in another state. See also State v. Anderson, 857 F.Supp. 52 (D.S.D. 1994), holding that State parole officers are without authority to gather evidence from tribal members on the reservation.

Cohen's Handbook of Federal Indian Law, 2012 ed. at 773-774, provides: "[p]roblems arise when state law enforcement officers attempt to operate in Indian country, especially when investigating crimes or making arrests involving Indians. If Congress has granted criminal jurisdiction to a state, state officers will possess the same law enforcement powers within Indian country as they do throughout the rest of the state. If the state does not possess a special grant of jurisdiction, problems will often occur when state officers enter Indian country to investigate off-reservation crimes."
Here it is clear the official taking the statement was a State officer and was without consent from the Oglala Sioux Tribe or the United States to investigate the State criminal offense involving the off-reservation burglary. See State v. Branham, 102 P.3d 646, 650 (N.M. App. 2004) (only written, not oral mutual aid agreements can confer authority on a state officer in Indian country).

The Circuit Court here suppressed defendant Cummings' statements made to DCI agent Rasmussen in his official DCI vehicle "[b]ecause [DCI agent] Rasmussen was without authority to conduct the investigation in Indian Country[.]" R. 133-34, Conclusions of Law, ¶ 8 (State's App. 5-6).

Rasmussen was clearly acting as a State officer when following State procedure investigating the off-reservation burglary. He identified himself as a DCI agent; explained he was investigating the off-reservation burglary; stated he had information that some of the property taken was inside defendant's residence; took the defendant to his DCI vehicle; explained he wanted to talk to the defendant; and instead of advising the defendant of his Miranda rights he explained that Cummings did not have to talk, an advisement only given by law enforcement officers. MT 18-19. See e.g., Miranda v. Arizona, 384 U.S. 436 (1996). The Circuit Court was patently correct in its analysis suppressing the statement made to Rasmussen inside his official DCI vehicle.

There is no clearer case of the exercise of state process and authority than the one at bar. See Nevada v. Hicks, 533 U.S. 353, 364 (2001) (defining process as any means used to acquire or exercise jurisdiction over a person or property).

To the extent that the State seeks to apply authority for its DCI agent to enter into Indian Country for investigative purposes without a warrant, the cases cited are drawn from Public Law 280 states or from states which have no significant Indian populations. South Dakota is not a Public Law 280 State. See State v. Onihan, 427 N.W.2d 365 (1988); State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990); and State v. Cummings, 2004 S.D. 56, 679 N.W.2d 484.

The State seeks to equate DCI agent Rasmussen with a common citizen who approaches a home and "knocks" on the door. This attempt to evade the jurisdictional problem confronting DCI agent Rasmussen is disingenous. There was no State jurisdiction, Public Law 280 or otherwise. The State attempts to circumvent Article XXII

of the South Dakota Constitution. This the State cannot do because Article XXII is a State Constitutional mandate which must be enforced, including its jurisdictional implications, by all officers of the executive, legislative and judicial branches of South Dakota State Government. See Matter of Guardianship of DLL, 291 N.W.2d 278 (S.D. 1980).

The South Dakota disclaimer, set forth in The South Dakota Constitution, Article XXII, regarding Indian land provides:

"First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of South Dakota, do agree and declare, that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries of South Dakota; and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition to the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state, shall never be taxed at a higher rate than the lands belonging to residents of this state. That no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or from any person a title thereto by patent or other grant save and except such lands as have been, or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, all such lands which may have been exempted by any grant or law of the Untied States, shall remain exempt to the extent, and as prescribed by such act of Congress."

The State cites cases from South Dakota where questioning of defendants occurred in other states. These cases are not helpful to the State because in none of those cases was interrogation in another state raised or discussed as an issue. Moreover, none

of those cases involved an examination occurring on an Indian reservation where the State officer had no consent or right to gather evidence as here.

South Dakota argues that State v. Cummings, 2004 S.D. 56, 679 N.W.2d 454, is distinguishable from this case. The South Dakota Supreme Court in Cummings, affirming Spotted Horse, held that South Dakota had no Public Law 280 jurisdiction, hot pursuit and arrest on the Reservation is illegal and constituted a State constitutional violation, and no evidence gathered after the violation could be used to prosecute the Indian defendant.

III. KNOCK AND TALK

South Dakota relies upon the investigatory technique it refers to as "knock and talk." No investigatory technique can provide jurisdiction to investigate criminal offenses where none exists regardless of the fact that no constitutional violation is shown. Reliance upon state or federal case law none of which involves authority in Indian Country cannot legitimatize the investigation in this case. Moreover, it is not disputed that Rasmussen was acting as a law enforcement official and the State cannot prevail by deeming Rasmussen to be a private person. The right of a State law enforcement officer to act beyond his jurisdiction, as here, cannot be justified by any concept of implied license. It makes no difference that the Tribe has not barred Rasmussen from the Reservation although it had the power to do so. And a criminal investigation in an area over which a State officer has no jurisdiction cannot be sanctioned by the consent of the suspect.

IV. AUTHORITY TO INVESTIGATE

The Circuit Court did not abuse its discretion in holding, relying upon Spotted Horse and Cummings, that Rasmussen had no authority to investigate a suspected crime in Indian Country where, despite the opportunity to do so, the State could provide nothing in writing where either the Tribe or United States had authorized any State official to perform law enforcement functions on the Pine Ridge Reservation. There is no danger that the Circuit Court's suppression can be construed to prevent the State from investigating crimes by non-Indians where it would have jurisdiction. It was undisputed that Morgan Cummings is an Indian and that the investigation took place in Indian Country. This case does not involve investigation through phone calls. As this Court noted in Cummings, dicta in Nevada v. Hicks cannot give the State jurisdiction where it is not authorized by law. If the State desires to investigate criminal offenses in Indian Country, it can secure the necessary authorizations from either the Tribe or the United States regardless if the suspected crime occurred outside of Indian Country. And reference to case law where South Dakota officers interview suspects in other states have no applicability to this case where those cases did not involve Indian Country or the issue of exercising jurisdiction beyond the boundaries of South Dakota was never raised.

South Dakota cites State v. Wilson, 261 N.W.2d 376, 379 (Neb. 1978), for the proposition that a State officer can go into another jurisdiction to secure evidence for prosecution of a crime in the jurisdiction where the crime was committed. However, in Wilson, BIA officers arrested the defendant on the reservation where they had jurisdiction unlike the situation here or in Cummings so the case is inapplicable for that

reason. As to the legality of the arrest, defendant claimed that BIA arrest was defective, but offered no evidence that the laws governing arrests on the Pine Ridge Reservation were different than the laws of Nebraska. Moreover, the Wilson court found the information secured by the BIA officers in Nebraska could be used to determine probable cause for the arrest on the Reservation because the officers "were legally present" there, unlike the situation here where Rasmussen had no authority from either the Tribe or the United States to investigate crimes on the Pine Ridge Indian Reservation. Moreover, State v. Wilson appears to be at odds with Young v. Neth, 637 N.W.2d 884, 889 (Neb. 2002), holding that a tribal police officer lacked authority to make an arrest outside the reservation for crimes observed within reservation boundaries. State v. Wilson provides no authority for Rasmussen to go into Indian Country without proper authorization to secure evidence for a criminal case in South Dakota. Lastly, the State's reliance on Wilson fails because Nebraska is a Public Law 280 State and the BIA police officer who arrested the defendant in that case had the authority to make the arrest on the Pine Ridge Indian Reservation. This fact makes the Wilson case inapplicable to this case. In the case at bar, it is clear (1) Rasmussen was a State officer (2) he had no consent from the Oglala Sioux Tribe to investigate within Indian Country, 18 U.S.C. § 1151; and (3) he had no statutory authorization from Congress or the United States to investigate an off-reservation State criminal offense. Wilson provides no authority for a DCI agent to enter Indian Country to conduct a criminal investigation.

V. CRIMES OUTSIDE OF INDIAN COUNTRY

The question is not whether an offense was committed outside of Indian Country, but the authority of a State law enforcement official to conduct a full fledged criminal investigation in Indian Country. There can be no doubt that in both Cummings and Spotted Horse the exercise of criminal jurisdiction by State officers took place in Indian Country. The fact that in both cases the crime for which the investigation and arrest took place occurred at least in part outside Indian Country was not determinative because the ultimate law enforcement action took place in Indian Country the same as in the present case. Voluntariness by the defendant is irrelevant the same as the submission to arrest was irrelevant in Cummings and Spotted Horse. The crucial fact is whether the State was exercising full fledged criminal investigation involving an Indian defendant in Indian Country. Indian tribes have the exclusive authority to make their own laws and be governed by them including the right to prohibit criminal investigations by State law enforcement officers unless consented to by the tribal law. See United States v. Wheeler, 435 U.S. 313, 328-329 (1978); Duro v. Reina, 495 U.S. 676, 694 (1990); United States v. Mazurie, 419 U.S. 544, 557 (1975) (tribes are unique aggregations possessing attributes over both their members and their territory); and Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 326-327 (2008).

Spotted Horse and Cummings do not merit reconsideration. They have been the law since at least the past 15 years in the case of Cummings and 30 years since Spotted Horse. See Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990) (no criminal or civil jurisdiction in Indian Country). The State rests on dicta in Nevada v.

Hicks to base their request for reconsideration including Justice Scalia's statements in that case. The issue here was not at issue in Nevada v. Hicks, which involved whether a state law enforcement officer could be sued in tribal court through a 1983 suit. Justice Scalia's majority opinion was joined in by 5 other Justices, a majority decision, and certainly not a fragmented Court. None of the concurring opinions even mentioned not alone maintained that a state law enforcement officer could investigate and arrest an Indian defendant in Indian Country or that such a proposition formed any part of either the majority or concurring opinions. The State's reliance on Marks v. United States, 430 U.S. 188 (1976), does not transform the dicta in Hicks into any governing principle. The State's arguments here are the same as made in Cummings 15 years ago. Thirty years of law should not be reversed on the basis of total dicta in Nevada v. Hicks. This Court was right when it held in Cummings that the issue there was not at issue in Nevada v. Hicks. There can be no inherent State jurisdiction when the State conducts a full fledged criminal investigation involving an Indian in Indian Country. If the State feels that it is stymied in enforcing its criminal authority in Indian Country it has four remedies–it can negotiate with the Tribe to secure the jurisdiction that the State feels it needs, it can ask Congress to give it jurisdiction to conduct criminal investigations involving an Indian in Indian Country, it can attempt to assume jurisdiction pursuant to 25 U.S.C. 1321, or it can ask the United States Supreme Court to overturn the law in this State that has prevailed for decades on the question before this Court.

CONCLUSION

For all the above reasons, the decision of Judge Rank should be affirmed in all

respects and this case remanded for trial.

Dated this 10th day of October, 2019.

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REQUEST FOR ORAL ARGUMENT

Oral argument is requested.

Dated this 10th day of October, 2019.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word Perfect 2017 and contains 2883 words from the Statement of the Case through the Conclusion. I have relied on the work count of Microsoft Word Perfect 2017 in order to prepare this certificate.

Dated this 10th day of October, 2019.

/S/ Terry L. Pechota
Terry L. Pechota

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of October, 2019, a true and correct copy of *Appellee's Brief* in Appeal No. 29010, via e-mail upon Stacy R. Hegge at atgservice@state.sd.us and to Sarah E. Harris at sarah.harrisbcsa@goldenwest.net.

/S/ Terry L. Pechota
Terry L. Pechota

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29010

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

MORGAN CUMMINGS,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
BENNETT COUNTY, SOUTH DAKOTA

THE HONORABLE BOBBI J. RANK
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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ARGUMENT

THE CIRCUIT COURT ERRED IN SUPPRESSING AN INDIVIDUAL'S VOLUNTARY STATEMENTS TO A STATE LAW ENFORCEMENT OFFICER ON INDIAN COUNTRY REGARDING A STATE CRIME COMMITTED OUTSIDE OF INDIAN COUNTRY.

I. A state law enforcement officer has investigative authority within Indian country.

Attempting to create a jurisdictional island on which Morgan's home sits, and in line with the circuit court's conclusion, Morgan primarily argues that a state law enforcement officer has no authority to enter Indian country and investigate a state crime.[1] *See, e.g.,* Appellee's Brief at 9; *cf.* R. 133-34, Conclusion of Law ¶ 5 (App. 5). According to Morgan, "[t]he question is not whether an offense was committed outside of Indian Country, but the authority of a State law enforcement official to conduct a full fledged criminal investigation in Indian Country."

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[1] Morgan's home is on a parcel of land in Bennett County, which is not within the exterior boundaries of the Pine Ridge Indian Reservation. *See* Appellant's Brief at 4; *U.S. ex rel. Cook v. Parkinson*, 525 F.2d 120, 124 (8th Cir. 1975) (indicating that the Act of May 27, 1910, 36 Stat. 440, removed Bennett County from the Pine Ridge Indian Reservation); *Stankey v. Waddell*, 256 N.W.2d 117, 127 (S.D. 1977) (recognizing the Eighth Circuit Court of Appeals' decision in *U.S. ex rel. Cook v. Parkinson*); *cf.* Appellee's Brief at 1, 6, 7. Although the parcel is not on the Reservation, the State does not dispute in this case that it is Indian country under 18 U.S.C. § 1151 and located within an area that is checkerboarded with Indian country. *Cf. DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 429 n.3 (1975) (indicating that non-reservation Indian country may consist of "isolated tracts . . . scattered checkerboard fashion over a territory otherwise under state jurisdiction" and pointing out the existence of "many practical and legal conflicts between state and federal jurisdiction" within that checkerboard area).

Appellee's Brief at 9. However, Morgan's contention that Indian country is outside of the State's territorial jurisdiction and therefore outside a state officer's scope of authority goes against well-settled law.[2] *Cf.* R. 91 (in support of Morgan's motion to suppress, stating that "[l]aw enforcement is typically limited to the territorial limits of the jurisdiction under which an officer operates.").

The State's territorial jurisdiction does not end at the border of Indian country within South Dakota. *See Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) ("[A]n Indian reservation is . . . part of the territory of the State."); *Anderson v. Brule County*, 67 S.D. 308, 292 N.W.2d 429, 430 (S.D. 1940) (recognizing that a reservation within the exterior boundaries of South Dakota remains part of the territory of the State).[3] Morgan does not refute that the State has criminal and civil jurisdiction within Indian country over certain individuals and crimes. *See, e.g., State v. Vandermay*, 478 N.W.2d 289, 290 (S.D. 1991); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151, 159-60 (1980) (concluding that a state has jurisdiction to tax certain on-

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[2] This Court addressed the concept of territorial jurisdiction as it pertains to law enforcement in *State v. MacDonald*, 260 N.W.2d 626 (S.D. 1977), explaining that a municipal officer did not have the official power to arrest beyond his territorial jurisdiction but did have the same power to arrest that is conferred to a private citizen. *Id.* at 627.

[3] The United States Supreme Court has recognized that "[l]ong ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980); *see also Organized Vill. of Kake v. Egan,* 369 U.S. 60, 72 (1962).

reservation activities by nonmembers and to impose tax collection requirements on Indian on-reservation businesses); Appellant's Brief at 13-14. However, failing to recognize that the State's "sovereignty does not end at [Indian country] borders[,]" Morgan errs in equating a state officer's actions in Indian country within South Dakota to a state officer's actions in another state. *See Hicks*, 533 U.S. at 361-62; Appellee's Brief at 3.

Morgan relies on *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), contending the United States Supreme Court held that "a state may not perform acts of sovereignty in another state." Appellee's Brief at 3. However, that proposition, which is in the dissenting opinion, was not the United States Supreme Court's holding in *Alvarez-Machain*. *See* 504 U.S. at 680 (Stevens, J. dissenting). *Alvarez-Machain* did not involve a state officer's actions in another state; rather, that case involved actions by United States law enforcement in another country. *Id.* at 657, 659 (majority opinion) (addressing a "claimed violation of an extradition treaty and proceedings against a defendant brought before a court by means of forcible abduction.").

Regardless, in *Alvarez-Machain*, the United States Drug Enforcement Administration caused the defendant to be forcibly kidnapped from Mexico and brought to the United States where he was then arrested. *Id.* at 657, 659. That is not comparable to today's case, where the interaction between Morgan and SA Rasmussen was

undisputedly consensual. *See* Appellant's Brief at 11-12. Nor is it comparable to the State's cited cases where a state officer participated in a voluntary interaction with an individual across state lines. *See, e.g.*, *United States v. Jones*, 701 F.3d 1300 (10th Cir. 2012); *United States v. Sawyer*, 441 F.3d 890 (10th Cir. 2006); *State v. Wilson*, 261 N.W.2d 376 (Neb. 1978). Given these factual distinctions, *Alvarez-Machain* offers no guidance.

Here, the circuit court broadly concluded that SA Rasmussen "had no authority to go into Indian [c]ountry to conduct an investigation of a state criminal offense." R. 133-34, Conclusion of Law ¶ 5 (App. 5). Yet seeming to acknowledge that a state officer may have at least some authority in Indian country, Morgan posits that the court's conclusion is limited; Morgan states that "[t]here is no danger that the Circuit Court's suppression can be construed to prevent the State from investigating crimes by non-Indians where it would have jurisdiction. It was undisputed that Morgan Cummings is an Indian and that the investigation took place in Indian Country."[4] *See* Appellee's Brief at 7. However, the court's plain statement is not limited to investigations

[4] Morgan quotes Cohen's Handbook of Federal Indian Law, 2012 ed., stating that "problems will often occur when state officers enter Indian country to investigate off-reservation crimes." *See* Appellee's Brief at 3. Cohen's Handbook does not indicate what those "problems" entail and does not cite authority for that proposition. *Cf.* Cohen's Handbook of Federal Indian Law, 2012 ed., 773-74. The only authority cited in the portion of Cohen's Handbook quoted by Morgan is on the topic of fresh pursuit. *See id.*

involving an Indian. *See* R. 133 (App. 5). Further, it is difficult to read such limitation into the court's statement given the lack of a finding that Morgan is an Indian or tribal member. *See* R. 129-32 (App. 1-4).

Even if Morgan's proposed limitation is accepted, it is unclear whether Morgan's position is 1) that a state officer lacks all investigative authority within Indian country if the suspect of a state crime is an Indian; or 2) that a state officer lacks authority to voluntarily interact with an Indian (whether a witness or suspect) within Indian country. If it is the former, there is no justifiable reason to prevent a State officer from entering Indian country to speak with an individual (Indian or non-Indian) regarding a state crime allegedly committed outside Indian country by an Indian, while permitting the officer to enter Indian country and speak with an individual (Indian or non-Indian) regarding a state crime allegedly committed by a non-Indian. In both instances, the State undoubtedly has criminal adjudicatory jurisdiction. *See Hicks*, 533 U.S. at 362; *Organized Vill. of Kake v. Egan*, 369 U.S. 60 (1962) ("It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country."); *see also* Appellant's Brief at 13-14, 23. Further, the identity of the suspect is, at many times, unknown during the course of the investigation. It would be absurd to foreclose a state officer from entering Indian country to speak with an individual until the officer has confirmed the identity and status of the suspect alleged to have committed a state crime.

If Morgan's position is the latter – that a state officer lacks authority to voluntarily interact with any Indian within Indian country – such position is likewise unreasonable. The impracticality is highlighted in situations when an individual may voluntarily converse with a state officer via cell phone. In that scenario, the officer may not know 1) whether the individual is currently within Indian country; and 2) whether the individual is a non-Indian, Indian, or tribal member. The state officer could thus be acting outside his or her authority without any indication that the conversation took place with an Indian located within Indian country.

Further supporting the rejection of either position, Morgan does not contend that a state officer's voluntary interaction with individuals within Indian country would infringe upon a tribe's right to self-government.[5] As stated in Appellant's Brief, when analyzing the scope of a state's jurisdiction, courts analyze whether the state action unlawfully "infringed on the right of reservation Indians to make their own laws and be ruled by them." Appellant's Brief at 20; *see, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-33 (1983); *Hicks*, 533 U.S. at 360-61; *see also Organized Vill. of Kake*, 369 U.S. at 75 ("[E]ven on

[5] Morgan argues that "Indian tribes have the exclusive authority to make their own laws and be governed by them including the right to prohibit criminal investigations by State law enforcement officers unless consented to by tribal law." Appellee's Brief at 9. However, even assuming *arguendo* that a tribe's right to self-government includes the ability to prohibit State law enforcement investigations, there is no indication that such prohibition was in place for purposes of this case.

reservations[,] state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."). Indicating that state interests in investigating an off-reservation violation of state laws outweigh tribal self-governance and tribal land ownership, *Hicks* supports that a state officer's interaction with an Indian, whether that individual is a witness or suspect, does not infringe upon a tribe's self-government. *See Hicks*, 533 U.S. at 361, 364-65, 370-71. Ultimately, an Indian's voluntary conversation with a state officer does not obstruct a tribe's ability to govern itself or to control internal relations, and that interaction should not be proscribed.

II. Morgan's statements to SA Rasmussen in SA Rasmussen's vehicle were validly obtained through a "knock and talk" consensual encounter.

Morgan contends that the State's purported lack of territorial jurisdiction within Indian country requires suppression of Morgan's statements even if those statements were validly obtained through a "knock and talk" consensual encounter. *See* Appellee's Brief at 4, 6. Morgan argues that the knock and talk method is insufficient to "evade the jurisdictional problem confronting [SA] Rasmussen" and that "[n]o investigatory technique can provide jurisdiction to investigate criminal offenses where none exists regardless of the fact that no constitutional violation is shown." Appellee's Brief at 4, 6 (emphasis added). Yet, assuming *arguendo* that SA Rasmussen was outside of the State's

territorial jurisdiction, Morgan fails to address the State's cited cases upholding the admissibility of evidence obtained by officers acting outside of their government's territorial jurisdiction. *See Fischer v. Commonwealth*, 506 S.W.3d 329, 335 (Ky. Ct. App. 2016) ("Whether a police officer is outside his jurisdiction is not the consideration for whether a knock and talk is proper."); Appellant's Brief at 9 n.3 (discussing cases in which the court did not suppress evidence obtained by an officer acting outside his or her territorial jurisdiction).

More importantly, Morgan does not meet his burden to show that suppression of evidence is an appropriate remedy in the absence of a constitutional violation. *Cf. State v. Jones*, 902 N.E.2d 464, 470 (Ohio 2009) (O'Donnell, J. concurring) ("The Fourth Amendment requires exclusion only when the officer lacked probable cause to make the stop; the fact that the stop was extraterritorial is irrelevant."); *State v. Mieritz*, 534 N.W.2d 632, 632 (Wis. Ct. App. 1995) ("[S]uppression of evidence is not a constitutionally required remedy when a law enforcement officer is outside his or her jurisdiction when obtaining evidence."); *State v. Afflerback*, 264 S.E.2d 784, 785-86 (N.C. Ct. App. 1980) ("It is not fundamentally unfair nor prejudicial to a defendant that evidence is obtained by police officers outside of their territorial jurisdiction while conducting an undercover investigation. It is not a violation of defendant's constitutional right embodied in the due process clauses of either the State or Federal Constitutions."). In actuality, "[s]uppression

of evidence . . . is ordinarily a remedy imposed for constitutional violations." *State v. Britton*, 2009 S.D. 75, ¶ 13, 772 N.W.2d 899, 904.[6] Here, Morgan's statements to SA Rasmussen were improperly suppressed because there were no constitutional violations in the knock and talk consensual encounter between Morgan and SA Rasmussen.

As discussed in Appellant's Brief, the two elements under the knock and talk method are 1) the officer was lawfully present; and 2) the interaction between the officer and the individual was consensual. *See* Appellant's Brief at 8. Here, Morgan does not challenge the court's finding of voluntariness and the only question remaining is whether SA Rasmussen was lawfully present. As the United States Supreme Court explained in *Kentucky v. King*, 563 U.S. 452 (2011), "officers may seek consent-based encounters if they are lawfully present where the consensual encounter occurs[,]" noting that an officer may be "lawfully present" if he or she is present "'pursuant to consent or a warrant.'" *Id.* at 463 (quoting *INS v. Delgado*, 466 U.S. 210, 217 n.5 (1984)).

Morgan does not seem to specifically dispute that SA Rasmussen "was where a member of the public would have a right to be." *See Fischer*, 506 S.W.3d at 335. Morgan instead argues that SA Rasmussen

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[6] Suppression may also be appropriate for "substantial, intentional, and prejudicial" violations of a statute or administrative rule meant to "protect the public against unauthorized or illegal government conduct[.]" *See State v. Britton*, 2009 S.D. 75, ¶¶ 15-17, 772 N.W.2d 899, 905. In this case, Morgan has not alleged any violation of a statute or administrative rule. *See* R. 91-94 (only alleging constitutional violations).

cannot be viewed as a private citizen because he "was clearly acting as a State officer when following State procedure investigating the off-reservation burglary." Appellee's Brief at 4, 6. But this argument misconstrues the State's position.

The State does not contend that SA Rasmussen was acting as a private citizen rather than as an officer. The appropriate question under the knock and talk method is whether the officer is where a private citizen would have a right to be, not whether the officer was acting in his or her official capacity. *See Florida v. Jardines*, 569 U.S. 1, 8 (2013); Appellant's Brief at 9-10. Indeed, within the State's cited authority, officers were acting in their official capacity when utilizing the knock and talk method. *See, e.g., Carroll v. Carman*, 574 U.S. 13, 14 (2014); *Jones*, 701 F.3d at 1305-12; *United States v. Taylor*, 458 F.3d 1201, 1203 (11th Cir. 2011); *Sawyer*, 441 F.3d 890; *Fischer*, 506 S.W.3d at 332. The fact that SA Rasmussen was acting as a state officer does not affect the "lawfully present" inquiry of the knock and talk method.

Morgan contends that *State v. Wilson*, 261 N.W.2d 376 (Neb. 1978) "provides no authority for a DCI agent to enter Indian Country to conduct a criminal investigation" because in *Wilson*, the officers conducting an investigation on an Indian reservation "were legally present." Appellee's Brief at 8. For SA Rasmussen to be "legally present[,]" as the officers were in *Wilson*, Morgan posits that SA Rasmussen needed authorization from the Tribe or the United States to

enter Indian country and voluntarily converse with Morgan. *See* Appellee's Brief at 8. Yet in *Wilson*, the officers were "legally present" even with no indication of tribal authorization or a cross-jurisdictional agreement. *See* 261 N.W.2d at 379. Instead, the Nebraska Supreme Court pointed out that "we know of no law that prohibits an officer of one state from entering another state to make an investigation." *Id.* *Wilson* does not support that tribal authorization or cross-jurisdictional agreements are required in order for the "lawfully present" element of the knock and talk method to be satisfied.

III. Cummings and its precursor, Spotted Horse, are distinguishable from today's case.

Because the conversation between SA Rasmussen and Morgan was voluntary with no constitutional violations, *State v. Cummings*, 2004 S.D. 56, 679 N.W.2d 484, and *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990), are distinguishable from today's case. *See* Appellant's Brief at 17-20. As described in Appellant's Brief, in *Spotted Horse*, an Indian defendant was pursued onto a reservation and arrested by a municipal officer. *See* 462 N.W.2d at 464-65; Appellant's Brief at 18-20. This Court concluded that the arrest was unconstitutional and suppressed subsequently gathered evidence under the exclusionary rule set forth in *Wong Sun v. United States*, 371 U.S. 471 (1963). *See Spotted Horse*, 462 N.W.2d at 468-69. Under similar facts, this Court in *Cummings* indicated that *Spotted Horse* controlled its decision. 2004 S.D. 56,

¶¶ 2-3, 8-10, 18, 679 N.W.2d at 485, 486-89; Appellant's Brief at 18-20. Notably, Morgan recognizes these factual distinctions between *Cummings* and today's case. *See* Appellee's Brief at 6.

Here, unlike *Spotted Horse* and *Cummings*, there was no pursuit or seizure that could invoke the exclusionary rule. *See supra* II.; R. 129-137, 154 (App. 1-10); *cf. United States v. Anderson*, 857 F. Supp. 52, 54 (D.S.D. 1994) (suppressing evidence of an on-reservation violation that was seized through a warrantless search on a reservation from an Indian parolee). The absence of a constitutional violation confirms that suppression of Morgan's statements was not required under either of those cases.

IV. Reconsideration of Cummings and Spotted Horse.

While factually distinguishable from today's case, statements regarding Indian jurisdiction principles in *Cummings* and its precursor, *Spotted Horse*, were relied upon by the circuit court to suppress Morgan's statements. *See* R. 133 (App. 5). The circuit court relied upon those cases in concluding that SA Rasmussen "had no authority to go into Indian Country to conduct an investigation of a state criminal offense." R. 133, 134 (App. 5-6). However, *Spotted Horse* and *Cummings* should be reconsidered in light of the following propositions.

First, the State does not need to take steps to acquire jurisdiction on Indian lands for purposes of investigating a state crime committed outside of Indian country. The State has inherent authority, as

recognized in *Hicks*, 533 U.S. 353 (2001), to enter Indian country and investigate these crimes committed outside Indian country. *See id.* at 362-63, 365; *see also State v. Harrison*, 238 P.3d 869, 875-79 (N.M. 2010). While Morgan argues that *Hicks* does not declare that "a state law enforcement officer could investigate and arrest an Indian defendant in Indian Country[,]" that topic was addressed in *Hicks*. *See* Appellee's Brief at 10. *Hicks* stated that "[n]othing 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." 533 U.S. at 361-66; *see also id.* at 364 ("the reservation of state authority to serve process is necessary to prevent [an Indian reservation] from becoming an asylum for fugitives from justice.") (internal quotation marks omitted). And as pointed out in Appellant's Brief, the United States Supreme Court's approval of the state's on-reservation investigative authority for off-reservation crimes committed by Indians was crucial to the holding in *Hicks* and was not dicta. *See* Appellant's Brief at 24-25. Indeed, *Hicks* has since been invoked to determine the scope of a state officer's authority to enter Indian country and investigate crimes committed outside of Indian country. *See Harrison*, 238 P.3d at 877 ("[T]he general consensus among our sister states regarding a state officer's authority to investigate off-reservation crimes in Indian country . . . is supported by *Hicks*, which held that '[s]tate sovereignty does not end at a reservation's

border,' because 'an Indian reservation is considered part of the territory of the State.'").

Disregarding the State's inherent authority, Morgan attempts to require State action under Public Law 280 in order for SA Rasmussen to voluntarily converse with Morgan about a crime committed outside of Indian country. *See* Appellee's Brief at 4, 10. But the State cannot take steps under Public Law 280 to obtain jurisdiction on Indian lands in order to investigate a state crime committed outside of Indian country. *cf. Spotted Horse*, 462 N.W.2d at 466-67, 469; *Cummings*, 2004 S.D. 56, ¶¶ 9-10, 18, 679 N.W.2d at 486-87, 489. Public Law 280 is not helpful in these situations because the crimes were committed outside Indian country, while Public Law 280 involves the state's assumption of criminal jurisdiction over crimes committed by an Indian within Indian country.[7] *See* Appellant's Brief at 24.

Morgan also implicates Public Law 280 in an attempt to distinguish the State's cited authority because those cases involved "Public Law 280 states or from states which have no significant Indian populations." Appellee's Brief at 4; *see also* Appellee's Brief at 8 (challenging the State's reliance on *State v. Wilson*, 261 N.W.2d 376, "because Nebraska is a Public Law 280 State[.]"). Because Public Law

[7] Public Law 280 "was enacted . . . in part to deal with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471 (1979) (internal quotation marks omitted).

280 is not implicated in the State's cited cases addressing the authority of state officers over crimes committed outside of Indian country, those cases are relevant regardless of whether they involve "Public Law 280 states." *See, e.g., Wilson*, 261 N.W.2d 376 (neither relying upon nor referencing the state's assumption of jurisdiction under Public Law 280 in analyzing the investigation of an off-reservation state crime allegedly committed by an Indian).

Finally, Article XXII of the South Dakota Constitution, which was encompassed by *Spotted Horse* and *Cummings*, is relied upon by Morgan as foreclosing State jurisdiction on Indian lands. Appellee's Brief at 4-5; *see also Spotted Horse*, 462 N.W.2d at 465-66; *Cummings*, 2004 S.D. 56, ¶ 9, 679 N.W.2d at 486. However, as the State pointed out, the purpose of Article XXII was not to prohibit state jurisdiction on Indian lands, but rather to preserve the federal government's responsibilities and obligations to Indians. *See* Appellant's Brief at 26-27; *Anderson v. Brule County*, 67 S.D. 308, 292 N.W.2d at 431. Additionally, Article XXII only relates to jurisdiction over the actual Indian land, rather than the State's jurisdiction regarding the activities on that land. That Article certainly cannot be interpreted to foreclose all State jurisdiction over activities occurring within Indian land. *See supra* I. (indicating that the State has criminal and civil jurisdiction within Indian country over certain individuals and crimes); *cf. Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 333-34 (2008) (stating that "[t]he distinction

between sale of the land and conduct on it is well established in our precedent"). Therefore, Article XXII is not applicable.

Failing to specifically refute these arguments regarding Article XXII, Morgan merely cites to *In re Guardianship of D.L.L.*, 291 N.W.2d 278 (S.D. 1980). In *Guardianship of D.L.L.*, this Court concluded that the Indian Child Welfare Act ("ICWA") did not violate Article XXII. *Id.* at 281. In analyzing whether the proper forum for a tribal member child custody case is state court or tribal court, this Court explained that Article XXII did not "reserve jurisdiction to the state whenever an Indian is off the reservation" and instead, "[t]he proper inquiry is whether the actions of the state would infringe on the right of reservation Indians to make and be governed by their own laws." *Id.* (citations omitted).

Thus, contrary to Morgan's contention, *Guardianship of D.L.L.* actually supports the State's argument that jurisdictional inquiries regarding Indians and Indian country are not controlled by or materially affected by Article XXII. And as stated above, it is undisputed in this case that the State has criminal jurisdiction over the alleged state crime. There is no question regarding whether state court or tribal court is the appropriate forum for this case, unlike in *Guardianship of D.L.L.*

CONCLUSION

Because there are no constitutional violations, the circuit court erred in suppressing Morgan's voluntary statements to SA Rasmussen during a "knock and talk" consensual encounter on Indian country. To the extent *Spotted Horse* and *Cummings* dictate otherwise, those cases should be reconsidered. For the foregoing reasons, the State respectfully requests this Court to reverse the suppression of Morgan's statements to SA Rasmussen.

Dated this 12th day of November, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's Reply Brief contains 4,557 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 12th day of November, 2019.

/s/ Stacy R. Hegge
Stacy R. Hegge
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of November, 2019, a true and correct copy of Appellant's Reply Brief in Appeal No. 29010, *State of South Dakota v. Morgan Cummings* was served via electronic mail upon Terry Pechota at tpechota@1868treaty.com and Sarah Harris at sarah.harrisbcsa@goldenwest.net.

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