IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES YOUNGBEAR, Defendant.	)))))))))	Case No. CR 11-0151 DEFENDANT'S OBJECTIONS TO REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO SUPPRESS

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James Youngbear, through counsel, respectfully submits the following objections to the Report and Recommendation filed on December 1, 2011, in response to his Motion to Suppress:

1. **Probable Cause**

Defendant notes that the application for search warrant states that witnesses saw James Youngbear "kick the door open." Report and Recommendation (R&R) p. 3; Gov. Exh. 1. Defendant objects to the factual conclusion that he "was observed kicking a car door open," as it may have been the door to the residence. R&R, p. 7.

Defendant objects to the conclusion that, under the totality of the circumstances, the warrant established probable cause. R&R, p. 8. Nevertheless, Defendant acknowledges the good faith exception in *United States v. Leon*, 468 U.S. 897 (1984). By acknowledging the applicability of the *Leon* good faith exception as to his first issue (whether the search warrant was supported by probable cause), he continues to assert his second and third issues (whether there were reckless material misrepresentations or omissions affecting probable cause and whether the warrant lacked probable cause to believe evidence of a tribal offense would be found at the residence). His position regarding the applicability of *Leon* to the first issue is not intended to diminish or affect in any way his position on the remaining two issues.

2. **Were There Reckless Material Misrepresentations or Omissions Affecting Probable Cause?**

Defendant objects to the general conclusion that "[t]here is simply no reason to believe that a drunken belligerent is more or less truthful than a sober belligerent." R&R, p. 11. While alcohol may, for some people under some circumstances, be a 'truth serum,' Defendant objects to the conclusion that such a possibility makes the fact of James Youngbear's intoxication not

relevant for purposes of the probable cause determination. An intoxicated person may indeed "make statements which, if sober, would go unsaid," but Defendant objects to any conclusion that those statements are more likely to be truthful than untruthful. *See* R&R, p. 11. *See also United States v. Laplatney*, 157 Fed.Appx. 93, 97 (10th Cir. 2005) (Court affirms, as sufficient, use of the following witness credibility instruction: "The testimony of a drug or alcohol abuser must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs or alcohol. The jury must determine whether the testimony of the drug or alcohol abuser has been affected by drug or alcohol use or the need for drugs or alcohol.").[1] *See also*, Criminal Pattern Jury Instruction, 1.16 (Witness's Use of Addictive Drugs) (10th Cir. 2005).[2]

Also important to note is that James Youngbear did not 'admit to illegal possession of a firearm' in the sense that he was directly asked a question (while intoxicated) and then answered it. *See* R&R, p. 11. Rather, in this case, James Youngbear was heard to make a spontaneous

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[1]*United States v. Laplatney* is an unpublished decision and can be found at www.westlaw.com, but counsel can provide a copy to the Court and to counsel upon request. The district court in that case appears to have used 10th Circuit Pattern Instruction 1.16, but included reference to both alcohol and drug abusers, rather than to just drug abusers.

[2]Defendant also notes that, in a jury instruction adapted from 11th Circuit Pattern Jury Instructions, a private company called Forecite National has proposed a sample instruction to address the witness who was under the influence of drugs or alcohol either when he or she testified or when he or she made an out of court statement. *See* FORECITE National, Volume 4-Chapter 27. The sample instruction reads: "*The [testimony] [out of court statements] of some witnesses must be considered with more caution than the [testimony] [out of court statements] of other witnesses. For example, the testimony of a witness who was under the influence of drugs or alcohol at the time of his or her [testimony] [out of court statement] should be considered with more caution than the [testimony] [out of court statements] of other witnesses.*" This sample instruction is adapted from 11th Circuit Pattern Jury Instructions- Criminal, Special Inst. 1.3 [Accomplice-Addictive Drugs-Immunity] (1997) and can be found at www.juryinstruction.com.

outburst when intoxicated. Defendant respectfully submits that, in the context of considering whether a statement is reliable or suspect, there is a significant difference between an answer to a direct question and a drunken outburst.

Defendant asserts that, given the limited information provided to the issuing judge to support a finding of probable cause, the fact of James Youngbear's intoxication was critical to the probable cause determination. Thus, Defendant objects to the following conclusions: that "Defendant's intoxication did not make his threat any more or less credible," R&R, p. 12; that this information "was not 'clearly critical' to a finding of probable cause," *id.;* and that "the fact that Defendant was intoxicated on April 29 does not make his threat to 'get my gun' any more or less credible." *Id.*

Defendant also objects to the conclusion that "there is no evidence that Posusta recklessly omitted the information [regarding intoxication] from the search warrant application." R&R, p. 12. The only information about the possible existence at that time of a firearm at James Youngbear's residence was his single statement. No one saw a firearm on that date (or on a recent date), and the other resident of the home stated she had not seen a firearm at the residence in the past four months. *See* R&R, p.4; Gov. Exh. 1. When the only evidence presented to the issuing judge to support the conclusion that James Youngbear possessed a firearm on that day was a single statement, the state of mind of the person making the statement is particularly relevant. In addition, not only did all three witnesses tell law enforcement that it appeared James Youngbear had been drinking, but the arresting officer reported smelling alcohol on James Youngbear, as well. Suppression Hearing Transcript (Hrg. Tr.), p. 19, lines 15-17. To omit this information from the application under these circumstances was to act in reckless disregard for

the importance of providing the issuing judge with full and complete information.[3]

Defendant objects to the conclusion that Officer Posusta did not include false or misleading material misrepresentations of fact. R&R, p. 12. Some of the information included in the affidavit misled the issuing judge as to the frequency and severity of James Youngbear's past conduct, as well as the specific source of that information. For example, Officer Posusta stated in the affidavit: "I know Mr. Youngbear from prior incidents." *See* R&R, p. 3. At the hearing, Officer Posusta testified that he had arrested Mr. Youngbear on only one occasion, for a theft charge; thus, he admitted, he had only one 'prior incident' with James Youngbear.[4] Hrg. Tr., pp. 21-23. Officer Posusta also stated in the search warrant application: " I know he [James Youngbear] has threatened to use firearms on other persons in the past, including law enforcement officers." Gov. Exh. 1. At the hearing, Officer Posusta testified that he knew of only one such threat. Hrg. Tr., p. 23. Technically, as noted in the Report and Recommendation, Officer Posusta "does not refer to more than one incident" involving a threat, but instead refers only to firearms in the plural. *See* R&R, p. 12. Defendant respectfully submits, however, that the more common sense implication of this statement is that multiple firearms and multiple

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[3]Officer Posusta testified that he did not think James Youngbear's intoxication was relevant to the search warrant, which sought evidence of Youngbear being a felon in possession of a firearm. *See* Hrg. Tr., 19. The question is not whether the fact of James Youngbear's intoxication is relevant to an offense of being a felon in possession of a firearm, however. The question is whether James Youngbear's intoxication is relevant to the reliability of James Youngbear's statement and, thus, to the issue of probable cause.

[4]At footnote 4 of the Report and Recommendation, it is noted that the number of prior contacts the officer had with Defendant was not included in the search warrant application. R&R, p. 12 (n. 4). Defendant respectfully objects to this conclusion. Officer Posusta reported to the issuing judge that he knew James Youngbear "from prior incidents;" his testimony at the suppression hearing directly contradicted this information. *See* Gov. Exh. 1; R&R, p.3; Hrg. Tr., pp. 21-23.

persons, including multiple law enforcement officers, were likely involved. *See* Gov. Exh. 1. There were not. Instead, Officer Posusta testified there was only one incident and only one person. Hrg. Tr., pp. 23-24. Officer Posusta also testified that he did not know of any specific law enforcement officers who were involved. Hrg. Tr., pp. 23-25. In addition, in the search warrant application, Officer Posusta reported to the issuing judge that this was information he 'knew.' *See* Gov. Exh. 1 (officer uses phrase "I know"). Information about a threat to law enforcement is included, one assumes, because a threat against a law enforcement officer is a threat of special importance and special disrespect for the law. In this case, however, according to the testimony at the hearing, this was *not* information Officer Posusta personally 'knew.'

Defendant acknowledges that Officer Posusta testified James Youngbear's NCIC "is flagged that he has threatened law enforcement officers with firearms." Hrg. Tr., p. 24; R&R, p. 12. Officer Posusta did not, however, inform the issuing judge of the source of this generalized information. At a minimum, the fact that this information came from an NCIC report does not make Officer Posusta's statement that he 'knew' this specific information any more truthful.

Defendant objects to the conclusion that the inclusion of these misrepresentations were not false or misleading. R&R, p. 12. Officer Posusta failed to provide the issuing judge with accurate information, and he failed to provide her with information about the source of that information. Defendant also objects to the conclusion that the inclusion of these misstatements was not reckless. *Id.* Defendant asserts that Officer Posusta was reckless in his use of language, misleading the issuing judge to believe he personally knew information that he did not and using language to lead her to believe the number of prior firearm-related incidents was significantly greater than what it was. *See United States v. Mashek*, 606 F.3d 922, 928 (8th Cir. 2010)

("Recklessness [ ] may be 'inferred from the fact of omission of information from an affidavit ... when the material omitted would have been 'clearly critical' to the finding of probable cause.') (citing *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir.1986)).

3. **Ignoring the False Information and Including the Omitted Information**

Defendant asserts that the affidavit "would not establish probable cause if the allegedly false information is ignored" and "the omitted information is supplemented." *United States v. Mashek*, 606 F.3d 922, 928 (8th Cir. 2010) (citation omitted). To ignore the false information is to eliminate the following phrases: "I know Mr. Youngbear from prior incidents;" and "I know he has threatened to use firearms on other persons in the past, including law enforcement officers."[5] As for the last paragraph, it would no longer have the phrase "threatening to use firearms."[6] In addition, the application would include the fact that all three witnesses stated James Youngbear appeared to be intoxicated and that the arresting officer noted James Youngbear smelled of alcohol. *See* Hrg. Tr., p. 19. The search warrant application without the false or misleading information, but including the omitted material information, lacks probable cause. As a result, Defendant objects to the conclusion that "any slight discrepancy between the

[5]Defendant asserts that, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), all of the false information must be ignored when determining whether the affidavit then establishes probable cause. *See Mashek*, 606 F.3d at 928. Defendant's position is that the Court cannot simply modify the statement by, for example, changing "incidents" to "incident." *Franks* does not provide for a modification of the affidavit, or an opportunity to replace the false information with truthful information. It requires the Court to ignore the false information altogether. *See id.* Even if the Court provides for a modification of 'incidents' to 'incidents,' however, Defendant's position is the resulting affidavit still lacks probable cause.

[6]Defendant asserts that the information from the NCIC is not information Officer Posusta 'knew,' as later determined at the suppression hearing. *See* Hrg. Tr., pp. 23-25. As such, it is 'false' for purposes of *Franks*.

application and Posusta's testimony" "would not affect a finding of probable cause." R&R, p. 12.

4. **Must the Evidence Be Suppressed Because the Application did not Allege a Violation of a Tribal Offense?**

Defendant objects to the conclusion that, under Tribal Code, a 'crime' includes violations of state and federal law. R&R, p. 15. Under the Sac & Fox Tribal Code, a 'crime' is defined as follows:

> "Crime" means a reference to an offense under this Code and any other ordinance of the Tribe and other applicable laws for which upon conviction a person may be subject to a criminal fine, imprisonment or criminal forfeiture, or any combination thereof.

Sac & Fox Tribal Code (Tribal Code), §13-1101(a).

An offense is defined as follows:

> "Offense" means conduct for which a sentence to a term of imprisonment or of a penal fine is provided by any law of the Tribe, but does not include civil violations.

Tribal Code, §13-5102(x). Under the Tribal Code, issuance of a tribal search warrant is limited in part as follows:

> (a) Upon the request of a Prosecutor or any law enforcement officer, the Tribal Court may issue a written search warrant to search for and seize evidence of a *criminal offense*.
> (b) A search warrant shall be supported by affidavit or sworn testimony and must particularly describe the person or place to be searched and the item(s) to be seized. If probable cause exists to believe that a *crime* has been committed and that evidence of the *crime* is present at the place or on the person to be searched the warrant shall issue. The search warrant shall direct police officers to search the location or person described for the items specified.

Tribal Code, §13-6601(a)-(b) (emphasis added). It appears the word 'crime' is not used frequently in the Tribal Code. Yet, in other locations where it is used, one can conclude the term

refers only to tribal crimes. For example, under "Classification of Offenses," §13-5104 states:

> Where this Article or any other tribal law defines any act or omission as a *crime* but does not clearly state the classification or punishment therefor, the *crime* shall be a class 5 offense, provided that this subsection shall not convert or be construed to convert any civil violation into an offense or any exercise of criminal jurisdiction.

Tribal Code, §13-5104 (emphasis added). In this context, the Tribal Code's use of the word 'crime' must refer only offenses under the Tribal Code; tribal law could not 'define any act or omission' as a state or federal crime. The Tribal Code also uses the phrase "[i]n any prosecution for a crime" when defining permissible defenses. For example, under §13-5201, "Lawful Use of Force," the Tribal Code states:

> (a) In any prosecution for a *crime*, it is a defense that the actor used, attempted to use, or threatened to use reasonable force upon or toward the person of another in the following cases:

Tribal Code, §13-5201 (emphasis added). The phrase "in any prosecution for a crime" is repeated in the code sections defining duress, entrapment, and mental disease or defect and involuntary intoxication. Tribal Code, §§13-5202, 5203, 5206. The sections on duress and entrapment also include the phrase "to commit a crime," or "participated in the crime;" in both uses, the word 'crime' refers to a crime being prosecuted by the Tribe. *See* Tribal Code §13-5203(a)(1) and (3); §13-5203(a)(2) and (b). Under Article VI of the Tribal Code, "Criminal Procedure," a "criminal action" is defined as "the proceedings by which a party is charged with a crime." Tribal Code, §13-6101(a). It appears, therefore, that the Tribal Code uses the term 'crime' and 'offense' somewhat interchangeably; and Defendant submits they are both limited to crimes and offenses under tribal law. *See also* Tribal Code §13-3102(b) (a duty of the office of the prosecutor shall included determining "whether to bring *criminal charges* on behalf of the

Tribe") (emphasis added).[7]

The Tribal Code also uses the phrase "criminal offense" elsewhere in the Tribal Code, other than when defining the scope of tribal search warrant authority. *See e.g.*, Tribal Code §13-9106 ("A sex offender who is subject to the criminal jurisdiction of the Sac and Fox Tribe of the Mississippi in Iowa court who fails to timely register or fails to timely update a registration commits a class 1 *criminal offense*.) (emphasis added). Tribal Code §13-6204(a) is entitled "Arrest Without Warrant - When Required, Permitted and Prohibited." This section reads:

> (a) A Tribal police officer shall arrest and detain a person until arraignment when the officer has probable cause to believe that the person has committed a *criminal offense* and:
> (1) It reasonably appears to the arresting officer that the person arrested is about the leave the jurisdiction of the Tribe for an extended period of time;
> (2) The person continues to refuse to sign a written promise to appear in Court;
> (3) The officer has probable cause to believe that defendant has committed a mandatory arrest offense.

Tribal Code §13-6204(a) (emphasis added). In this context, where the Tribal Code outlines the procedure to assure appearance in tribal court, Defendant submits that "criminal offense" is limited to an offense under the Tribal Code.

Defendant also notes that, in other sections of the Tribal Code, specific mention is made of federal law or other jurisdictions *See e.g.*, Tribal Code §13-9101(a) (defining "confidential sex offender information" to include information that "is deemed confidential under tribal law, tribal regulations, or any applicable federal law."); §13-9101(d) (defining "sex offender" to include any person convicted of "any offense in any other jurisdiction which involves sexual

[7]Defendant also notes that Article V of Title 13 of the Tribal Code is entitled "Crimes and Offenses."

misconduct . . .). In contrast, the Tribal Code makes no reference to state or federal law when defining the word 'crime.' *See* Tribal Code §13-1101(a). Defendant submits that 'crime' under the Tribal Code does not include state or federal law. The inclusion of the phrase "other applicable laws" directly following the phrase "any other ordinance of the Tribe" does not change this result; the drafters included reference to other jurisdictions when appropriate and simply chose not to do so when defining the word 'crime.' *See id.*

Finally, Defendant objects to any suggestion that the search warrant in this case sought evidence of a tribal offense of assault, intimidation, or disorderly conduct. *See* R&R, p. 14. Officer Posusta did not testify that he sought the search warrant for evidence of the charged tribal law offenses, and he did not so indicate in the search warrant application. *See* Gov. Exh. 1. Instead, Officer Posusta testified that he believed James Youngbear's intoxicated state was not relevant to the search warrant, *i.e.*, James Youngbear "being a felon with a gun." Hrg. Tr., p., 19. Officer Posusta also testified that proof of the tribal court charges of assault, intimidation, and disorderly conduct did not require the finding or existence of a firearm. *Id*., pp. 27-28. Officer Posusta sought a search warrant in this case solely for the purposing of finding evidence that James Youngbear was a felon in possession of a firearm.

5. **Admissibility of Evidence in Federal Court**

Defendant objects to the conclusion "that the application established probable cause for issuance of the search warrant." R&R, p. 16. As argued above, the application failed to provide probable cause to believe that evidence of a tribal offense (or tribal crime) would be present at the residence searched. Defendant thus reasserts his objection to the conclusion that the word 'crime' includes both state and federal crimes as well as tribal crimes and offenses.

Defendant acknowledges that federal law applies to the admissibility of evidence in federal court, even if seized by state or tribal authorities. *United States v. Hornbeck*, 118 F.3d 615, 617 (8th Cir. 1997) ("In a federal prosecution, we evaluate a challenge to a search conducted by state authorities under federal Fourth Amendment standards.") Nevertheless, the Eighth Circuit "has suggested that, in some circumstances, principles of comity may favor federal courts excluding evidence seized by state officers in violation of state law." *United States v. Timley*, 443 F.3d 615, 624 (8th Cir. 2006) (citing *United States v. Eng*, 753 F.2d 683, 686 (8th Cir. 1985)). Tribal law, too, would be granted the same respect of comity. *See e.g. Hornbeck*, 118 F.3d 615 (analyzing admissibility of evidence seized pursuant to tribal search warrant). In this case, the application for search warrant failed to establish probable cause that evidence of a tribal offense would be at the residence. *Compare Hornbeck*, 118 F.3d at 618, fn. 6 (acknowledging that "in some circumstances principles of comity may weigh in favor of a federal court suppressing evidence seized in violation of state law," but noting "no such principle" at stake because the ruling "does not impact tribal court or tribal law). In this case, the tribal court lacked the authority to issue the warrant, as is it did not seek evidence of a tribal offense and, thus, was lacking in probable cause. Absent this violation of the federal constitutional prohibition against issuing warrants without a finding of probable case, the search would not have taken place. *See Timley*, 443 F.3d at 624 (suppression of evidence may be appropriate if "the defendant was prejudiced by the violation in the sense that absent the violation the search may not have occurred") (citation omitted). Under these unique circumstances, the evidence seized as a result of the execution of the faulty tribal warrant must be suppressed in federal court.

Defendant also notes that he alleges not a procedural violation of tribal law, but a

violation of the constitutional requirement that no warrant shall issue without probable cause. *Compare Timley*, 443 F.3d at 624 ("Timley complains that the application supporting the warrant was never actually filed, which we assume is true. There is no question, however, that it was presented to a magistrate for a determination of probable cause. As such, Timley was not prejudiced by the violation."); *Hornbeck*, 118 F.3d at 618 (Hornbeck's argument was based entirely on alleged violations of tribal law; he did "not argue that the search and seizure violated the Constitution or other federal law"). In this case, Defendant does not allege a simple tribal procedural violation. Instead, unlike *Timley* and *Hornbeck*, he alleges the warrant lacked probable cause altogether. Indeed, the very facts that saved the *Timley* warrant -- the mere procedural nature of the violation and an ultimate finding of probable cause, fail the Youngbear warrant. Under these circumstances, Defendant submits, the Court does not need to find the officer "'flagrantly disregarded' tribal law believing he could simply seek a prosecution in federal court." R&R, p. 17 (citing *Timley*, 443 F.3d at 624-25). Instead, the violation here is of federal constitutional dimension, as the search warrant lacked probable cause. Applying federal constitutional law, the evidence must be suppressed in federal court.[8]

6. **Good Faith Exception**

Defendant objects to the conclusion that the good faith exception of *Leon* applies when the search warrant lacked probable cause to believe evidence of a tribal offense would be found at the residence. R&R, p. 17. Because the tribal judge lacked the authority to issue a tribal search warrant for evidence of a federal crime (that was not also a tribal offense), the warrant is

[8]Of course, Defendant asserts the warrant was issued in violation of Tribal law, as well, as the tribal judge exceeded her authority in issuing it.

void. Under such unusual circumstances, Defendant submits that the *Leon* good faith exception does not apply. Regardless of the good (or bad) faith of the officer, the tribal judge lacked authority to issue this warrant. An officer with the best of intentions, and good faith, cannot lawfully execute an invalid warrant.

Even if the Court applies *Leon* to this situation, the good faith exception does not save this warrant. Defendant submits that, under these highly unusual circumstances, the tribal judge wholly abandoned her judicial role by issuing a warrant without the underlying lawful authority to do so. *See United States v. Grant*, 490 F.3d 627, 632-33 (8th Cir. 2007) (listing the "four circumstances in which an officer's reliance on a search warrant would be objectively unreasonable," including "when the judge 'wholly abandoned his judicial role' in issuing the warrant") (citing *United States v. Leon*, 468 U.S. 897, 923 (1984)). Defendant has found no cases to assist in the analysis of this particular circumstance; and Defendant intends no disrespect to the tribal judge. In this case, however, the tribal judge acted outside her authority and issued a search warrant completely lacking in probable cause to believe an offense under tribal law had been committed. Put differently, the tribal judge issued a warrant granting permission to search for evidence the tribal authorities had no authority to search for, rendering the warrant without effect.

Defendant also asserts that the warrant was so lacking in probable cause, or so facially deficient, that the good faith exception should not apply. *See Grant*, 490 F.3d at 632-33 (two other circumstances in which the good faith exception does not apply are "when the affidavit in support of the warrant was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" and "when the warrant is 'so facially deficient' that the

executing officer could not reasonably presume the warrant to be valid") (citing *Leon*, 468 U.S. at 923). An officer of the Sac and Fox Tribe should be expected to know the laws of the tribe: being a felon in possession of a firearm is not a tribal offense. Yet, this was the purpose for obtaining the warrant. *See*, Hrg. Tr., p. 19. Again, the circumstances presented to the Court in this case are unusual, but they appear to present a set of facts to support the conclusion that the officer's reliance on the search warrant in this case was not objectively reasonable. *See id.*

7. **Summary**

Defendant respectfully objects to the conclusions that "the search warrant issued by the Tribal Court was supported by probable cause" and that "[n]o misrepresentations were recklessly included in the application, nor was any information recklessly omitted." R&R, pp. 17-18. Defendant also objects the conclusion that "[e]ven if the alleged misrepresentation is ignored and the omitted information is included, however, it would have no effect on the finding of probable cause." R&R, p. 18. Defendant objects to the conclusion that "the Tribal Court had authority to issue a search warrant based on probable cause to believe the evidence of a crime could be found at the place to be searched." *Id.* Defendant also objects to the conclusion that, [e]ven if the Tribal Court's authority is limited to violations of tribal law," " the admissibility of the evidence in a federal prosecution is unaffected." *Id.* Finally, Defendant objects to the conclusions that "the officers had an objectively reasonable belief in the validity of the search warrant" and that "any defects in the search warrant do not require suppression of the evidence." *Id.*

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I declare that the statements above are true to the best of my information, knowledge, and belief.

By: /s/ A. McClain