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BIG HORN COUNTY ATTORNEY PUBLIC STATEMENT IN RESPONSE TO U.S. SUPREME COURT DECISION IN *UNITED STATES v. JOSHUA JAMES COOLEY*

FOR IMMEDIATE RELEASE

June 1, 2021

Big Horn County Attorney's Office was first to file charges against Cooley for suspected methamphetamine trafficking in local area in 2016

Hardin, MT —

From the Desk of County Attorney Jay Harris:

Earlier today, the United States Supreme Court issued a unanimous opinion in the matter *United States of America v. Joshua James Cooley*, U.S. Supreme Court No. 2019-1414. This opinion represents the sixth time a case was litigated before the highest court in the United States which arose from facts which occurred on the Crow Indian Reservation and Big Horn County, following *Draper v. United States* (1896), *United States v. Powers* (1939), *Montana v. United States* (also known as "The Big Horn River Decision") (1981), *National Farmers Union Insurance Companies v. Crow Tribe* (1984) and *Crow Tribe of Indians v. Montana* (1998). Notably, Cooley represents the second case involving criminal jurisdiction (*Draper*) and third case involving questions of tribal authority to regulate non-Indian conduct (*Montana*, *National Farmers Union*) which originated on the Crow Reservation and Big Horn County.

Factual and Procedural Background – State Court, Federal District Court and Ninth Circuit

Cooley was arrested the early morning hours of February 26, 2016 by Bureau of Indian Highway Safety Officer James Saylor, of the Crow Tribe, near mile marker 16 along U.S. Highway 212 on the Crow Indian Reservation, following a welfare check which provided concern to Officer Saylor due to Cooley's apparent inability or unwillingness to answer questions appropriately, increasingly odd behavior and the presence of two semi-automatic rifles, a handgun and three-year old child in the vehicle, combined with Cooley's furtive movements towards the handgun. In the course of the investigation, authorities located two "SKS rifles" and a .45 caliber handgun, along with \$2,200 in cash in a violin case. Also seized was a large number of empty, clear plastic baggies and a very large amount of a white powdery substance below the driver's seat and rear seat of the vehicle. The white powdery substance field tested positive as methamphetamine. In total, Cooley was in possession of 356 grams of a substance which field tested positive as methamphetamine. Cooley was arrested by the Bureau of Indian

Affairs Office of Justice Services and due to his “non-Indian” status, was later transferred to the custody of the Big Horn County Sheriff’s Office and booked into the Big Horn County Jail. Cooley was charged by the Big Horn County Attorney’s Office on February 29, 2016 with Criminal Possession of Dangerous Drugs with Intent to Distribute, along with three other criminal counts associated with the February 26, 2016 investigation. At arraignment, Cooley pleaded not guilty and the District Court set bond in the amount of \$100,000, which Cooley posted on April 12, 2016, and on May 20, 2016 the Court issued a \$50,000 arrest warrant based on allegations that Cooley was not complying with drug testing requirements. On April 21, 2016, a federal grand jury indicted Cooley on Possession with Intent to Distribute Methamphetamine and Possession of a Firearm in Furtherance of a Drug Trafficking Crime, based upon the same allegations previously presented by the State of Montana. Cooley was arrested by the U.S. Marshal’s Service pursuant to a federal arrest warrant on May 24, 2016 and was arraigned in federal court on May 25, 2016. Based upon the inability of the State to prosecute Cooley given the active federal prosecution, the Big Horn County Attorney’s Office moved to dismiss the pending Big Horn County District Court matter on June 7, 2016, which the Court granted the same day. Following a defense motion to suppress evidence collected in the underlying investigation, U.S. District Court Judge Susan Watters ordered all evidence suppressed on February 7, 2017 – based upon a ruling that Officer Saylor was not able to articulate an “apparent” violation of State or federal law to justify the detention of a non-Indian on a public right of way. The Government appealed the order to suppress to the Ninth Circuit Court of Appeals, which affirmed the federal district court by a three-judge panel on March 21, 2019. The Ninth Circuit agreed with Judge Watters as to the outcome, but not the rationale for the suppression. The Ninth Circuit pointed out that a police officer cannot make a legal determination of Indian status of a suspect by “making assumptions based upon that person’s physical appearance.” The lack of questioning as to Cooley’s Indian status by Officer Saylor was taken into account by the Ninth Circuit as the Court ruled that “continuing to detain — and searching — a non-Indian without first attempting to ascertain his status is beyond the authority of a tribal officer on a public, nontribal highway crossing a reservation.” Finally, the Ninth Circuit found that there is an Exclusionary Rule impliedly contained in the 1968 Indian Civil Rights Act as it pertains to unlawfully seized evidence.

The Supreme Court’s Ruling in Cooley

The U.S. Supreme Court, in a 9-0 decision authored by Justice Stephen Breyer, held that under federal case law (including U.S. Supreme Court precedent) an Indian tribe under certain circumstances has the authority to temporarily detain non-Indians suspected of criminal activity on an Indian reservation. The Court held that “to deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.” Importantly, the Supreme Court cast “doubt” about the workability of the legal standards the Ninth Circuit set out in its earlier opinion (specifically, that a police officer must ask suspect if he is “Indian” and that there must be an “apparent” violation of State or federal law observed by the tribal officer) and held that the first requirement, even if limited to asking a single question, would produce an incentive to lie and the second requirement—that the violation of law be “apparent” – would introduce “a new standard into search and seizure law.” The Court declined to legally validate either of these standards. The Supreme Court also pointed out that – as an

investigating officer – James Saylor’s search and detention do not subject Cooley to tribal law, but “rather only to State and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it.” The Supreme Court remanded the case back to the Ninth Circuit for further proceedings.

County Attorney Statement in Response to Cooley Decision:

“The U.S. Supreme Court’s ruling in *Cooley* affirms the well-settled authority of Indian tribes to temporarily detain any person located on an Indian reservation pursuant to a criminal investigation. Any subsequent prosecution is subject to legal standards and procedural protections under the respective tribal, State and federal statutes and constitutions, as may be applicable. While the Court did not address the “Bad Men Clause” provisions of the 1825, 1851 and 1868 treaties between the Crow Tribe and the United States – each of which have language extraordinarily critical to criminal justice – the implementation of these important treaty provisions protecting public safety should be done at first instance by non-judicial authorities of the federal government and Crow Tribe. As a Crow Indian and local citizen, my hope is that future law enforcement efforts by the Crow tribal government be based on tribal statutory law and give appropriate respect and recognition to our treaties with the United States.”

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